



REPORT
CONCERNING THE RELATIONSHIPS
BETWEEN POLICE AND CITIZENS AND
IDENTITY CHECKS



Pursuant to Article 71.1 of the Constitution and organic law No. 2011-333 dated 29 March 2011, the Defender of Rights has taken over the competence previously devolved to:

- the Ombudsman of the French republic;
- the Ombudsman for Children;
- the National Commission on the Ethics of Security;
- the High Authority for the fight against discrimination.

At the service of the defence of the rights of users of public services and the rights of children, in support of victims of discrimination or breaches in security-related ethics, the Defender of Rights performs:

- primarily, a mission to protect rights and freedoms, in the context of handling individual complaints sent to it or cases that it decides to take on;

- secondly, a mission to promote rights and equality, particularly pursuant to the general recommendations that it makes.

In application of Article 34 of the organic law dated 29 March 2011, "the Defender of Rights carries out all communication and information actions that it considers appropriate in its various areas of competence".

CONTENTS

CONTENTS	2
INTRODUCTION.....	3
1 – APPRAISAL OF CONDITION	6
1.1 - THE LEGAL FRAMEWORK	6
1.1.1 - <i>What is an identity check</i>	6
1.1.2 - <i>Under what conditions may an identity check take place?</i>	6
1.2 - THE POINTS OF VIEW OF THE PLAYERS	11
1.2.1 - <i>The institutional players</i>	11
1.2.2 - <i>The associations</i>	12
1.2.3 - <i>The police unions and the members of the Gendarmerie</i>	14
2– PRACTICES OF THE POLICE ABROAD.....	16
2.1 -THE UNITED KINGDOM.....	16
2.1.1 - <i>Two types of police checks</i>	17
2.1.2. - <i>The forms</i>	18
2.2 - THE PROJECTS CARRIED OUT WITH THE HELP OF <i>OPEN SOCIETY</i>	21
2.2.1 - <i>Fuenlabrada (Spain)</i>	22
2.2.2 - <i>Extension to other towns in Spain</i>	24
2-2-3 <i>Other trials initiated by Open Society</i>	24
2.3 - THE UNITED STATES	26
2.3.1 - <i>At the federal level</i>	26
2.3.2 - <i>At the level of the states</i>	26
2.3.3 - <i>At the local level</i>	27
2-4 CANADA-QUÉBEC	28
3 – PROSPECTS	31
3.1. THE IDENTIFICATION OF THE CONTROLLING OFFICER: IN A DEMOCRATIC SOCIETY, ALL GOVERNMENT SECURITY AGENTS EXERCISING THEIR FUNCTIONS MUST BE ABLE TO BE IDENTIFIED	31
3.2. - SECURITY FRISKING: THE NECESSITY OF GOVERNANCE IN THE CODE OF CRIMINAL PROCEDURE AND THE CODE OF ETHICS	35
3.3 - TRIALLING: AN ESSENTIAL CONDITION BEFORE THE GENERALISATION OF ANY MEASURE	38
3.4 – THE PRESENTATION OF A DOCUMENT TO THE PERSON CHECKED	39
3.4.1 – <i>The anonymous check ticket</i>	41
3.4.2 – <i>The nominative certificate</i>	43
3.4.3 – <i>The registered certificate</i>	44
3.4.3.1 – <i>The certificate registered in anonymous form</i>	47
3.4.3.2 – <i>The certificate registered in nominative form</i>	49
CONCLUSION	51
APPENDICES	53
V. HEARINGS CARRIED OUT BY THE DEFENDER OF RIGHTS	54
VI. WRITTEN SOURCES	56

INTRODUCTION

The relationship between the security forces and the population has always and everywhere been a subject of debate. It is a sign of democratic vitality. Only totalitarian societies which smother freedom of expression do not have these controversies.

From the time when he took up his functions in the summer of 2011, the Defender of Rights received numerous interlocutors, notably representatives of associations. Amongst the subjects brought up, that of the relationship between the police and the population, notably in working class districts, quickly emerged. These associations emphasised that, for several years, reports coming particularly from organisations for the defence of human rights had denounced the discriminatory character of identity checks as they are practised in France.

The question was brought into the public debate on the topic of the fight against "discriminatory identity checks", an expression used by several associations and employed by the media.

These identity checks, which may be abusive or felt as such, are also condemned because they are too often accompanied by security frisking, which is experienced as humiliating and an invasion of privacy, a set of practices which contribute to worsening tensions between the police and the population groups concerned.

These associations have stated that such a situation can be corrected, in particular by following the examples of the solutions implemented by the police in the United Kingdom and the trial carried out by the local police in Fuenlabrada, a Spanish town in the Madrid suburbs of about 200,000 inhabitants.

In both cases, in separate forms, each identity check automatically entails the police presenting a document which explains, among other things, the reasons why the check was made and identifying the person carrying out this check. According to the promoters of this system, this has two main advantages.

It would contribute to significantly lowering the number of identity checks, particularly those targeting young people and checks known as "discriminatory".

This written record would allow the persons checked to refer the matter to the competent authority if they consider themselves victims of abusive checks.

The problem of the relationship between the police and the population concerns all of the missions of the Defender of Rights, malfunctions in the public services, the ethics of security, minors and discrimination.

The topic of identity checks is the most lively expression of the mistrust which has begun to establish itself in certain areas.

In France, since the end of the 1970s, identity checks have been a focus of the debate. Sharp exchanges preceded the adoption of the law No. 81-82 dated 2 February 1981 known as the "security and liberty law", which established identity checks of a purely preventive character. These discussions regularly arose concerning the dozen legislative texts which, since then, have developed this procedure.

Yet, thirty years later, the debate persists. However, it is not so much the option granted to the police to perform such checks which is in question, but the precise procedures for implementing them.

For this reason, at the beginning of 2012, the Defender of Rights wished to study the practices of the foreign countries cited as examples and examine if and how such initiatives could be transposed to France, in a very different institutional context from that of the countries in which they are implemented, with the aim of presenting an informed analysis to the public.

He therefore made his assistant, Ms Françoise Mothes, vice-chair of the panel in charge of ethics in the area of security, responsible for carrying out more in-depth research and going to meet the players in several countries presented as references in the matter.

He heard the representatives of several police unions (constables, police officers and police commissioners). He also received a delegation from the Directorate General of the Gendarmerie. The various groups showed feelings of hostility at the idea of presenting a receipt, interpreting its introduction as mistrust of them.

He also met several members of Parliament including Ms Esther Benbassa, senator for the Val-de-Marne and Mr Yves Pozzo di Borgo, senator for Paris, who each tabled a parliamentary bill relative to identity checks.

In the proposal that she made in November 2011, senator Benbassa (Europe Ecologie Les Verts) proposed¹ supplementing Article 78-2 of the Code of Criminal Procedure with seven subparagraphs establishing, firstly, the principle of the presentation of a "document" at the time of an identity check. Secondly, the proposal established the four series of statements that must be shown on it "under penalty of invalidity": the reasons justifying the check and the identity verification; the date and time from when the check was carried out; the reference number of the agent making the check; the observations of the person who was checked. Lastly, was proposed that a report "recording all checks be sent to the French public prosecutor" under conditions to be determined by regulatory channels.

For his part, Senator Pozzo Di Borgo (Union Centriste) has just presented ² a text for which the purpose is broader. Firstly, he proposes a modification of subparagraph 1 of Article 78-2 of the Code of Criminal Procedure, specifying that "the words 'plausible reasons to suspect' be replaced by the words 'objective and individualised reasons to suspect'", thus aiming to govern the checks "at the source". Secondly, as in the previous proposal, several subparagraphs supplement Article 78-2 specifying the delivery of a report under penalty of invalidity for each check, listing the obligatory statements and referring the implementation procedures to a decree in the Council of State which should include determining means of administrative recourse against the Inspectorate General of the National Police for persons subject to unjustified checks.

Lastly, to complete his study, the Defender of Rights organised a seminar in Paris on 8 October 2012, during which several representatives of foreign police forces were able to explain their practices to the various stakeholders in this case in France (members of Parliament, police, gendarmes, magistrates, lawyers, associations,...).

¹ Bill relative to identity checks and the fight against discriminatory identity checks, registered at the presidential offices of the Senate on 16 November 2011: <http://www.senat.fr/leg/pp11-104.html>

² Official registration with the Senate office ongoing at the time of the publication of the present report.

1 – APPRAISAL OF CONDITION

1.1 - The legal framework

1.1.1 - What is an identity check?

The identity check is the request made to a person by a law enforcement agent, a policeman or member of the Gendarmerie, to prove their identity by any means.

Police and gendarmes, whatever their rank, in their capacity as agents of the Criminal Investigation Department (art. 20 of the Code of Criminal Procedure). However, the check must be carried out under the responsibility of an officer of the Criminal Investigation Department.

The identity check must be distinguished, "upstream", by the statement of identity and, "downstream", by the verification of the identity.

► The statement of identity:

Municipal police³, police community support officers, voluntary gendarmes and Paris security agents, assistant agents of the Criminal Investigation Department (art. 21 of the Code of Criminal Procedure) or transport security agents in their capacity as specially sworn agents, may only take "statements of identity" (art. 78-6 of the Code of Criminal Procedure) or "collect identities".

The difference between checking and collection/statement is that the originators have no power of coercion. In other words, if the person refuses or cannot prove their identity, they must seek the assistance of an authorised agent of the Criminal Investigation Department, who may make an identity check. Nevertheless, from the point of view of the person concerned, the difference between "check", "statement" or "collection" of identity is difficult to perceive

► Identity verification:

If a check cannot establish the identity of the person, or the person refuses to give it, or is unable to prove it, he/she may be held (on site or on police premises) so that an identity check can be carried out under the conditions specified by art. 78-3 of the Code of Criminal Procedure, a procedure which gives rise to the establishment of a report.

1.1.2 - Under what conditions may an identity check take place?

Subject to the specific texts notably covering checks in the context of road traffic and those relative to persons of foreign nationality, **any person**

³ In 2011, the Constitutional Court, in the context of examining the LOPPSI 2, cancelled the project to extend to agents of the municipal police the right to make identity checks (decision No. 2011-625 DC dated 10 March 2011).

who is on the national territory must agree to have their identity checked (Article 78-1).

Three main categories of situations must be mentioned because they are the focus of the subject which concerns us. They are covered by Article 78-2 of the Code of Criminal Procedure, a text which, as we mentioned, has been the subject of numerous successive amendments since its codification in 1983.

Firstly, according to the terms of the first subparagraphs of Article 78-2 of the Code of Criminal Procedure, **any person may be checked for whom there exists "one or more plausible reasons to suspect"** that he/she has committed or tried to commit an offence, he/she is preparing to commit a crime or an offence, he/she is likely to provide information useful to investigation in case of a crime or an offence or he/she is the subject of a search ordered by a court authority.

The officers of the Criminal Investigation Department and, under their orders and responsibility, the agents and assistant agents of the Criminal Investigation Department mentioned in Articles 20 and 21-1 may ask any person to prove their identity by any means if they have one or more plausible reasons to suspect:

- *that they have committed or tried to commit an offence;*
- *or they are preparing to commit a crime or an offence;*
- *or they are likely to provide information useful to an investigation in case of a crime or offence;*
- *or they are the subject of a search ordered by a court authority.*

Furthermore, **the French public prosecutor may also, upon written requisition, order identity checks for identifying and proceeding against certain offences in a place and at a time that he/she specifies.** In particular, it is on this basis that checking operations are organised in places of large public gatherings, such as stations.

"Upon written requisition from the French public prosecutor for the purposes of identifying and proceeding against offences that he/she specifies, the identity of any person may also be checked, according to the same procedures, in the places and for a period of time determined by this magistrate. The fact that the identity check may reveal offences other than those targeted in the requisitions of the French public prosecutor does not constitute a cause of invalidity of the related procedures".

