

## **Police-initiated Stop Practices in the United Kingdom - Where are we now?**

### **Paper for presentation to Roundtable on Current Debates, Research Agenda and Strategies to Address Racial Disparities in Police-Initiated Stops in the UK and USA**

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**by**

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This introduction to stop and search in the United Kingdom can be divided into five sections. The first will deal briefly with the situation prior to the passage of the Police and Criminal Evidence Act 1984 (PACE). The second will provide an outline of the introduction of national regulation of stop and search under PACE. The third will discuss developments following publication of the *Report of The Stephen Lawrence Inquiry* in 1999. The fourth will look specifically at the use of stop and search in anti-terrorism operations in the United Kingdom. Finally, several recent developments in respect of stop and search will be described and some general conclusions drawn to inform comparisons between the situation in the United Kingdom and the United States.

#### **1. Stop and search in the United Kingdom prior to PACE**

Prior to the Police and Criminal Evidence Act 1984 stop and search powers in the United Kingdom were contained in a variety of individual pieces of national and local legislation, which in turn led to considerable geographical differences in the actual use of these powers by local police forces. Historically, greatest use of these powers was in London by the Metropolitan Police, and also in other large conurbations that had significant concentrations on post-World War II immigrants from the former British Commonwealth, particularly the West Indies. This combination of factors led to a significant politicisation of stop and search (and of policing in general) during the 1960s and 1970s, in particular around the issue of the use of the so-called 'sus' laws (under the Vagrancy Act 1884 which empowered the police to stop, search and arrest "a suspicious

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person or reputed thief' being in a public place with the intent to commit a felony).

Although this particular legal provision was eventually repealed in 1981, the use of other stop and search powers against black communities in particular continued to be controversial. For example, in a particular police 'anti-mugging' operation in London, called Swamp 81, the Metropolitan Police carried out mass stops and searches of primarily black men in the Brixton area of London, and this was identified as one of the key factors touching off the subsequent large-scale riots in the area. Nevertheless, the Scarman Report<sup>1</sup> which followed the riots in Brixton and other British cities, emphatically rejected the notion that the policy of launching such an operation was indicative of racism in the police beyond the level of the individual officer:

The directions and policy of the Metropolitan Police are not racist. I totally and unequivocally reject the attack made upon the integrity and impartiality of the senior direction of the force. The criticisms lie elsewhere - in errors of judgement, in a lack of imagination and flexibility, but not in a deliberate bias and prejudice....

Such plausibility as this attack has achieved is due, sadly, to the ill-considered, immature and racially prejudiced action of some officers in their dealing on the street with young black people. Racial prejudice does manifest itself occasionally in the behaviour of a few officers on the streets. It may be too easy for some officers, faced with what they must see as the inexorably rising tide of street crime, to lapse into an unthinking assumption that all young black people are potential criminals.<sup>2</sup>

Nor did the Scarman Report recommend any curtailment in the police's legal powers in respect of stop and search.

However, in the same year the Royal Commission of Criminal Procedure,<sup>3</sup> set up in the wake of some early miscarriage of justice cases in the mid-1970s, did acknowledge a need to codify police powers generally, and of stop and search in particular, on a national basis. This report formed the basis of the subsequent passage by a Conservative Government of the Police and Criminal Evidence Act 1984.

## **2. PACE and the Development of National Regulation**

The Police and Criminal Evidence Act (PACE) was - and remains- the most significant piece of legislation on policing in Britain passed in the post-World War II period. In political terms, it was intended to restore the legitimacy of urban policing, which had suffered a critical loss in public confidence as a result of both miscarriage of justice cases and the recent history of violent confrontations between the police and inner city communities. Legally, PACE not only codified but strengthened police powers in a number of areas, including in respect of arrest and pre-charge detention of suspects and general powers of

search. Against this, there were some extensions of rights of suspects, particularly in respect of access to custodial legal advice and representation.