It is generally accepted that these first two categories of checks may be qualified as checks carried out in the name of the Criminal Investigation Department, **in other words, with the aim of identifying and proceeding against** the perpetrators of an offence.

Lastly, the third category of checks are those **carried out in the name of the administrative police, in other words to prevent disturbances to public order.**

"The identity of any person, whatever his/her behaviour, may also be checked, according to the procedures specified in the first subparagraph, to prevent any harm to public order, notably the security of persons or property..."

This provision was introduced into the Code of Criminal Procedure in 1993 by the law relative to checks and verifications of identity. Given the vague character of its wording, this has, from the outset, been interpreted subject to the Constitutional Court (Decision No. 93-323 DC dated 05 August 1993⁴), emphasising "whereas the practice of generalised and discretionary identity checks would be incompatible with respect for individual liberties; whereas it is permissible for the legislator to specify that checking the identity of a person may be unrelated to his/her behaviour, it remains that the authority concerned must justify, in all cases, specific circumstances establishing the risk of harm to public order giving grounds for the check".

Decision No. 93-323 DC dated 05 August 1993 (extract)

7. Whereas this subparagraph incorporates the provisions already in force pursuant to which an identity check may be carried out, according to the same procedures as in the other cases, to prevent harm to public order, notably to the security of persons or property, adding the new detail according to which the identity of any person may be checked "whatever his/her behaviour";

8. Whereas the members of the National Assembly originating the referral assert that this addition, by authorising identity checks without their reasons being justified, excessively harms individual freedom by depriving it of legal guarantees;

9. Whereas the prevention of harm to public order, notably harm to the security of persons or property, is necessary to protect the principles and rights having constitutional value; that although the practice of generalised and discretionary identity checks would be incompatible with respect for individual liberties; that although it is permissible for the legislator to specify that checking the identity of a person may be unrelated to his/her behaviour, it remains that the authority concerned must justify, in all cases, specific circumstances establishing the risk of harm to public order giving grounds for the check; whereas it is only subject to this reservation concerning the interpretation that the legislator may be regarded as not having deprived of legal guarantees the existence of constitutionally-guaranteed liberties;

10. Whereas it is the responsibility of the administrative and judicial authorities to oversee full respect for all conditions of form and substance laid down by the legislator; whereas in particular it is incumbent upon the competent courts to prohibit and suppress illegal acts which may be committed and to possibly provide for reparation of their harmful consequences; whereas it is for the judicial authority, the guardian of individual liberty, to check, in particular, the conditions relative to the legality, reality and relevance of the reasons for the identity checking and verification operations; whereas, for this purpose, it is its responsibility to assess, if applicable, the behaviour of the persons concerned;

⁴ <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1993/93-323-dc/decision-n-93-323-dc-du-05-aout-1993.10491.html>

As a reminder, we will again mention **three other more specific hypotheses provided for by the Code of Criminal Procedure.**

▶ The legislator thus provided for, in the same Article 78-2, identity checks in a zone of 20 km from the borders with member states of the Schengen agreement as well as in ports, airports and railway stations or bus terminals open to international traffic, to prevent and identify offences related to cross-border criminality. However, the check must not exceed six hours in the same place and may only consist of a systematic check of the persons present.

▶ Article 78-2-1 provides for identity checks, upon requisition from the French public prosecutor, during visits to places of work, to check the regular employment of the persons there.

▶ Lastly, Article 78-2-2 specifies the procedures specific to certain offences (terrorism, drug trafficking) and the inspection of vehicles.

To conclude, it should be noted that **although the identity checks followed by police custody or identity verification are counted and precisely identified, the checks that required no action are not. This lack of objective data gives free range to subjective points of view expressed by the players.**

n.b.: To inform certain debates, we will specify that the Court of Cassation makes a specific reading of the breakdown of this article, separate from that made by the legislator and the Constitutional Court or the commentators (for example, see the directory of criminal law and criminal procedure). To clarify, when the Court of Cassation makes reference to checks carried out pursuant to subparagraph 4 of art. 78-2 (the much talked-about purely-preventive checks), one must refer to the content of what the other players in law designate as subparagraph 7. This incongruous difference in approach is creating some confusion in the commentaries, which the table below seeks to eliminate, notably in order to understand the purpose of the modifications to Article 78-2 envisaged by the parliamentary bills tabled at the Senate then the National Assembly.

Article 78-2 of the Code of Criminal Procedure (extract)	Count of the subparagraphs in application of the	Account of the subparagraphs by the Court of Cassation
The officers of the Criminal Investigation Department and, under the agents of the Criminal Investigation and assistant agents of the Criminal mentioned in Articles 20 and 21-1 may ask any person to prove their identity by any means if they have one or more plausible reasons to suspect:	Subparagraph 1	Subparagraph 1
- that they have committed or tried to commit an offence;	Subparagraph 2	Subparagraph 2
- or that they are preparing to commit a crime or an offence;	Subparagraph 3	
- or they are likely to provide information useful to an investigation in case of a crime or offence;	Subparagraph 4	
- or they are the subject of a search ordered by a court authority.	Subparagraph 5	
Upon written requisition from the French public prosecutor for the identifying and proceeding against offences that he/she specifies, the identity of any person may also be checked, according to the same procedures, in the places and for a period of time determined by this magistrate.	Subparagraph 6	Subparagraph 3
The fact that the identity check may reveal offences other than those targeted in the requisitions of the French public prosecutor does not constitute a cause of invalidity of the related procedures.		

<p>The identity of any person, whatever his/her behaviour, may also be checked, according to the procedures specified in the first subparagraph, to prevent any harm to public order, notably the security of persons or property...</p>	<p>Subparagraph 7</p>	<p>Subparagraph 4</p>
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1. 2 - The points of view of the players

The lack of objective and quantified data from large samples, established by an independent organisation, leaves the field wide open to subjective points of view, thus increasing the risk of the debate being manipulated and often being summed up as stigmatisation of one party by the other.

1.2.1 - The institutional players

► **At the national level**, the *National Commission on Security Ethics (CNDS)*, from which the Defender of Rights has taken over the duties, and the *National Consultative Commission on Human Rights (CNCDH)* have taken a position.

The *CNDS* gave several opinions on the subject of identity checks, noting the importance of them being exercised in accordance with legal conditions so that they could not be considered as "discriminatory identity checks" and regretting that it was not able to determine the conditions under which the checks can be carried out.

Opinion of the CNDS (extracts):

► *Opinion 2006-11: "... A legal measure that restricts individual liberties and symbolises the public authority, identity checks can cause reactions of anxiety. Everything depends on the circumstances and particular conditions under which these checks are implemented. Police officers must behave in an exemplary manner (art.7 of the Code of Police Ethics), with courtesy, politeness and with no arrogance or mockery".*

► *Opinion 2010-18: "... As the Commission has no elements other than the declarations of M.T.T., which it has no a priori reason to doubt, it is not able to establish the conditions under which these checks were carried out and cannot, consequently, give an opinion on the circumstances under which they were performed..."*

► *Opinion 2008-89: "... The Commission condemns checks subject to initiatives that do not strictly meet the legal conditions and which could be considered as discriminatory identity checks..."*

n.b.: These various opinions have not led to specific replies by the ministry of the interior.

The *CNCDH*, in its 2010 report entitled "The Fight against Racism, Anti-Semitism and Xenophobia" gave an account of all of the work concerning the question of identity checks, notably drawing attention to the contributions of the *Open Society Justice Initiative* concerning the question of "racial profiling". It thus invited "the ministry of the interior to take the necessary measures to fight against any discriminatory behaviour within the police, notably by monitoring the activities of the police in order to identify ethnic profiling practices", considering that the ministry could follow the example of trials carried out in this regard in Great Britain and in Spain.

► At the European level, the *European Commission against Racism and Intolerance (ECRI)* set up by the Council of Europe, in its report on France dated 2010 following that of 2005, although it considers that since that year, France has made progress in several areas, thinks that certain points remain worrying, notably the question of racial profiling in matters of identity checks.

It "therefore asks the French authorities to take measures to fight against any discriminatory behaviour by the representatives of law and order, including racial profiling, notably by defining and prohibiting racial profiling in the law, and carrying out research on racial profiling and monitoring the activities of the police in order to identify racial profiling practices".

In 2010, the European Union Fundamental Rights Agency (*FRA*) published two reports in the context of a symposium of the European Police College (CEPOL) on checks by the police and minorities. The first one presented the results of the first enquiry carried out at the level of the European Union, showing levels of trust in the police, and the second was a guide to understanding and preventing discriminatory ethnic profiling, intended to improve the efficiency of the activities of the police. This enquiry, known as EU-MIDIS was based on a sample of 23,500 persons.

The *FRA* defines discriminatory ethnic profiling as being the less favourable treatment of a person compared to others in a similar situation, giving examples of checks and searches as well as the decision to exercise police powers based only or mainly upon the race, ethnic origin or the religion of a person.

In particular, the *FRA* recommends, to compensate for these practices, that a report should be presented to the person checked, citing the United Kingdom and Spanish and Hungarian trials.

Also, several European institutions, and particularly the European Court of Human Rights, consider that democratic states have the obligation to investigate each time complaints are received about the behaviour of the police, and have stated that is necessary to be able to identify them.

1.2.2 - The associations

For several years, numerous voices have been raised against the discriminatory aspect of identity checks, commonly known as "discriminatory identity checks" in France. The following list does not claim to be comprehensive and concerns only the studies carried out over the last few years.

► From 2001, the *Human Rights League* condemned, in a report prepared with the Magistrates' Association and the French Lawyers' Association, breaches of the law committed during identity checks, while recognising the obligation for the police to ensure the security of citizens and the difficulties that they may encounter in exercising their duties.

► *Amnesty International*, in a public declaration dating from 2005, emphasised the recommendations sent to the government to review the procedures and guidelines relative to identity checks and the way in which they are implemented, so that these checks are not discriminatory.

► In 2007, the US foundation *Open Society Justice Initiative* requested the researchers at the national scientific research centre to examine and evaluate the extent to which identity checks on minorities were based on their appearance. **It was the first enquiry carried out in France on this subject which mentions both the identity checks and the security frisking which both major and minor persons checked have complained of.**

This study "**Profiling Minorities: A Study of Stop-and-Search Practices in Paris**"⁵ covered 500 police checks carried out at five sites in Paris (in and around the Gare du Nord and the station Châtelet-Les Halles).

Using the terminology used in the report published in 2009, in all of the places, 57.9% of the persons observed were "white", 23% "black", 11.3% "Arab", 4.3% "Asian" and less than 3.1% "Indo-Pakistani".

It turned out that, overall, the "blacks" were six times more at risk of being checked than the "whites", and the "Arabs" were seven to eight times more at risk.

In the same way, young people were over-checked, even more so when they dressed in a particular style (hip-hop, piercing, baseball cap on backwards, etc.).

Lastly, the "blacks" and the "Arabs" were respectively four and three times more often subject to security frisking than the "whites".

► At the beginning of 2012, the international organisation *Human Rights Watch (HRW)* publicised a **report** entitled "**The Root of Humiliation: Abusive Identity Checks in France**"⁶.

The research was carried out from May to September 2011 in Paris, Lyon, Lille and in their regions; 67 persons were heard, including 31 minors aged between 13 and 18. Interviews were also carried out with police and non-police civil servants in the police prefecture and in the prefecture of Nord-Pas-de-Calais.

HRW considers that the frequent checks suffered by young "blacks" and "Arabs" indicate that the police are using ethnic profiling. To conclude the report, the organisation issued various recommendations notably addressed to the French government so that ethnic profiling would be condemned, a legislative reform of Article 78-2 of the Code of Criminal Procedure would occur and a form intended to record, in writing, all identity checks would be introduced to our practices.

► From 2008, the *Representative Council of France's Black Associations (CRAN)*, which supports the governance of checks, requested the CSA Institute to conduct a survey on visible minorities and identity checks, which took place in June 2009.

► The association *Graines de France* which presents itself as a discussion group intended to come up with ideas in the field of social sciences in working class districts, using specialised experts and relevant tools, organised round table discussions in around ten towns in France between October 2010 and May 2011, composed of representatives of the police, local elected representatives and researchers. These meetings resulted in a "public appeal" which, amongst other proposals, adopted that of the delivery of a receipt in case of an identity check⁷ as well as the demand for objective reasons for carrying out such a check.

► The immigrants' information and support group (*GISTI*) in its 2012 report on "identity checks and arrests of foreigners" joined the mobilisation against discriminatory identity checks.

⁵ <http://www.cnrs.fr/inshs/recherche/docs-actualites/rapport-facies.pdf>

⁶ <http://www.hrw.org/fr/reports/2012/01/26/la-base-de-l-humiliation-o>

⁷ <http://appelpoliceservicepublic.wordpress.com/>

► The *collective against discriminatory identity checks*⁸ also recommends the presentation of a report to anyone checked. Over the last few months, it has broadly contributed to bringing this question to public attention, notably by setting up, in spring 2011, a **special SMS number enabling persons who consider themselves victims of discriminatory checks to report the matter**, an operation which generated thousands of calls. The collective carried out various communications operations, including their latest, the presentation of an awareness-raising and information kit to members of parliament. Lastly, **it referred, to the Defender of Rights, several complaints relative to identity checks considered as abusive, notably concerning minors.**

► The association *SOS Racisme* has been constantly pressing for the adoption of the presentation of a check ticket for the last fifteen years. This request is one of a set of measures that the association recommends to improve relationships between the police and the population. It considers that this practice, which is not intended to stigmatise the police, is necessary to re-establish trust with young people⁹.

Lastly, it is worth remembering that in the spring of 2012, **fourteen individuals**, with support including from Open Society, Stop discriminatory identity checks, the French Lawyers' Association and the Magistrates' Association, **had the Minister of the Interior, overseas territories, local authorities and immigration brought before the Paris district court to have it ascertained that the State had committed a fault by checking their identity without any legal reason and in a discriminatory manner.**

Also, it should be noted that the **question of the (de facto) anonymity of the police carrying out the identity checks** would give them a feeling of impunity while making it very difficult to identify them with certainty in the case of a dispute. It also arose from various hearings that **the practice of "security frisking"** was a major grievance against the police, with these systematically accompanying, or even proceeding, the identity checks.

1.2.3 - The police unions and the members of the Gendarmerie

► The representatives of the police unions who were heard are unanimously opposed to the presentation of a receipt during identity checks, seeing it as mistrust of them. They feel stigmatised by the term "discriminatory identity checks", which they consider tantamount to an accusation of racism, while their own ranks increasingly contain people of different origins. They declare that they are frequently the target of hostility, which particularly targets their colleagues of non-European origin. They state that the "targeting" of checks obeys only considerations of a professional character. On the other hand, unlike a survey institute, they do not have to check samples that are representative of the population, but persons who are similar in one way or another to the profiles sought in the context of the check.

For them, the receipt, in whatever form, would be a new constraint added to those which are imposed upon them. Yet they consider that these administrative burdens hinder the fight against delinquency to the detriment of citizens who

⁸ <http://stoplecontroleaufacies.fr/slcaf/>

⁹ It should be noted that, during the French presidential campaign of 2012, the think tank Terra Nova and the international league against racism and anti-Semitism, among others, adopted this topic themselves.

want to live in security. They fear that this will cause loss of motivation by the police.

Therefore, they consider that their work would be considerably complicated, which would slow down checking operations and could lead to a resurgence of delinquency thus leading to a worsening of the security of the population and public order.

They argue that elected representatives, and the citizens in certain districts, do not understand that they can no longer intervene systematically with identity checks when they are called several times in a short period due to inappropriate occupation of building lobbies or sales of drugs which revolt the inhabitants.

They stress that violence is increasing, tensions are worsening in the districts most exposed to delinquency and that identity checks as they exist are a means of stemming the black economy and that hindering them would contribute to encouraging delinquents.

Many unions blame the effects of the "statistics culture", which acts to the detriment of the "results culture", on numerous identity checks carried out to reach the required quotas.

On security frisking, the positions of the unions are diverse. The great majority of them want to be able to associate identity checks with security frisking, considering that they are a safety measure for the police, who are exposed in the middle of a group of persons, one of whom could, at any moment, use a dangerous object. Furthermore, they argue that the frisking enables them to find weapons or drugs on the people checked and that the practice contributes to maintaining order. They state that the police who carry out identity checks demonstrate common sense to determine those who are targeted.

Other representatives of the police consider that not all identity checks should systematically be accompanied by security frisking, considering that the latter is often the cause of problems and the debate which the checks have aroused.

All of the unions stressed the necessity of establishing ongoing training which is actually followed by the police, and the benefits of instilling in them, or reminding them of, the rules of courtesy and presentation which they must apply when they make checks. They also recommend the necessity of simulating stress situations, so that they can manage them appropriately when they occur.

Certain unions are not opposed to a visible registration number worn by police so as to allow their identification, a number which was on the uniforms of the French "police nationale" until 1984. It should be noted that, in the operational units, the registration numbers or names of members of the Gendarmerie have never been affixed to their uniforms.

► **The members of the Gendarmerie**, because of their military status, are not represented by unions. Therefore, the Defender of Rights heard representatives of the Directorate General of the National Gendarmerie and officers performing their functions in the departments.

They greatly stress the application of the ethical rules which are instilled into them and emphasised throughout their military careers, whatever their rank, in initial and ongoing training, and in the hierarchical control relative to the quality of service which is exercised daily. Like the police officers, there are opposed to the presentation of a form, for which the introduction would be totally misunderstood due to the manner in which they exercise their functions.

Indeed, they state that, living with their families within the population, they do not check the identity of persons who they know. Neither do they make checks without a specific reason.

They consider that an ordinary identity check should not lead to a security frisking, which they perform only in case of an arrest.

In contrast to the police, a registration number has never been worn on their uniforms and, on this point, they consider that such a measure concerning them would be a sign of mistrust of them.

It is clear that, despite a shared observation of the worsening of relations between the police and the public, no large-scale work has ever been initiated by the public authorities to analyse practices and measure the effects of modes of intervention of law enforcement in relation to the population.

Also, it is detrimental that no in-depth and scientific investigation has been done by an independent organisation at the national level, with distinctions between urban and peri-urban areas, between random checks carried out in public places and checks carried out in sensitive districts, or between checks pursuant to requisitions from public prosecutors and administrative checks and between "relevant" checks and checks that did not result in any arrest.

A large-scale study enabling better evaluation of the practice of these checks and any abusive aspects would have been a useful aid to decision-making.

The hearings carried out by the Defender of Rights have enabled measurement of the extent of the misunderstandings between the security forces and association leaders, and the perplexity of the political players in coping with this incomprehension. It is based on reciprocal mistrust: "discriminatory identity checks", says the one side, "anti-cop" prejudice, says the other side.

2- PRACTICES OF THE POLICE ABROAD

2.1 - The United Kingdom

In Great Britain, the approach that led to the practice in force began with the first law governing police checks known as PACE (*Police and Criminal Evidence Act*) of 1984 following the "race riots" involving confrontation with the police in Brixton in 1981, then strengthened following the death of Stephen Lawrence in 1993, for which the investigation concluded that prejudices and racist practices existed within the British police forces.

To date, the United Kingdom is the sole Member State of the European Union which systematically collects data concerning police checks in relation to ethnicity.

The organisation of the British police is complex; it includes regional (including 4 for Wales), divisional, private and national police forces.

Amongst the 43 regional forces, the position of the *Metropolitan Police Service*, more familiarly known as the *MET*, responsible for policing Greater London, is a model for numerous police services throughout the world and particular reference will therefore be made to it.

2.1.1 - Two types of police checks

In all cases, strictly speaking, there are no identity checks because the British do not possess national identity cards; it only involves checking individuals according to specific conditions and formalities:

► The *Stop and Account* (or *Stop and Encounter*), is the operation which consists of the police officer asking a person in a public place to provide explanations on what he/she is doing, the reasons for his/her behaviour, his/her presence in the zone or for any object in his/her possession.

The aim is to be focused on the action, the presence in a particular place or the behaviour of a person, who is neither frisked nor searched.

This person does not have to give the elements of his/her identity (name, address,...), is invited to classify himself/herself in an ethnic group: white (British, Irish,...), mixed race (West Indian, African,...)...

The response, even if obviously wrong, is noted by the police officer.

► *Stop and Search*, is the operation that will enable the police officer, in a public place, to eliminate or confirm a suspicion that he/she may have about a person, an intervention which is based upon "reasonable suspicion".

The code of conduct A of the *PACE (Police and Criminal Evidence Act)* of 1984 establishes that "reasonable suspicion" may not be based only on personal factors. For it to be reasonable, it must be founded on an objective basis determined by the situation.

The *PACE* code stipulates that the suspicion cannot be based on generalisations or stereotypical views of certain groups.

However, in the fight against terrorism, the legislation allows police officers to check persons without requiring reasonable suspicion (section 44 of the *Terrorism Act* of 2000).

Likewise, section 60 of the *Criminal Justice and public Order Act* of 1994 provides for an exception to the existence of reasonable suspicion in the case of suspicions of violence or the carrying of weapons under two conditions: a precise location and a limited duration.

At this stage, it is appropriate to mention a ruling of the European Court of Human Rights, which condemned the United Kingdom, in application of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms guaranteeing the right to respect for privacy, because Article 44 of the Terrorism Act is not restrictive enough of police power and provides insufficient protection (ECHR, 12 January 2010, *Gillan and Quinton v. United Kingdom*, Req. No. 4158/05), mentioning a "(confirmed) risk of discriminatory use of these powers".

Stop & Search authorises a systematic search of the person, his/her clothing and any objects that he/she has in his/her possession.

Internet pages run by the London police inform citizens of their rights in case of *Stop & Account* and *Stop & Search*¹⁰.

2.1.2. - The forms

The *Crime and Security Act* of 2010 ended the obligation to register instances of *Stop & Account* from 1 January 2011. However, the legislation allowed the security forces, locally, to continue to collect data relative to ethnic origin, particularly in certain districts, and to present a receipt. This is how the *MET* continues to proceed.

METROPOLITAN POLICE SERVICE Form 5890

Family name*

First Name(s)*
*(if name not given, use space to give a description)

Gender M ☐ F ☐ DoB A/Age

EA Code ☐ SDE Code ☐ Height

Address

Post Code

Vehicle Type VRM

Search Grounds

Stop/Search Search (if different location)

Date Date

Time Time

Loc'n Loc'n

BOCU Code ☐ BOCU Code ☐

Search Code ☐ Outcome Code ☐ Arrest Code ☐

Person Y ☐ N ☐ Vehicle Y ☐ N ☐ Damage caused* ☐ Injury caused* ☐

*Details

Searching/Stopping Officer

Warrant/Pay No. B(OCU) Team/Unit

MP 1102/08 Police copy

The new legislation also specifies a reduction in the amount of data recorded for *Stop & Search*, notably that relative to the name and address. However, the *MET*, like the majority of the British security forces, continues to record *Stop & Search* according to the procedures explained below.

¹⁰ <http://safe.met.police.uk/index.html>

In order to improve their work, 4,000 police officers out of the 36,000 in London have been provided with a *BlackBerry* smartphone to record the essential data arising from the checks. In this case, a receipt is presented to the person checked, informing him/her from which police station he/she can, subsequently, request a copy of the report.