But the main way in which PACE sought to 'balance' increases in police powers and to regulate them was through the imposition of formal administrative/bureaucratic controls over the exercise of these powers, especially under a national set of *Codes of Practice*.<sup>\*</sup> The (probably intended) effect was to shift the politics of policing away from the streets and direct confrontations of the police and challenges to their legitimacy, to debates over the details of the PACE *Codes of Practice* and their implementation through administrative structures of the police and the Home Office, the central government ministry with oversight of the police. It should also be noted, however, that the crisis in police legitimacy and PACE also ushered in a period of unprecedented transparency and scrutiny of the police through empirical research and the collection of routine data on a whole range of police operations and practices, including stop and search.

Legally PACE established a general power of the police to stop and search a person, vehicle or anything in or on the vehicle in a public place where they have reasonable suspicion for suspecting the person is in possession of, or the vehicle contains, stolen goods or prohibited articles. Prohibited articles include offensive weapons, bladed instruments, prohibited fireworks or any article made, adapted, or intended for use in burglary, theft, taking a motor vehicle without consent, obtaining property by deception, or causing criminal damage. There remain separate powers to stop and search, also subject to reasonable suspicion, for possession of drugs (under the Misuse of Drugs Act) or firearms (under the Firearms Act) in a public place and (from 2002) of persons suspected of being terrorists under the Terrorism Acts. The police also have a general power to stop vehicles, without a requirement of reasonable suspicion, under the Road Traffic Acts.

### *Reasonable suspicion*

As in the United States, reasonable suspicion has proved in the hands of the judges to be, in the words of one of the key legal texts on criminal justice,<sup>4</sup> a 'slippery concept', and one that has proved relatively ineffective as the basis for challenging police practices in this area. There are also other reasons why legal challenges to stop and search may be an ineffective route to enforcing the standard of reasonable suspicion. People who are stopped and searched but not then arrested may be reluctant to draw further attention to themselves by challenging the police in this way, whilst where prohibited items are found this may be seen as in itself justifying the stop and search in the first place.

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<sup>\*</sup> The *Codes of Practice* are statutory and violations of them may form the basis of disciplinary proceedings against police officers, formal complaints against the police, and civil legal actions for damages. They may also be taken into account by the criminal courts in interpreting the scope of police powers under PACE, but in general there is no exclusionary rule under which evidence obtained in violation of PACE and the *Codes of Practice* will be strictly excluded in criminal trials.

On the other hand, the relevant PACE *Code of Practice*<sup>5</sup> has, under a series of periodic revisions, become increasingly detailed in its guidance to the police as to what does and does not constitute reasonable suspicion. To give a flavour of this, it is worth quoting some key sections that have appeared in the *Code* at various times:

Reasonable grounds for suspicion depend on the circumstances in each case. There must be an objective basis for that suspicion based on facts, information, and/or intelligence which are relevant to the likelihood of finding an article of a certain kind or, in the case of searches under section 43 of the Terrorism Act 2000, to the likelihood that the person is a terrorist. Reasonable suspicion can never be supported on the basis of personal factors. It must rely on intelligence or information about, or some specific behaviour by, the person concerned. For example, other than in a witness description of a suspect, a person's race, age, appearance, or the fact that the person is known to have a previous conviction, cannot be used alone or in combination with each other, or in combination with any other factor, as the reason for searching that person. Reasonable suspicion cannot be based on generalisations or stereotypical images of certain groups or categories of people as more likely to be involved in criminal activity. A person's religion cannot be considered as reasonable grounds for suspicion and should never be considered as a reason to stop or stop and search an individual.

It is worth noting in passing that the last sentence was added to the *Code* in the wake of the much wider use of stop and search against members of the Muslim community following 9/11 and the terrorists bombing in London in 2005.