If the check is carried out by a police officer not equipped with a *BlackBerry*, the person, following the check, is given the duplicate of a form that includes:

- the surname of the police officer;
- the reason for the check with a code, for example B for drugs;
- the ethnic code according to the non-verified declarations of the person, for example A2 for Pakistani and W1 for British;
- the time of the search;
- the result of the check also by code, for example 3 for a verbal warning;
- the reasons for the search;

Three sheets accompany this form: one describing the powers of police officers in checks, which they must state to the person checked and the manner in which they must behave; the other relative to the complaints procedure, and the third concerning the translation of the various codes.

The collection of data on the ethnic origin of people checked was established in 1992.

Joint training sessions with representatives of communities and police officers are organised to adjust the policies on checks.

The percentage of checks leading to an arrest is 16.5%. As the objective is to reach 20%, the policy is therefore to reduce checks looking for drugs and to increase those relative to the carrying of weapons.

According to the information communicated, the London police mainly check white people but it turns out that if the figures are related to the general population, we notice that a "black" person has a 4.5 times greater risk of being checked than a white person. There is therefore still a disproportion, which was confirmed, during the seminar of 8 October 2012, by Mr Carl Lindley, chief inspector of the MET.

The statistics are available online on the Home Office's site, with the aim of transparency so that citizens can make comments and suggest modifications in the checks, notably requesting priority reasons.

The city of Leicester has about 2,000 police officers for 1 million inhabitants. All of them have the option to make checks but only 60% of them practice them. Some of them, instead of the *Blackberry* used in London, use the radio.

The form, like in London, has been reviewed several times and the latest simplification has been in use since October 2011.

Following this threat, the *MET* decided to reduce the number of *Stop & Search* operations undertaken in this context and undertook that these would cease to be discriminatory and disproportionate.

During the same period, the Commission made an agreement with the *Thames Valley police* and the *Leicestershire Constabulary* for 18 months.

This agreement specified the presentation of a quarterly report on the checks with, firstly the requirements of the Commission and secondly the responses given by the police. It must be published via the police website and disseminated within the police service concerned.

The police service has obligations including the following:

- Specify, in writing, the criteria that may be used by the officers for deciding whether to proceed with a *Stop and Search*;
- Reduce the disproportion between the number of checks of black people compared to those for white people, with percentages not to be exceeded;
- Every three months, monitor the use which has been made of the *Stop and Search* power;
- Record and centralise all complaints concerning abuses during the use of the *Stop and Search* power;
- Highlight the cases where the police officers are not certain that the *Stop & Search* has been done in accordance with the rules of *PACE*;
- Set up a programme to train police officers on the use of *Stop and Search* powers;

This agreement has, according to a police officer from the *Leicester Constabulary*, led to positive effects. However, in a report published on 12 June 2012, the Commission for equality and human rights stated that "ethnic minorities currently represent two thirds of persons subject to *Stop & Search*"

2.2 - The projects carried out with the support of Open Society

In 2003, the *Open Society Justice Initiative*, a US non-governmental organisation financed by the George Soros foundation, initiated numerous research programmes in most European countries on the question of racial profiling.

In 2007, after having obtained the support of the European Commission's AGIS programme, Open Society Justice Initiative launched a project entitled *Strategies for Effective Stop and Search (STEPSS)* in Bulgaria, Hungary and Spain, with the purpose of building, over a period of 18 months, cooperation between the police and players in civil society for controlling and monitoring racial profiling with the aim of setting up monitoring and police work efficiency practices based on research and lessons learned in the United Kingdom.

Through *STEPSS*, *Open Society* intended to highlight the fact that identity checks could be reduced without any negative consequence on the maintenance of order, and that the relationship between the police and the community would therefore be improved.

The trial was considered positive in Fuenlabrada, in Spain, and in Hungary, where it was stopped due to a change of political regime.

However, it failed at a second pilot site in Spain, Gerona, and in Bulgaria. Projects nevertheless remain ongoing in three other towns in Spain.

Associations in Spain have seized upon the subject of identity checks, particularly Amnesty International and the increasingly numerous movements representing either migrants or sexual minorities protesting about the way the checks are carried out.

Indeed, Amnesty International, worried about information concerning the existence of "identity checks based on physical appearance (...) notably in Madrid, Catalonia and Andalusia", published, in December 2011, a report entitled "Parad el racismo, no a las personas - perfiles raciales y control de la inmigración en España" ("Stop racism, not people. Ethnic profiling and immigration control in Spain").

According to this report, the checks reached "considerable proportions" in the capital, which is why the investigation focused on this city. This is why, with regard to the Spanish situation, the trial initiated by Open Society is worth particular attention.

2.2.1 - Fuenlabrada (Spain)

This industrial town, located to the south of the Madrid urban zone, has a local police force of 250 officers and 300 officers of the National Police for a population of 205,000 inhabitants. Foreign nationals who legally reside in Fuenlabrada represent 16% of the total population. The unemployment rate is 22% and the crime rate is slightly below the average for large towns in the Madrid region.


The *STEPSS* project, in which the town hall is heavily involved, began in November 2006 and ran until December 2008 with the town's local police force, which is not the equivalent of the municipal police in France. The town hall did a lot of work in setting up the project. Today, it is no longer a project but a practice, for which the results can be analysed over time.

All of the police are authorised to make checks but only the National Police can control immigration, which the local police force in Fuenlabrada therefore does not do. Both of them base their competence on Article 20 of the organic law dated 21 February 1992 relative to protection and public security, which states that "law enforcement agents may use, in their investigation and crime-prevention functions, identity checks and perform relevant verifications on the public highway (...)".

Several actions have been carried out to make the project a success:

- The development of an intensive training and awareness-raising programme for police concerning new tools and principles for checks;
- The adoption of a police protocol/guide for identity checks in public places, specifying:

- the establishment of an obligatory form delivered to the person checked following the check, with information on the duration of the check, the reason for the check, the nationality, sex and age of the person checked, whether frisking was carried out and whether any offence was revealed;
 - a brief explanation of the reason for the check to the person checked;
 - The establishment of a visible police registration number on his/her uniform, visible to the persons checked and usable in case of a complaint against the police officer; this number corresponds to the one shown on the counterfoil book of forms.
- Information to the general public in Fuenlabrada concerning their rights in the context of identity checks and possible recourse in case of ethical lapses by the police during a check;
 - Evaluation of identity checks via the use of statistics established according to the nationalities of the persons checked (and not according to the ethnic origin as in London);
 - The involvement of various foreign communities in establishing the trial.




1


Policía de Fuenlabrada

1 2 3 4 5 6 7 8

Identificación de personas en vía/lugar públicos			
0002			
Fecha:		Hora de inicio de la parada:	
Lugar de la parada:			
Apellidos:			
Nombre:			
D.O.I.:	Tipo:	Núm.:	
Nacionalidad:		Fecha nacimiento:	
Población de nacimiento:			
Provincia:		País:	
Hijo de:		y de:	
Domicilio:			
Nº:	Piso:	Localidad:	
Provincia:		Teléfono:	
Motivo de la identificación:			
Observaciones sobre la motivación:			
Se procede a registro personal:		<input type="checkbox"/> Sí <input type="checkbox"/> No	Es positivo el registro: <input type="checkbox"/> Sí <input type="checkbox"/> No
Objetos intervenidos:			
Otros datos de interés:			
Vehículo relacionado:		Matrícula:	Color:
Se formula denuncia:		<input type="checkbox"/> Sí <input type="checkbox"/> No	Normativa denuncia:
Infracción:			
Ilícito penal	<input type="checkbox"/> Sí <input type="checkbox"/> No	Actuación	Falta penal <input type="checkbox"/> Imputado no detenido <input type="checkbox"/> Detención <input type="checkbox"/>
Tipo penal:			
Hora del final de la parada:		Agentes actuantes N.I.P.	



Ayuntamiento de
FUENLABRADA
Concejalía de Seguridad Ciudadana y Tráfico
Servicio de Policía Local



AGIS 2008
With financial support from the AGIS Programme
European Commission - Directorate General Justice, Freedom And Security

F-110-2

As we may see, the form is simplified compared to that used in Great Britain, but we nevertheless find certain common statements on it.

The results, with regard to the statistics, demonstrate that by checking half as much, the police are twice as effective in their choices, which was confirmed by **David Abanades**, head of the first response unit of the Fuenlabrada police service and representative of diversity management within this local police force, **who spoke at a seminar organised on 8 October 2012 by the Defender of Rights**.

Before the establishment of the *STEPSS* project, in 2007, the number of identity checks was estimated at 10,000 per year. This had an efficiency rate of about 15% (all nationalities combined).

The current rate is about 4,300 checks per year for a much higher efficiency rate, because in the first quarter of 2012, it was 29.48% for Spanish and 24.57% for foreigners.

2.2.2 - Extension to other towns in Spain

With the "*Programa para la identificación policial eficaz (PIPE)*", partly financed by *Open Society*, the Fuenlabrada trial was extended to three other towns in Spain, which have the common feature of each being a provincial capital:

- to the east of the country, Castellón de la Plana, a municipality in the Valencia community of [Spain](#), provincial capital of 180,000 inhabitants in the east of the country;
- to the north-east, Corunna, a port of 250,000 inhabitants in the autonomous community of Galicia, also provincial capital;
- Lastly, to the south, in the sixth-largest city in Spain, Malaga, an Andalusian city of 570,000 inhabitants.

The first programming meeting was held in the summer of 2012 as part of a project which effectively began in September 2012.

2-2-3 Other trials initiated by Open Society

Other trials, both local, as in Gerona, a city of 100,000 inhabitants in the autonomous community of Catalonia in Spain, or national, as in Bulgaria, were, however, a failure. In these two countries, the preparation and implementation phases of the project took place between January 2007 and March 2008. Also, in Hungary, the change of majority in the country, which occurred in 2010, stopped the trial for political reasons.

► Gerona (Spain – Catalonia)

The reasons for the failure are clearly identified by *Open Society*: certain officers of the *Mossos d'Esquadra* (Catalonia police force) considered that the introduction of check forms was a punitive measure in response to an incident during which police officers struck a person in detention. They broadly disseminated this point of view on the police intranet.

Also, the hierarchy of *Mossos d'Esquadra* did not sufficiently control the police officers to enable them to better target the checks and neither did it make sufficient use of the statistical data generated by the check forms in order to better manage and supervise checking practices.

► Bulgaria

Ms Rachel Neild, senior adviser at Open Society, explained on 8 October 2012 that the population was not sufficiently informed, thinking that the forms presented to them meant that they had to pay a fine. Likewise, the training of the police officers on the ground was insufficient.

► Hungary

In Hungary, in 2002-2003, a study carried out by the Helsinki Hungary Committee (Hungarian organisation for the defence of human rights) showed that Roma were exposed to discrimination and racial profiling by the Hungarian police. In 2005, the Hungarian social research Institute (*TARKI*) commissioned a study, the results of which showed that Roma were indeed victims of discrimination during identity checks, being three times more likely to be checked by the police than non-Roma, even though the rate of flagrant offences in each group was practically identical.

The riots of 2006-2007 also created a climate of mistrust in the Hungarian population towards the police, including in matters of identity checks. Thus the *STEPPS* project should have contributed to restoring citizens' trust in the police.

Three pilot sites were chosen: the 6th district of Budapest (active town centre, which includes the main railway station), Szeged (town of 200,000 inhabitants on the Romanian border) and Kaposvar (rural district of 120,000 inhabitants). A preparatory phase was necessary to train the police officers and prepare the form, followed by a data-analysis phase, which showed a reduction in the checks and an increase in their targeting, with greater efficiency.