To continue, the *Code* goes on further to state that

Reasonable suspicion can sometimes exist without specific information or intelligence and on the basis of the behaviour of a person. For example, if an officer encounters someone on the street at night who is obviously trying to hide something, the officer may (depending on the other surrounding circumstances) base such suspicion on the fact that this kind of behaviour is often linked to stolen or prohibited articles being carried. Similarly, for the purposes of section 43 of the Terrorism Act 2000, suspicion that a person is a terrorist may arise from the person's behaviour at or near a location which has been identified as a potential target for terrorists.

However, reasonable suspicion should normally be linked to accurate and current intelligence or information, such as information describing an article being carried, a suspected offender, or a person who has been seen carrying a type of article known to have been stolen recently from premises in the area. Searches based on accurate and current intelligence or information are more likely to be effective. Targeting searches in a particular area at specified crime problems increases their effectiveness

and minimises inconvenience to law-abiding members of the public. It also helps in justifying the use of searches both to those who are searched and to the public....

Again, it is worth pausing here to note how this latter provision of the *Code* may be taken as legitimating area-based rather than individualised suspicion.

Returning again to the *Code*:

Where there is reliable information or intelligence that members of a group or gang habitually carry knives unlawfully or weapons or controlled drugs, and wear a distinctive item of clothing or other means of identification to indicate their membership of the group or gang, that distinctive item of clothing or other means of identification may provide reasonable grounds to stop and search a person. (NB: Other means of identification might include jewellery, insignias, tattoos or other features which are known to identify members of the particular gang or group.)

This latter provision may be seen as allowing certain forms of group suspicion, the operation of which may extend beyond specific gang members where the identifying item is in fact more widely adopted as part of a local sub-culture.

The *Code* concludes, on the subject of reasonable suspicion, by noting that

An officer who has reasonable grounds for suspicion may detain the person concerned in order to carry out a search. Before carrying out a search the officer may ask questions about the person's behaviour or presence in circumstances which gave rise to the suspicion. As a result of questioning the detained person, the reasonable grounds for suspicion necessary to detain that person may be confirmed or, because of a satisfactory explanation, be eliminated. Questioning may also reveal reasonable grounds to suspect the possession of a different kind of unlawful article from that originally suspected. Reasonable grounds for suspicion however cannot be provided retrospectively by such questioning during a person's detention or by refusal to answer any questions put.

If, as a result of questioning before a search, or other circumstances which come to the attention of the officer, there cease to be reasonable grounds for suspecting that an article is being carried of a kind for which there is a power to stop and search, no search may take place. In the absence of any other lawful power to detain, the person is free to leave at will and must be so informed.

There is no power to stop or detain a person in order to find grounds for a search. Police officers have many encounters with members of the public which do not involve detaining people against their will. If reasonable grounds for suspicion emerge during such an encounter, the officer may search the person, even though no grounds existed when the encounter began. If an officer is detaining someone for the purpose of a search, he or

she should inform the person as soon as detention begins.

These last provisions draws attention to what have been referred to as 'voluntary stops', where police officers engage with people on the street and may question them without officially detaining them, and the role of such 'voluntary stops' as possibly leading to a formal 'stop and search'. As we shall see, the practice of searching people on a 'voluntary' basis was outlawed following the Stephen Lawrence Inquiry in the late 1990s, and subsequently the police were required to record 'stops and account', i.e. stops that did not lead to a formal search, although this requirement has recently been dropped.

### *Recording of stop and search*

This brings us to another feature of the Police and Criminal Evidence Act regime for regulating police powers, which is the requirement for the police to maintain administrative records relating to a wide range of their activities. Perhaps the most significant of these is the PACE custody record required for every person who is arrested or otherwise detained in a police station, and which is intended to provide a detailed log of everything that happens to that person during their period of detention. It also provides a record of the how suspects are informed of their rights, such as to legal advice, and what actions are taken if they choose to exercise these rights.

On stop and search, PACE originally specified that a record of each stop and search was required to be made, immediately unless not practical to do so, including the following items:

- The name of the person stopped and searched or, if not known, a description of that person or of the vehicle searched
- The object of the search
- The grounds for making it
- The date and time when it was made
- The place where it was made
- Whether anything, and if so what, was found
- Whether any, and if so what, injury to a person or damage to property appears to have resulted from the search
- The identity of the police constable conducting the search

The Act also required that the person stopped and searched should be entitled to a copy of the record if requested within 12 months of the date of the search.

These statutory requirements were subsequently extended under revisions of the relevant *Code of Practice*. Most significantly, following passage in 1991 of a statutory requirement for the Home Office to publish annual statistics on issues of race and criminal justice,<sup>6</sup> the relevant *Code of Practice* was amended in 1995 so as to require the recording of the ethnicity of the person stopped and searched. This requirement has now been enshrined in the main statute, but more importantly, there have been significant changes introduced recently to curtail the recording regime surrounding stop and search.

Theoretically, these recoding requirements can serve a number of purposes. First, they may assist individuals who consider that they may have been stopped and searched unreasonably to challenge the police through formal complaints and/or civil claims for damages. Secondly, statistics derived from such records allow for a more general monitoring of the nature, extent and effectiveness of the police's use of their stop and search powers. Thirdly, the data may assist in internal supervision of the use of stop and search within local police areas and even down to individual officer level. For example, it is possible to compare individual officers in terms of their behaviour in stopping and searching members of different ethnic groups and the effectiveness of their stops and searches in leading to arrests.

In the decade following PACE coming into force, the number of stops and searches requiring reasonable suspicion recorded nationally rose from just over 100,000\* to nearly 900,000. At the same time, the proportion of these stops and searches that resulted in an arrest gradually fell over this period, from just over 17% down to just over 10%. There was a further spurt in the use of stop and search in the mid-1990s, when it reached nearly 1.1 million per annum, but it then fell off again in the years immediately following publication of the *Report of the Stephen Lawrence Inquiry* (see below), with arrest rates resulting from stops and searches remaining in the range of 10% to 13%. Research done in the mid-1990s showed that while nearly half of arrests for drug offences (mainly possession of cannabis), 37% for motoring offences, 22% for taking a motor vehicle without consent and 14% for theft of a vehicle resulted from stops and searches, relatively few arrests for other offences came by this route. Thus, only 11% of arrests for theft/handling, 6% for theft from vehicles, 3% for robbery or burglary, and 2% for shoplifting resulted from a stop and search.<sup>7</sup>

The national statistics have also consistently shown considerable disparities in the extent to which members of different racial and ethnic groups are subject to stop and search. In the latest year for which figures are available, there were 1.14 million stops and searches of persons based on reasonable suspicion recorded in England and Wales,\* and black people were 7 times and Asians twice as likely to be stopped and searched than white people. These rates of ethnic disproportionality in stop and search have remained fairly consistent over recent years.

Of course, these figures are based on comparisons with the ethnic composition of the general population, and it is often contended that rates of disproportionality would be less if based on population figures for more local areas and/or for the younger age groups against whom the power is most often deployed.<sup>8</sup> Research conducted prior to the introduction of specific stop and search powers under anti-terrorism legislation showed that a third of Afro-

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\* It is likely that the figures in this period, especially in the earlier years, reflected a significant degree of under-recording.

\* There were also 8,300 vehicle stops and searches.

Caribbean males, compared with a fifth of white and Asian males, had had experience of being stopped and searched, and that among those between the ages of 16 and 25 years, 53% of Afro-Caribbean males and 47% of whites reported having been stopped and searched. However, these latter figures do not take into account that individuals of particular ethnic backgrounds may more often be stopped and searched repeatedly.