The innovative feature of this trial was that minorities accompanied the police during their checks. Although, at the beginning, the police were very reticent, some of them recognised having learned much from these "civil controllers", in the same way that minorities began to realise the difficulties of the job of policing, which they did not necessarily previously appreciate. Of course, in certain places, reactions were very different, notably in districts where unemployment was high and where minorities were not appreciated.

After the arrival in power of Viktor Orban, the police managers were changed and the project was abandoned. The Helsinki Hungary Committee is currently writing a report assessing the project.

2.3 - The United States

2.3.1 - At the federal level

Historically, at the federal level, racial profiling authorising a police check without reason was judged contrary to the 4th Amendment of the Constitution in 1968 by the ruling *Terry v. Ohio*¹¹, given by the United States Supreme Court on 10 June 1968.

Police officers are therefore authorised to make identity checks if they have *reasonable suspicion* and not because the person belongs to a particular category of the population.

In summer 2001, 80% of Americans were opposed to racial profiling. After the September 2001 terrorist attacks, more than 60% were in favour of it in the fight against terrorism.

The checks carried out under the 2001 *Patriot Act* adopted after the 11 September 2001 to allow exceptional checks based on anti-terrorist suspicions, caused concerns about racial profiling in the United States and allegations of abuse against the Muslim community. A circular from the federal justice ministry in June 2003 prohibited racial profiling by all federal agents.

Currently, there is no federal legislation on identity checks, with the Supreme Court only setting minimum standards in matters of arrests, the search for evidence, the questioning of suspects etc., with each State or police service determining its practices, notably the way in which identity checks are carried out.

A bill is currently being studied, named the "*End Racial Profiling Act 2011*" (*ERPA 2011*), including a concrete prohibition on racial profiling, the training of police officers on this topic, the obligation to collect data with a standard reference and provision to pay federal subsidies to States which undertake a policy that is resolutely against racial profiling.

2.3.2 At the state level

At the state level, the question of racial profiling essentially concerns the fight against illegal immigration and road checks.

► **In Arizona**, the law SB 1070 on immigration, dated 23 April 2010, pushed the Obama administration to refer the matter to the Supreme Court due to provisions which seemed to authorise racial profiling. On 25 June 2012, the Court invalidated three of the four disputed provisions, maintaining the one which was the most controversial. Effectively, it seems to tolerate racial profiling because it allows police officers to check the immigration status of a person questioned if he/she has "reasonable doubt" about the legality of his/her presence in the country.

The drafter of the law argues that the disputed article does not allow racial profiling because it is stated that the police officer cannot use only the race, skin colour or origin to proceed with verification of the migration status of the person.

This law came into force during September 2012.

¹¹ http://www.law.cornell.edu/supct/html/historics/USSC_CR_0392_0001_ZS.html

The collection of data, published on the *NYPD* site, is intended to produce information in order to better evaluate the response of the police to offences and crimes. It is essentially a means of management at all levels.

In 2011, there were 685,000 identity checks and 1,700 complaints concerning them, 200 of which were considered legitimate.

An independent analysis of the data was carried out by an NGO, the *New-York Civil Liberties Union (NYCLU)* and the *Center for Constitutional Rights (CCR)* which were able to access the information after authorisation from the courts. The *NYCLU* made a report by district that was much more complete than that from the police.

It appears that checks in 2011 were seven times more numerous than in 2002. In 70 out of 76 districts, more than 50% of persons checked were "black" or "Hispanic" and, amongst the 70, in 33 districts, "youth of colour" represented more than 90% of checks. For example, between January and March 2012, out of 203,500 checks, 54% of persons were "black", 33% were "Hispanic" and 9% were "white".

Ongoing legal action was brought against the city of New York by the CCR in 2008, to stop racial profiling practised by the police. Indeed, the statistics drawn up by this NGO demonstrate that New Yorkers of sub-Saharan African and Latin American origin are widely represented in *Stop & Frisk/Search*.

This trend seems to be illustrated by a survey published in the New York Times on 20 August 2012. More than 1,000 adults were questioned by telephone; it turned out that 64% of New Yorkers considered that, in their city, the police were "more clement with white people than with Afro-Americans".

This point of view is shared by 80% of Afro-Americans and 48% of "white" people.

► In **Cincinnati** and **Los Angeles**, police officers complete forms when they check drivers and passengers of motor vehicles or pedestrians. These forms are recorded.

► In **Philadelphia**, collection of data has been obligatory since 1990. In November 2010, an association, the *American Civil Liberty Union (ACLU)* brought a legal procedure against the police of this city, accusing them of carrying out illegal *Stop & Frisk/Search*. In June 2011, a court gave a decision making an independent personality, the Dean of a faculty of Law, responsible for monitoring checks and searches, and for making recommendations on the most appropriate practices to ensure that *Stop & Frisk/Search* are carried out in accordance with the Constitution.

2-4 Canada-Québec

In Canada, "visible minorities" regularly complain about racial profiling by the immigration, customs and police services. Tensions in certain districts of large cities such as Montréal or Toronto have led the municipal police forces to set up specific arrangements for managing community relationships.

In 2002, in the spirit of American studies and anti-terrorist checks after 11 September 2001, the "Toronto Star" newspaper published the results of police statistics which revealed racial profiling practices. However, it was in 2005 that the first study on racial profiling was

published by the police in Kingston, a small town where most of the population is "white".

The study showed that although "black" people were 3.7 times more likely to be stopped for a road check, persons of Asian origin were less likely than "whites" to be checked.

On 10 May 2011, the Quebec Commission on Human Rights and Youth Rights, chaired by Mr Gaétan Cousineau, presented a report entitled "Racial Profiling and Systemic Discrimination of Racialized Youth¹²", covering racial profiling in the public security sector and in the school environment. It emphasised the necessity of legislating concerning the supervision of police practices.

In April 2012, the board of directors of the Toronto police services took the decision to prepare a report on the relationships between the members of the police and youths of certain ethnic-racial origin to draw conclusions from it, a report which had to be presented before December 2013. This decision seems to have been taken following a series of articles published by the *Toronto Star* newspaper in March 2012, entitled "Known to the Police Services". These articles studied data coming from "contact cards", meaning forms completed by police during checks, a practice called *carding*. On these cards, a statement concerns the colour, black, brown or white.

However, this paper showed that, between 2008 and 2011, the study on *carding* in Toronto showed that 400,985 cards had been presented to "black" persons, for a total "black" population of 208,555 people. At the same time, only 979,506 cards were delivered to "white" people, for a total "white" population of 1,313,935 "whites".

The local police chief in Toronto, William Blair, during a seminar on 8 October 2012, stated that the presentation of a receipt to persons being checked was being studied.

Also, the police services in Ottawa, during April 2012, made an agreement with the Ontario Human Rights Commission under which they undertook to carry out a study on racial profiling during identity checks, a study which should be carried out over two years.

Although the police in Ottawa also practice *carding*, the race is not mentioned on the cards due to a stricter policy on racial profiling adopted in June 2011. Racial profiling is precisely defined there and police officers cannot undertake checks unless there are reasons that are neutral from the race point of view. The police officers are requested to inform their superiors when they witness racial profiling and the latter must also take the necessary measures when the facts are clear.

¹² http://www.cdpcj.qc.ca/publications/documents/profilage_rapport_fr.pdf

Several observations can be made following the examination of police practices abroad.

Firstly, the governance arrangements for identity checks were put in place following a consensus covering both the observation of the initial situation and the objectives to be achieved.

Secondly, it appears that, in the cases observed, the presentation of a form led to a quantitative reduction in identity checks.

Thirdly, from a qualitative point of view, these fewer checks proved to be far more relevant. This improved efficiency is measurable by the simple ratio consisting of the number of checks carried out over the number of checks leading to the detection of offences.

Fourthly, it appears that in spite of the existence of these arrangements, the human rights defence associations, the press and the control organisations put in place state that the police continue to practice more frequent checks on "minority" population groups.

Reflecting this point of view, these minorities persist in believing that they are also checked more often than the "majority" population.

Thus, even in the United Kingdom, persons questioned who declare themselves to be "black" or "Asian" still feel that they are checked more often than "white" persons and were targeted only because of their ethnic origin.

We may conclude from this that although the reduction in the number of checks, due to their governance, automatically generates fewer abusive checks (the checks which are considered discriminatory), the governance of checks does not alone settle the question of discriminatory checks, whether these are really or only perceived as such. This assessment is decisive with regard to the expectations expressed by those who have been involved in this case.

3 – PROSPECTS

Last June, the Defender of Rights presented the institution's first annual report to the President of the Republic, and the Prime Minister and Minister of the Interior.

He informed them of the study undertaken during February on the regulation of identity checks. He informed them that this report would be made public in the middle of October.

The Prime Minister, Mr Jean-Marc Ayrault, declared, on 27 September 2012¹³, "*... the Defender of Rights, Dominique BAUDIS, who was referred to numerous cases of complaints of "discriminatory" checks, of a feeling that something is wrong and, how can I put it, of a lack of respect. I'm not saying that this is always true, there is sometimes exaggeration, but there is a real problem. Well, Dominique BAUDIS will make his own proposals. And then, with Manuel VALLS, we will decide.*"

In accordance with his initial intention, the Defender of Rights designed the present report as an educational information document exploring various avenues and as a tool for help with decision-making.

The work carried out over eight months shows that any change in the situation requires three prerequisites:

- **the identification of those performing the checks;**
- **the governance of the security frisking which accompanies the checks;**
- **the prior trialling of any arrangement for regulating the checks;**

Indeed, during this study and the numerous hearings, certain related problems emerged, as well as the specific question of "receipts". It quickly appeared that the present report must examine these related subjects.

3.1. The identification of the agent carrying out the check: in a democratic society, all security officials exercising their functions must be able to be identified

The identification of the representatives of law enforcement could form part of a framework of general law, which furthermore is compliant with European recommendations.

This approach is illustrated in general law by Article 4 of the law No. 2000-321 dated 12 April 2000 relative to the rights of citizens and their relationships with the administrations, according to the terms of which, "*in their relationships with one of the administrative authorities mentioned in*

¹³ During the TV programme "Des paroles et des actes" on France 2.

Article 1¹⁴, all persons are entitled to know the first and last names, the capacity and the administrative address of the agent responsible for investigating his/her request or handling the case which concerns him/her; these elements are shown in the correspondence sent to him/her. If reasons of public security or the safety of persons justify it, the anonymity of the agent is respected."

The reservation expressed, stating that "*If reasons of public security or the safety of persons justify it, the anonymity of the agent is respected*" is obviously suitable for law enforcement. Indeed, their identification would not be nominative for reasons of security. Nevertheless, this circumstance should not deprive the citizen of his/her entitlement to know the identity of his/her interlocutor¹⁵.

For a long period, in France, police officers wore their registration numbers visibly on their uniforms. In 1984, the Interior Ministry, when introducing a new uniform, removed it.

However, the requirement to identify security forces is regularly emphasised by European decision-making bodies.

Letter sent by the European Human Rights Commissioner to the German federal ministry of the interior on 9 December 2010 (extract):

"Concerning the behaviour of law enforcement, (the Commission) encourages the federal authorities and the authorities of the Länder to envisage strengthening existing arrangements by establishing an independent system for hearing complaints against the police. He/she also invites the German government to give details of the measures adopted to allow police officers to be identified, notably when their equipment and uniform make their identification impossible. In a democratic society, it is essential for the population to be able to trust the police. Yet, this trusted relationship can only come about if law enforcement works in total transparency and its agents are held responsible for their acts."

The European Court of Human Rights, in the context of allegations based on Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment"), has issued numerous reminders concerning the obligation for the State to conduct an investigation leading to the identification and punishment of those responsible (for example: ECHR, 20 May 1999, *Ogur v. Turkey*, case No. 21594/93, § 88; ECHR, 28 October 1998, *Assenov v. Bulgaria*, § 102). Still more recently, it emphasised it again in the ruling of 11 October 2011, *Hristovi v. Bulgaria*.