### *Stop and search without reasonable suspicion*

Perhaps one of the most significant developments in the law governing stop and search in the post-PACE period was the passage of the Criminal Justice and Public Order Act 1994, which introduced the concept of stop and search without the requirement of reasonable suspicion. The Act provided such powers to be used in two circumstances. First, Section 81 amended existing anti-terrorist legislation to allow a senior officer to authorise stops and searches without reasonable suspicion where it was considered 'expedient' to do so in order to prevent acts of terrorism. This power was subsequently revised and incorporated in section 44 of the Terrorism Act 2000, as discussed below.

Secondly, Section 60 of the Criminal Justice and Public Order Act 1994 allows a police officer of the rank of Inspector (a rank that is normally based in a fairly localised area within a particular police force) or higher rank who reasonably fears serious violence or the carrying of weapons in a particular locality to authorise police officers to search *any* person or vehicle in that locality for weapons over a period of 24 hours. This provision was originally introduced with the aim of combating potential violence associated with specific events, such as hooliganism around football matches, and was later extended to 'raves' and trespassory assemblies. However, use of the power has also become associated with anti-knife and gun crime operations and more generally with combating gang culture in inner cities. In this connection, although each authorisation for the use of the power is time limited, there is provision for a local police Superintendent (an officer ranked above an Inspector) to renew the authorisation for a further 24 hours, and in practice this has often led to particular areas being subject to stops and searches without reasonable suspicion on a virtually continuous basis.

Use of section 60 has grown exponentially since it was first introduced. Thus, in 1997/8 there were fewer than 8,000 section 60 stops and searches in England and Wales, but this grew to over 45,000 in 2004/5 and to just under 150,000 in 2008/9. The data show that use of section 60 is heavily concentrated in London and a few other large cities, and that it is even more disproportionately targeted on black people than stops and searches requiring reasonable suspicion, with blacks 27 times more likely to be stopped and searched under section 60 than whites. Section 60 stops and searches also lead to arrests much less often - only 2% of the time - than is the case with those based on reasonable suspicion.

### 3. The Stephen Lawrence Inquiry and its Aftermath

The evidence therefore indicates that PACE and the national regulation of stop and search did little to curb its use or targeting on certain sections of the community. Indeed, the introduction of section 60 effectively legitimated the type of mass stop and search operation that had led to the Brixton riots in 1981 and continued to fuel widespread black resentment of the police. Concern over alleged police racism was further exacerbated by the murder of a black teenager, Stephen Lawrence, in south London in 1993 and the completely ineffective police investigation that followed. This resulted initially in a failure of the police to bring any prosecutions and eventually to a number of white youths widely believed to be responsible for the murder being acquitted following a private prosecution by Stephen Lawrence's family.\* These events led the incoming Labour government in 1997 to set up a judicial inquiry into the murder of Stephen Lawrence and the subsequent police investigation.

The inquiry report published in 1999<sup>9</sup> was highly significant in political terms for its endorsement (unlike the earlier Scarman Report) of long-standing claims by the black community of the police being 'institutionally racist'. This finding was based in large part on the inquiry's detailed examination of the failings in the original police investigation of Stephen Lawrence's murder. In passing, it can be noted that one of these was an incident when police carrying out surveillance of two of the youths thought to be involved in the murder allowed them late at night to leave their residence carrying black bags without stopping and searching them. However, at the end of the inquiry a series of general evidence sessions were held in a number of cities at which issues relating to stop and search featured prominently, and stop and search was also identified in the final report as another area of 'institutional racism' in policing.

It is worth quoting at some length the inquiry's conclusions regarding stop and search:

While we acknowledge and recognise the complexity of the issue, and in particular the other factors which can be prayed in aid to explain the disparities, such as demographic mix, school exclusions, unemployment, and recording procedures, there remains ... a clear core conclusion of racist stereotyping....

Nobody in the minority ethnic communities believes the complex arguments which are sometimes used to explain the figures as to stop and search are valid ... Whilst there are other factors at play we are clear that the perceptions and experiences of the minority communities that discrimination is a major element in the stop and search problem is

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\* In a very recent development, two of the original defendants have been re-charged with the murder of Stephen Lawrence and are due to stand trial in the Autumn of this year. This follows a dropping of the traditional 'double jeopardy' bar on reinstating proceedings against previously acquitted persons where there is substantial new evidence.

correct...

It is pointless for the police service to try to justify the disparity in these figures purely or mainly in terms of the other factors which are identified... Attempts to justify the disparity through identification of other factors, whilst not being seen vigorously to address the discrimination which is evident, simply exacerbates the climate of distrust.

Despite the strength of these conclusions, it is perhaps surprising that the first recommendation the inquiry made in respect of stop and search was that 'the powers of the police under current legislation are required for the prevention and detection of crime and should remain unchanged.' Instead, the inquiry confined itself to proposing a widening and strengthening of the PACE regime for recording and regulating stop and search, through outlawing 'voluntary' or non-statutory stops and searches, extending recording requirements to include stops without searches or 'stops and account' and the self-defined ethnicity of those stopped, better analysis and use of these records for the purposes of supervising stop and search activities of police officers, and wider publication of the resulting statistics. Although the UK government accepted virtually all of the inquiry's recommendations in other areas, it did not immediately do so in respect of those relating to stop and search, although eventually the relevant *PACE Code of Practice* was amended to abolish the use of 'voluntary' stops and searches and to include 'self-defined' ethnicity in the records of stops and searches.

#### *Targeted and 'intelligence-led' stop and search*

Even so, the Stephen Lawrence Inquiry's conclusions appear to have had an immediate impact on police stop and search practices, in that it was reported in several areas that rank-and-file officers, resentful of the inquiry's labeling of the police as 'institutionally racist', effectively decided to boycott the use of stop and search. At the same time, several police forces adopted a policy of a more 'targeted' and 'intelligence-led' use of stop and search, which resulted in some reduction in the overall rate of stops and searches and some increases in the proportion of them that led to arrests. However, it also resulted in even greater rates of ethnic disproportionality in terms of those subject to stop and search. This in turn led some to question the nature of the 'intelligence' on which such targeted stop and search was based and whether in fact it simply 'institutionalised' and reproduced past racial and ethnic biases in police practices.

Similar criticism arose from research on stop and search commissioned by the Home Office following the Stephen Lawrence Inquiry report. One of these studies<sup>10</sup> sought to compare the ethnic composition of those subject to stop and search to that of the population 'available' to be stopped and searched within the areas where, and at the times of day when, police stop and searched operations were most frequently carried out. The research used cameras mounted on cars to film the street population and those in vehicles in these

areas at these particular times of day. Perhaps not surprisingly given the 'self-fulfilling' methodology employed, it was found that the ethnic profiles of those stopped and searched, although disproportionate to the composition of the general population, was not out of line with that the 'available population', and if anything on this latter basis white persons were stopped and searched more often than their presence might justify.

On this basis, the author's concluded that 'disproportionality [in stop and search] is ... a product of structural factors beyond their [the police's] control.' I argued at the time that this was akin to arguing that slavery was not a racist institution, since the population available to be captured and enslaved in West Africa at the time just happened to be predominantly black. More importantly, the authors seem to have ignored that the concentration of police resources and stop and search on certain geographical areas and groups in the population is itself a product of police decision-making, albeit at a strategic level as opposed to the prejudiced attitudes and discriminatory behaviour of individual police officers. As the recent Equality and Human Rights Commission report on stop and search has noted:

Street availability is influenced by police decisions where and when to do stops and searches and these decisions heavily influence the people that are 'available to be stopped and searched. This is compounded by policing that is geared toward street availability.<sup>11</sup>