Generally, the European Court of Human Rights considers that the lack of identification confers a form of impunity on certain categories of police.

From the point of view of the guarantees to be provided to fight against this form of impunity, we find the same approach in the European Code of Police Ethics¹⁶ which, in 2001, was the subject of a resolution adopted by the Committee of Ministers of the Council of Europe, for which the aim was to "provide a set of principles and guidelines for the objectives, functioning and control of the police in democratic societies which respect the

¹⁵ Subject naturally to particular situations where anonymity is required due to the very nature of the mission.

¹⁶ <https://wcd.coe.int/ViewDoc.jsp?id=224465&Site=CM>

rule of law..." On this point, its Article 45 expressly states: "Police personnel must normally, during their operations, be able to certify their capacity as a member of the police and their professional identity".

It arises from this that identification should be the rule and anonymity should remain the exception.

Several countries or federal states make sure that the police are identifiable, by a badge bearing their name (notably in Great Britain, Land Saxe-Anhalt, Belgium, New York and Toronto), or by the public wearing of a professional registration number (Berlin, Ireland, Hungary,...).

More specifically, the CNDS, then the Defender of Rights, have argued that this is necessary.

It is important to stress that following opinion 2003-51 from the CNDS (see below), the ministry did not dispute this right of citizens but its response highlighted the tangible difficulties in exercising this right, for which the exercise could be a source of conflict with the agent performing the check: *"concerning the identification of intervening police officers, requests for registration numbers are frequently expressed in a manner and context where they appear as a threat of a dispute, which is badly received by police officers"*.

Opinion of the CNDS (extracts):

► *Opinion 2003-51: "The CNDS emphasises the instructions of 11 March 2003 relative to the guarantee of the dignity of persons remanded in custody, in which it is stipulated that handcuffing "must only be used when the person is considered dangerous for others or himself/herself or likely to escape". This requirement to respect the dignity of persons under arrest must apply even more so in cases of identity checks. The transparency that is desirable between the police services and citizens must mean that police officers communicate their registration number when they are asked to do so."*

► *Opinion 2009-77: "The Commission considers it quite abnormal that it is so difficult to identify police officers when their intervention, for which we know the place and time, has not been recorded in writing by them at the time of the events, as is the case when an identity check is without consequence. This difficulty prevents any challenge. It also prevents measurement of the frequency of poor practices and runs the risk of having the isolated behaviour of certain police officers reflect on all police officers."*

"The Commission considers that it is not acceptable that the regional director is not able to identify the police officers, or even the unit, which carried out a check where no subsequent action was taken. It wants measures to be taken to end this situation."

From this observation, supported by the study of practices on the ground, we can draw the conclusion that displaying the registration number would avoid such requests.

In line with the position of the CNDS, the Defender of Rights (decision 2009-212 of 22 November 2011) recommended, after the unanimous opinion of the panel, that provisions be taken to identify police officers when they intervene in uniform.

The possibility of identification by a visible registration number is a guarantee for the citizen if he/she is the victim of the behaviour of a representative of law enforcement or, more broadly, a person exercising functions in the field of security, whereas today, numerous complaints or investigations cannot be completed because the alleged perpetrator cannot be identified. This would also allow the police to be cleared if the complaint is found to be groundless.

3.2. - Frisking: the necessity of governance in the Code of Criminal Procedure and the Code of Ethics

The hearings conducted by the Defender of Rights revealed that the practice of frisking caused as many complaints as the checks themselves, due to their intrusive, vexatious and sometimes humiliating character. On the police side, it appeared that the practice of this frisking depended very broadly on discretionary individual assessment.

Security frisking, which is absent from the Code of Criminal Procedure, is governed in its usage by Article 203 of the internal regulations for the use of members of the national police force (provincial urban police forces), according to the terms of which: *"as searching is considered as a body search (...), police officers are only authorised to take security measures. These measures consist, during arrests in the act of committing an offence or during questioning, of immediately frisking the arrested or questioned individuals and removing any weapons or dangerous objects or anything of criminal origin that they may be carrying..."*.

Thus, according to this text, which is still in force, frisking may only occur during an arrest or questioning, and not in the context of an identity check, where no offence has been detected.

It is different from the body search. The latter is, in law, considered equivalent to a search in that it harms individual liberties and the privacy of the person concerned. Consequently, this procedure is subject to all of the procedural guarantees specified by the Code of Criminal Procedure.

Apart from that, here again, the distinction between frisking and searching is sometimes not clear for the person concerned and it arises from the hearings carried out by the Defender of Rights that security frisking is, in fact, practised upon the initiative of the police officer or gendarme. For this, it is worth looking at the opinions given by the CNDS and the decision of the Defender of Rights.

Opinion of the CNDS (extracts):

► *Opinion 2006-82: "... In the absence of any explicit text concerning security frisking, other than Article 203 of the internal regulations for the use of members of the national police force, which only concern persons who are arrested, the Commission would like more precise instructions to be enacted concerning the circumstances under which frisking may be decided..."*

On this point, the Directorate General of the National Police Service replied that "the existing arrangements and their procedures for implementation are amongst the basics of the initial and ongoing training programmes of police officers. Nonetheless... the security frisking that M.B. underwent during the road check was not, a priori, justified."

► *Opinion 2009-211: "... The Commission would like ministerial instructions emphasising that the security frisking practised systematically during an identity check carried out on the basis of the aforementioned Article 78-2, in the absence of reasons to suspect that the person is hiding prohibited objects, constitutes harm to dignity that is disproportionate in relation to the intended aim..."*

In reply, the police prefect stated that "although it is true that the articles of the internal regulations for the use of members of the national police force (...) make reference to security frisking... of an individual in quite specific circumstances, the absence of a text nevertheless does not prevent police officers from implementing this security measure in other situations. Indeed, from the training phase in the police school, they are taught that during an identity check, it is possible and even desirable to perform security frisking, as they do not know how dangerous the person checked is..."

CNDS opinion (extract):

► *Opinion 2010-11: "... As such a measure (security frisking) constitutes harm to physical integrity, the Commission disapproves of security frisking being carried out systematically on persons subject to an ordinary identity check without any offence being attributed to them or without any suspicion that they are hiding dangerous objects for themselves or others or products that are prohibited... The commission ... also recommends that all security officers be reminded that security frisking should not be systematic..."*

Note: The Directorate General of the National Police Service replied that "The same judgement leads one to conclude that this administrative measure... was fully justified by the circumstances of the questioning, particularly the aggressiveness spontaneously shown by the person in question and the threat that his agitation constituted..."

*Decision of the Defender of Rights
(extract):*

► *Decision 2010-34: "... The systematic character of this practice is deplorable. Indeed, the internal regulations for the use of members of the national police force, adopted on 7 May 1974, and modified several times, states that police officers must carry out frisking only when the person is brought to the police station (Articles 147, 151, 231), either for identity verification or to be remanded in custody or placed in a provisional lock-up. No text provides for associating an identity check based on the aforementioned Article 78-2 with security frisking, as long as there is nothing to arouse suspicion that the person is in possession of prohibited objects (...)* "the Defender of Rights wishes to emphasise that security frisking (...) for no reason, leading one to suppose that the person is hiding prohibited objects, constitutes harm to human dignity that is disproportionate in relation to the intended aim".

Following this decision, the police prefect reminded the police officer in question that identity checks could not be systematically associated with security frisking.

It is apparent from hearings carried out by the CNDS and by agents of the Defender of Rights as well as from complaints sent to him, that the persons checked, sometimes young minors who already resent certain identity checks as abusive, are also complaining that security frisking is too often systematic, which exacerbates their resentment of the security forces.

It is therefore desirable to control the "security frisking" technique in order to define the practical actions in relation to searches and to define the usage doctrine, by a text which could be shown both in the Code of Criminal Procedure and in the National Police Code of Ethics (in the process of revision).

3.3 - Trials: an essential condition before generalising any measure

Trialling is a necessary precondition to any general implementation of any system whatsoever for regulating identity checks, because the study of initiatives carried out in other countries reveals that the introduction of new measures suddenly throughout the national territory is bound to fail.

Recently, the Paris Council adopted the following decision ¹⁷:

Vœu de l'exécutif municipal relatif à la lutte contre le délit de faciès lors des contrôles d'identité

Considérant le vœu présenté par Ian Brossat, le groupe Communiste et les élus du Parti de Gauche relatif à la délivrance de récépissés lors des contrôles d'identité,

Considérant l'étude conduite par le CNRS en 2009 montrant l'existence sur le territoire parisien de contrôles d'identité à caractère discriminatoire dont les jeunes des quartiers populaires sont les premières victimes,

Considérant que la Ville de Paris entend se mobiliser pour le respect du principe républicain d'égalité devant la loi de tous les citoyens sans distinction d'origine,

Considérant l'engagement pris par le Président de la République en matière de lutte contre les contrôles au faciès, auquel le Premier ministre et le Maire de Paris ont rappelé leur attachement,

Considérant la nécessité absolue de rétablir la confiance et le respect réciproques entre les habitants et les policiers,

Considérant l'existence de plusieurs mesures envisageables afin de mieux réglementer les contrôles d'identité, dont la délivrance d'un récépissé,

Considérant que le Gouvernement est engagé dans une réflexion pour déterminer le dispositif le plus efficace et qu'il arrêtera ses préconisations à la lumière notamment des travaux menés par le Défenseur des droits dont les conclusions seront rendues en octobre,

Sur la base de ces recommandations, la Ville de Paris sera disposée à être un territoire d'expérimentation du dispositif de lutte contre les contrôles discriminants.

The mayors of other municipalities have also made it known to the Defender of Rights that they were ready to facilitate and support a trial on the territory of their municipality.

Diverse regions, transport networks and different systems would allow instructive comparisons from the lessons learned prior to any decisions concerning the national scope.

The text adopted by the Paris Council mentions "several possible measures" including the delivery of a receipt.

It should be emphasised that such trials themselves will have to be preceded by a specific period of training for the police officers/gendarmes who would be concerned and a sustained information campaign to the population groups and local association managers.

¹⁷ Council of Paris, session of 24, 25 and 26 September 2012, wish of the municipal executive relative to the fight against the offence of discrimination during identity checks.

3.4 – The presentation of a document to the person checked

It must be stated from the outset that the reference models of London and Fuenlabrada are not transposable identically to our legal environment.

The examination of foreign trials and practices shows that certain options cannot be imported into France.

Thus, the practices observed, notably in the United Kingdom which allows assessment of the occurrence of checks according to ethnic or racial groups, cannot be transposed to France, where the collection of data of an ethnic or racial character would contravene constitutional principles.

By its decision No. 2007-557 DC dated 15 November 2007¹⁸ (law relative to the control of immigration, integration and asylum), the Constitutional Court very clearly prohibited a provision aiming to authorise the creation of files based on reference systems of an ethnic-racial nature.

Decision No. 2007-557 DC dated 15 November 2007 (extract):

24. Whereas Article 63 of the referenced law, which results from an amendment adopted by the National Assembly upon first reading, modifies section II of Article 8 and section I of Article 25 of the aforementioned law dated 6 January 1978; that it seeks to allow, for the conduct of studies on measuring the diversity of origins, discrimination and integration and subject to authorisation from the French data protection commission, the processing of private data "showing, directly or indirectly, the racial or ethnic origins" of persons; (...)

29. Whereas, although the processing necessary to carry out studies on measuring the diversity of origin of persons, discrimination and integration may relate to objective data, they may not, without flouting the principle laid down by Article 1 of the Constitution, be based on the ethnic origin or race;

It should also be remembered that law No. 78-17 dated 6 January 1978 (French data protection act), in its Article 8, states that:

"It is prohibited to collect or process private data which shows, directly or indirectly, the racial or ethnic origins, political, philosophical or religious opinions or the trade union membership of persons, or which are relative to their health or sexual life."

Without entering into the details of exceptions to this principle¹⁹, we simply wish to emphasise the principled opposition of the Defender of Rights to anything which could, in one way or

¹⁸ <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/depuis-1958/decisions-par-date/2007/2007-557-dc/decision-n-2007-557-dc-du-15-novembre-2007.1183.html>

¹⁹ See, for example, the guide "Measure to Move towards Equality of Opportunity", co-written by the French data protection authority and the Defender of Rights:

another be considered equivalent to ethnic statistics, a position also shared by the French data protection authority and the CNCDH. The model present in the English-speaking world, of ethnic counting, is consequently not possible.

The same applies concerning the Spanish trial at Fuenlabrada, which established counting by nationalities.

The nationality is considered as sensitive data according to the meaning of Article 8 of the law dated 16 January 1978. Thus, the French data protection authority pays particular attention to the conditions under which such data is collected and used. In particular, it checks the appropriateness of the collection, which must be justified case by case.

In the context of the study that concerns us, it is far from certain that it may be considered appropriate to make a distinction between nationals and foreigners. Other than the questions of principle that such an initiative would raise, it would bear no relation to the initial purpose of the approach, as expressed by the associations, which does not primarily aim to establish that foreigners are the subject of discriminatory checks. On the contrary, if we may say so, the dominant position consists of deploring the fact that young French citizens, who nevertheless have equal rights, are subject to discriminatory treatment due to their physical appearance. The "Spanish model" is therefore inappropriate.

The fact remains that the term "receipt", frequently used in this debate, in fact covers highly diverse practices and procedures. We will therefore speak of the presentation, by the inspecting officer, of a document to the person checked.

There is great diversity of practical solutions which could be adopted, as mentioned by the participants in the seminar of 8 October 2012. However, they all belong to one or other of four options – significantly different from each other – that we will describe. They are presented below in the light of the legal and technical requirements that they cause, and the effects that we may expect of them.

The first two options favour the presentation of a document to the person checked without the inspecting officer keeping any record of it. Consequently, it makes it impossible to construct any file while making it easier for the person checked to dispute the matter, particularly in cases of repeated checks.

Conversely, the following options specify that when a document is presented to the checked person, data is recorded by the public authorities. Consequently, it is necessarily based on constituting a file and, subsequently, provides the additional option of carrying out overall analyses of police activity.

Just to eliminate any ambiguity it should be emphasised that, whatever the option, the delivery of a document under no circumstances constitutes a "free pass" which would exempt its holder from having to justify his/her identity again.

3.4.1 – The anonymous check ticket

During a check, the inspecting officer presents the checked person with a ticket showing his/her rank, identifier (registration number) and the service to which he/she is attached.

The presentation of this ticket would mean that the identity check was now formalised and no longer trivial.

It would provide the person checked with the professional identification of the person who checked his/her identity, without having to request it.

It would invite the inspecting officer to use judgement and moderation, without creating any extra administrative workload for him/her.

However, this document, devoid of the name of the person checked, would be rather inconclusive in the context of a complaint, due to this anonymity, which would not enable the authentication of the identity of the person checked.

a) Purpose.

The purpose of the anonymous check ticket is to at least formalise the act of checking the identity of a person.

b) Description.

During a check, the inspecting officer presents the checked person with a check ticket, in other words a document showing his/her registration number.

c) Constraints.

This solution could be easily implemented because it does not assume the delivery, to the police officers concerned, of individualised books of tickets, bearing their pre-printed registration number.

At the practical level, delivery of this document would not take up much time because the inspecting officer would do no more than deliver the ticket without having to fill it in or supplement it with any other statement.

d) Effects.

From the point of view of the effects of the check ticket, the number of checks carried out would probably drop. Psychologically, **this action would have the advantage of ending a form of trivialisation of this procedure.**

Also, it would avoid any administrative overload for the police/Gendarmerie, as the delivery of the document would not require any administrative processing.

Beyond the symbolic, this ticket would have little value as proof in case of a dispute, because there would be no record of the number of tickets delivered and they would not show the name of the person checked.

Indeed, without any means of tracing, this document could be given to another person. In any case, the presentation of a large number of tickets in support of a complaint of possible abuse would be rather unconvincing in the context of a dispute (before a judge, the Defender of Rights or an Inspectorate General of the security forces).

Furthermore, we could not ignore the risk of fraud, because the falsification and duplication of this type of document would be easy.

However, compared to the current situation, it would simplify the search for the inspecting officer in case of a dispute, as the Defender of Rights has already observed several times that when investigating certain complaints, the identification of the representatives of law enforcement in question proved to be impossible.

This check ticket could be improved with informative statements such as those shown on the card that the New York police present to those who are checked.

Common Reasons Police Stop Individuals

A number of factors, alone or taken together, may raise a police officer's suspicion to a level where he or she may lawfully stop, detain, question and even frisk that individual. Some common examples include:

- Sights or sounds suggestive of criminal activity (ringing alarm, running from crime scene)
- Actions that are consistent with concealing a weapon or item used in the commission of a crime
- Carrying what appears to be a weapon
- Report of suspicious or suspected criminal behavior

If you have been stopped and were not involved in any criminal activity the NYPD regrets any inconvenience.

3.4.2 – The nominative certificate

During a check, the inspecting officer presents a certificate showing, in addition to the information relative to the identity and capacity of the inspecting officer (registration number, rank, service), the name of the person checked, and the reason, place, date and time of the check.

This certificate system would have the same objectives as the ticket (formalising the act of the identity check and communication of the identification of the inspecting officer to the citizen). However, delivery of a nominative certificate would have a significant benefit for the person checked, because it would be more convincing than an anonymous ticket in support of any complaint which the person concerned may make.

However, its introduction would oblige the security forces to take the time to complete the certificate, showing the name of the person checked, and the various items of information relative to this check.

a) Purpose.

The purpose of the nominative certificate would, in addition to formalising the action, be to formalise the circumstances in which this action took place.

b) Description.

During a check, the inspecting officer would present the person checked with a document showing the identity of the person checked (possibly including his/her year of birth, postal code and place of residence,...), that of the inspecting officer through a registration-number type identifier, as well as giving the reason, the place and time of the check, and even its reason together with whether or not security frisking was performed.

c) Constraints.

From a practical point of view, this procedure would mean that the inspecting officer would have to take the time to specify the factual circumstances of the check.

Technically, because these certificates are not recorded, this would not create any administrative workload for the police/gendarmerie services.

d) Effects.

The delivery of a nominative certificate would reduce still further the number of checks carried out. It would provide improved guarantees to the person checked without needing to set up the administrative processing of the documents kept by the police/gendarmerie services.

As long as it is personalised by a series of statements, the receipt would make its fraudulent usage harder. **Its evidential character in support of any complaint would be enhanced because the document could easily be cross-referenced with its author.**

3.4.3 - The recorded certificate

During a check, the inspecting officer delivers a certificate to the checked person, as in the previous option. However, he/she keeps a duplicate of this document for recording.

We could envisage this option either with the name of the person being recorded or with an anonymous duplicate showing the information (place, date, time, reason), but not the name of the citizen.

Whatever the solution chosen, any recording of a check implies the creation of a file likely to contain potentially-sensitive personal data.

In any case, this prospect assumes first referring the matter to the French data protection authority, whose duty is to "make sure that IT is at the service of the citizen and that it cannot harm the human identity, human rights, privacy or individual or public freedoms", which are the very focus of the present study.

► **First obstacle: the constraints attached to the creation of a file of personal data.**

We will confine ourselves here to emphasising that the general rules relative to the processing of private data were the subject of a convention from the Council of Europe²⁰, then a community directive²¹ the spirit of which is fully reflected by Article 6 of the law No. 78-17 dated 6 January 1978 (French data protection act), as it was amended in 2004:

Art. 6 of the law dated 6 January 1978

Processing may only relate to private data which fulfils the following conditions:

1 The data is collected and processed in a fair and legal manner;

2 It is collected for determined, explicit and legitimate purposes and is not processed subsequently in a manner that is incompatible with these purposes. However, subsequent processing of data for statistical purposes or purposes of scientific or historical research is considered as compatible with the initial purposes of the collection of data if it is carried out in compliance with the principles and procedures specified in the present chapter, in Chapter IV and in Section 1 of Chapter V

²⁰ Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data dated 28 January 1981: <http://conventions.coe.int/treaty/fr/treaties/html/108.htm>

²¹ Directive 95/46/EC from the European Parliament and Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&numdoc=31995Lo046&model=guichett&lg=fr

and Chapters IX and X if it is not used for taking decisions with regard to the persons concerned;

3 It is adequate, relevant and not excessive with regard to the purposes for which it is collected and its subsequent processing;

4 It is accurate, complete and, if necessary, updated; appropriate measures must be taken so that inaccurate or incomplete data with regard to the purposes for which it is collected or processed is deleted or rectified;

5 It is retained in a form allowing the identification of the persons concerned for a period which does not exceed the duration necessary to the purposes for which it is collected and processed.

We note in particular the *principle of finality*, through which it is emphasised that the processing of data must be for "determined, explicit and legitimate" purposes, with this data not being able to be used for purposes other than those which were defined. We also emphasise the *principle of proportionality*, which means that the system for collecting, storage and processing must be strictly proportionate with regard to the previously-defined purpose.

In a recent decision of March 2012, the Constitutional Court set out a recital establishing the principle that "the freedom proclaimed by Article 2 of the 1789 Declaration of the Rights of Man and the Citizen implies the right to respect for privacy; that, consequently, the collection, recording, retention, consultation and communication of personal data must be justified for reasons of general interest and implemented in a manner that is appropriate and proportionate to this objective²²." Previously, the constitutional court had already, on several occasions, ruled on the establishment of police files to ensure, firstly, that their purpose really was for reasons of general interest, and secondly, that the resources used were proportionate to the objective.

From the point of view of the purpose, the debate on identity checks reveals, firstly, a concern to combat discrimination. Yet, as we have seen, it does not appear that the system of forms alone can fulfil this objective. It remains to be seen whether the objective of combating checks that are more generally qualified as abusive could be qualified as an objective of general interest according to the meaning of the law and jurisprudence.

From the point of view of proportionality, on the other hand, we come back to the uncertainties which remain concerning the question of identity checks as a whole. In other words, there would also be cause to wonder about the relevance of establishing general nominative files with regard to the law on respect for privacy.

► Second obstacle: the uncertainties related to the management of personal data files.

Beyond this position of principle, the Constitutional Court adapts its control depending on whether it concerns files of the Criminal Investigation Department used exclusively for judicial purposes (e.g.: national automated DNA database), files of the Criminal Investigation Department which can be used for administrative purposes (e.g.: Automated judicial file of the perpetrators of sex offences) or files of the

²² Decision No. 2012-652 DC dated 22 March 2012, law relative to the protection of identity.

administrative police (notably concerning foreign nationals: see the prohibition by the Constitutional Court of a provision providing for access, by the services of the police/Gendarmerie, to the databases of the **French Office for the Protection of Refugees and Stateless Persons or OFPRA**²³).

Yet, **assuming that a nominative file of persons checked was created, its nature would be hybrid.** Indeed, as it arises from the terms of Article 78-2, these checks are of either a judicial or administrative nature.

Admittedly, its use would primarily be intended for administrative purposes (evaluation). In this regard, further thought should be given in advance to the nature of the statistical research that should be able to be undertaken and for what purpose; the concepts of "measuring the activity of the police, or the "relevance of checks carried out" remain much too vague, with regard to the obstacles to be overcome, to be able to constitute such a file.

The fact remains that one cannot totally rule out **usage for police investigatory purposes**, as it is difficult to imagine that the court judge, in the context of a criminal investigation, would renounce the use of an instrument that is so well-informed on the movements of a part of the population.

More broadly concerning the **conditions for the implementation** of such a system, the first question to ask would be to determine who would hold this file. The police authorities? The judiciary? An independent third party such as the Defender of Rights? An institution dedicated to research and statistical work, as certain associations recommend?

Each of these options has disadvantages; either they lack independence or, in reality, they come up against a problem of material processing capacity.

Assuming that an agreement can be found on choosing the holder of this file, a series of fundamental questions remain concerning the essential guarantees that should be put in place:

- **who, in practice, could consult it?**
- **what records would be kept of these consultations?**
- **how would the person who is the subject of the consultation of information concerning him/her be informed of this?**
- **how long can this information be retained?**
- **how would the destruction be performed and controlled (we are thinking about the precedent of "Stic" or "Judex" criminal record files, for which the Defender of Rights is regularly contacted by claimants who have noticed that these files contain information which should have been deleted?)**

In the light of these general considerations, it should be emphasised that the two envisaged procedures themselves refer to two very distinct situations, notably from the legal point of view, according to which these files should, or should not, have a nominative character.

²³ Decision No. 97-389 DC dated 22 April 1997, a law instituting various provisions relative to immigration.

3.4.3.1 – The certificate registered in anonymous form

During a check, the inspecting officer presents the checked person with a certificate showing, in addition to the information relative to the identity and capacity of the inspecting officer (registration number, rank, service), the name of the person checked²⁴, and the reason, place, date and time of the check.

The inspecting officer, who will have to take the time to complete this document, would keep a duplicate of this certificate *on which the name of the person checked is not shown*.

The person checked would have an accurate nominative certificate, the record of which would have been kept. He/she would therefore have a reliable document in case of any dispute.

The information recorded would remain anonymous for third parties, but the accumulation of factual data would enable it to be used for purposes of evaluation of the action of the police/Gendarmerie.

a) Purpose.

The purpose of the certificate is to allow the person checked to have a nominative document enabling him/her, in case of abuse, to have a nominative record. The anonymous information retained by the inspecting officer would enable anonymised statistical processing.

b) Description.

The inspecting officer has a booklet bearing a number corresponding to his/her registration number with duplicate sheets. It includes a series of sections, as in the first two procedures.

The first sheet, which is presented to the person checked, contains all of the information collected during the check; the second is kept by the inspecting officer, but this document differs from the first in that it does not show the name of the person checked.

The information retained by the police/gendarmerie services contains only the place of the check, the time, the reason and, where applicable, whether or not security frisking was performed.

c) Constraints.

Mention was previously made of the main legal and technical constraints related to the creation of such a file.

²⁴ It should be noted that the collective "Stop discriminatory identity checks" has also envisaged that it should also show information relative to the address of the person checked. These elements would, according to the collective, be useful for analysing the geographical origin of the person checked and assessing the circumstances of the check (near or far from the place of residence).

d) Effects.

Keeping the stubs would enable accurate counting of the number of checks, the first item of information likely to constitute a usable indicator. Also, this data would provide the opportunity to have a geographical approach to the question. Lastly, the analysis of the reasons for intervention and checking could also reveal interesting qualitative information.

Although, in itself, there would be no point in setting up a complex system to collect statistical data, the questions related to its management (who would collect this data? How long would it be retained?) and its use (by whom? For what purposes?) remain unanswered. These questions should be the subject of a study by the French data protection authority with regard to the project which could be submitted to it.

3.4.3.2 – The certificate registered in nominative form

At the time of a check, the inspecting officer provides the checked person with a certificate showing the same information as in the previous scenario.

However, the person checked and the inspecting officer each keep a full copy of the same document, meaning that it contains the name of the person checked.

a) Purpose.

The purpose of the form results from the desire to evaluate, firstly the legitimacy of checks, and secondly the individual or overall activity of the security forces. It is not only about identifying who carried out the check but also being able to precisely establish the profile of the checked person and the precise circumstances under which this event occurred, including whether security frisking took place.

b) Description.

At the time of a check, the inspecting officer presents a duly-completed form including a series of sections that must all be completed.

c) Constraints.

In addition to the general constraints already mentioned, the question would remain of the principle of establishing a nominative file recording the identity checks.

Without prejudice to an analysis which, there again, would in any case be the responsibility of the French data protection authority, we can, initially, wonder whether it is appropriate to create a new police file likely to potentially record millions of occurrences per year.

Secondly, it should be emphasised that such a file would only be useful if it was correctly and thoroughly completed. Indeed, the objective of evaluating the checks carried out assumes that very precise information is collated. Thus, while any ethnic or racial reference must be avoided, it must necessarily record a set of sensitive personal data (age, address). Furthermore, information specific to the circumstances of the check itself (date, time, place) must also be specified. The reason for the check must also be added to this specific data.

Before any exploitation whatsoever, this set of information would constitute a gigantic database that would enable the geo-location of thousands of individuals at a given time or over a given period.

Consequently, we cannot ignore the reaction of the population as a whole, which would be subject to systematic and intrusive record-keeping during any check.

d) Effects.

From the point of view of the overall assessment of police activity, setting up and then operating such a nominative database would contribute, if we refer to foreign precedents, to lowering the number of checks, the number of persons checked and, amongst those, the number (if not the proportion) of persons considering (rightly or wrongly) that they were the subject of a discriminatory check.

At the qualitative level, such a file would enable, for example, according to the information collected, observation of the places in which the checks most frequently take place, the preferred times, the age ranges most exposed to this type of check, etc.

The nominative character would probably make it possible to carry out certain studies on family names, under supervised conditions, producing results similar to those that would be obtained from an "ethnic file". In all cases, the findings established would, in spite of everything, run up against the same limits.

The real or imagined "origin" of the person checked is not in itself useful information in establishing whether the check was based on a discriminatory reason. Indeed, it is essential to have information establishing the context of the check. Without this, we may wonder about the significance of the fact that a particular person considers that they are "over-checked" due to his/her origin if we have no objective data concerning the composition of the population likely to be the subject of a check carried out at the same place at the same time.

Consequently, any active exploitation of this file would assume the use of millions of items of extremely precise data for which we cannot, furthermore, underestimate the risk that they might be used for purposes other than their initial purpose.

On the other hand, it is true that such a tool would constitute, for a person who is repeatedly checked, an extremely effective instrument to allow him/her to establish the reality of this. In the same way, the officer in question would have a set of information useful to justify his/her attitude.

Finally, assuming a consensus is found concerning the intended purpose of such a system, the main question that would remain would be that of the proportionality of the system with regard to the expected effects.

CONCLUSION

Examination of foreign practices shows, if necessary, that the question of identity checks is closely related to the quality of the relationship between the security forces and the population.

The population is entitled to expect behaviour that is as exemplary as possible from sovereign security forces. The security forces, who are responsible for ensuring the security of all under difficult conditions and sometimes at peril of their lives, must be respected, as must their duties.

As we have tried to explain, the solution of the "receipt", including in its most comprehensive form (United Kingdom and United States) does not fundamentally settle the problem of discriminatory checks when they occur. However, it appears, solely through its automatic effects, to be a means of reducing the number of checks and consequently the number of abusive checks.

The persons heard by the Defender of Rights all emphasised that "demand for security" was strong. Yet, to increase their efficiency, law enforcement needs the support of the population, without which the fight against criminality is less effective. And yet we know that this support depends on the trust that the population has in the representatives of law enforcement.

However, the same interlocutors each lamented the worsening of the relationship between the police and population and wanted basic solutions to be found to this problem.

These necessarily involve the (re-)establishment of dialogue. It is essential to develop the organisation of meetings between the police and representatives of population groups in which local elected representatives must be fully involved, so that everyone can get to know each other better and keep each other informed about problems encountered and solutions expected. Numerous initiatives have been undertaken with variable success in the context, for example, of local councils for security and the prevention of delinquency, commissions to promote equality of opportunity and citizenship or neighbourhood councils.

Although the Defender of Rights exercises, with regard to the public authorities, a power of recommendation and proposal in matters of legislative or regulatory reform, it can also make a direct contribution to taking a new step towards re-establishing the essential mutual understanding between law enforcement and the population. Also, in order to re-launch this dialogue, and perhaps to help to develop its terms, the Defender of Rights is ready to organise, at the national level, the framework for ongoing dialogue between the security forces and players in civil society (particularly associations and elected representatives), which would enable best practices to be listed and new approaches to be trialled.

These approaches will not remove the requirement for an adaptation to training.

For the associations, it would be desirable to open up training areas, such as, for example, the National Institute of Advanced Studies for Security and Justice, which would give them an understanding of the problems of security in a dispassionate context

Concerning law enforcement, it is also necessary to adapt the initial and ongoing training with the aim of improving judgement, interviewing skills and ability to dialogue, with the aim of fighting prejudice and the harmful stereotypes that are prejudicial to contact with certain members of the public.

There again, the Defender of Rights is ready to contribute to preparing programmes intended for the police forces and the Gendarmerie and to improve its educational presence in their training centres.

APPENDICES

- I. Hearings carried out by the Defender of Rights
- II. Written sources
- III. Full minutes of the seminar "identity checks and police-public relationships: practices of foreign police forces" organised by the Defender of Rights (8 October 2012, Maison du Barreau, Paris)
- IV. Documents

V. HEARINGS CARRIED OUT BY THE DEFENDER OF RIGHTS

In the context of his study, the Defender of Rights received any person who expressed the wish to give their opinion on this subject.

Hearings in France

Elected representatives

Jean-Pierre Sueur, Chairman of the Senate law commission,
Esther Benbassa, Senator (Val-de-Marne)
Bariza Khiari, Senator (Paris)
Yves Pozzo Di Borgo, senator (Paris)
François Rebsamen, senator (Côte d'or)

Malek Boutih, member of Parliament (Essonne)
Razzi Hammadi, member of Parliament (Seine-Saint-Denis)

Myriam El Khomri: Assistant to the Mayor of Paris, responsible for preventive measures and security

Ministers

Mr Manuel Valls, Minister of the Interior

Mr François Lamy, minister delegated to the Ministry of Regional Equality and Housing, responsible for cities

Administrations

Directorate General of the National Gendarmerie and Directorate General of the

National Police Service

Commission for diversity and equality of opportunity

Police unions

Alliance Police Nationale
SGP-FO Police
SNOP - union of internal security executives
Synergie Officiers
UNSA Police

Union of national police commissioners, Independent
union of police commissioners

Associations

Amnesty International France,
Collective "Stop discriminatory
identity checks"
Council representing the black associations of France,
Human Rights Watch
Human Rights League
International League against Racism and anti-Semitism,
Open Society Justice Initiative
Movement against racism and for friendship between peoples,
SOS Racisme

Authors

Laurianne Deniaud and Thierry Marchal-Beck, authors of "Discriminatory Identity Checks, How to End Them" (publisher: *Les Petits matins*, 2012)

Hearings carried out abroad

Belgium

Emile DEJEHANSART, magistrate, member of the permanent committee for the control of the police services in Brussels (Committee P)

Alain ETIENNE, chief superintendent of the federal police, deputy director general of Committee P

Canada

Gaétan COUSINEAU, chairman of the commission on personal rights and the rights of young people in Montréal

Claude SIMART, Commissioner for police ethics in Québec,

Pierre GAGNE, chairman of the police ethics committee, André

MARIN, Ontario ombudsman

Spain

Bartolome Jose MARTINEZ GARCIA, general secretary of the Defensor del Pueblo

Jose Francisco CANO DE LA VEGA, chief inspector of the local police in Fuenlabrada

David Martin ABANADES, head of the Fuenlabrada police initial intervention service and diversity management representative of the Fuenlabrada local police

United Kingdom

Ted HENDERSON, head of the Metropolitan police control department in London

Nick GLYNN, police inspector responsible for police checks in Leicester

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