Other studies in this series appeared to undermine some of the more common rationales advanced to support the widescale use of stop and search. Thus, a finding that stop and search has 'a minor role in detecting offenders for the range of all crimes that they address, and a relatively small role in detecting offenders for such crime that come to the attention of the police'<sup>12</sup> seemed to contradict the Stephen Lawrence Inquiry conclusion that stop and search 'was required for the prevention and detection of crime.' The same study questioned the value of stop and search as a more general deterrent to crime:

Searches appear to have only a limited direct disruptive effect on crime by intercepting those going out to commit offences.... It is not clear to what extent searches undermine criminal activity through the arrest and conviction of prolific offenders. However, it is unlikely that searches make a substantial contribution to undermining drug-markets or drug-related crime in this way, given that drug searches tend to focus on users rather than dealers, and cannabis rather than hard drugs.... There is little solid evidence that searches have a deterrent effect on crime.

However, the impact of the Stephen Lawrence Inquiry report on police stop and search practice, as well as the critical questioning of its value, both proved to be relatively short-lived. The Government did move in 2004 to extend the PACE recording requirements to 'stops and account', but by this stage the number of stops and searches had already begun to climb back to the levels found in the mid-1990s, especially when account is taken of the additional stops and searches without reasonable suspicion under section 60 and anti-terrorism

legislation.

#### **4. Stop and Search under Anti-terrorism Legislation**

A major review of United Kingdom anti-terrorist law was initiated in 1995, and this led eventually to the passage of the Terrorism Act 2000. Section 43 of this Act provides for the police to stop and search to any person reasonably suspected of being a terrorist. More importantly, sections 44 - 47 of the same Act empowered senior police (at Assistant Chief Constable/Commander level), where they considered it 'expedient' to do so in order to prevent acts of terrorism, to authorise within their police areas stopping and searching without reasonable suspicion of any person or vehicle for articles for use in acts of terrorism. In contrast to section 60 authorisations discussed above, those under the Terrorism Act were required to be confirmed by the Home Secretary (a central Government minister) within 48 hours but otherwise could remain in force for up to 28 days, and like section 60, they could be renewed on a repeated basis. Indeed, the whole of the Metropolitan Police area in London was continuously subject to such an authorisation for most of the decade following the Act coming into force in 2001.

The Terrorism Act 2000 also provided a power for a police officer, immigration officer or customs official to stop, search and detain any person entering leaving the United Kingdom for up to nine hours to determine if s/he is a terrorist. The exercise of this power does not require reasonable suspicion and those stopped are at risk of arrest and criminal conviction for failing to answer any questions or to provide any information requested of them, even without the benefit of legal advice (to which those detained in police stations have a statutory right under PACE). Although not under arrest, they may also be searched (including stripped searched) and have fingerprints and DNA samples taken.

Over the decade following the enactment of what is commonly referred to as the section 44 power, 650,000 persons were stopped and searched under this provision, the vast majority in London, with over half of the ten year total occurring in just a two year period between 2007 and 2009. These stops and searches resulted in only 5,552 arrests (0.9%), of which just 287 were for terrorist-related offences, although none of the latter appear to have resulted in a conviction. Black and particular Asian people were very heavily over-represented among those subjected to stop and search under section 44. However, as the above statistics indicate, once authorised to use them, the police in London came to regard section 44 as having much wider application than to deal with terrorism alone. In particular, it came to be seen as a tactic to be used in controlling protests more generally.\*

It was just such a use of section 44 to stop and search two white people on their

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\* It was even suggested at one stage that police were deliberately stopping and searching white people under section 44 as a means of lowering rates of ethnic disproportionality in its use.

way to a demonstration against an arms fair in London in 2003 that led to what has been the most significant legal challenge to police stop and search powers in the United Kingdom. This challenge was based on the grounds that the police and Home Secretary had acted *ultra vires* in authorising the whole of London on a continuous basis for section 44 stops and searches, as well as an alleged violation of several articles of the European Convention on Human Rights. These were Articles 5 (right to liberty), 8 (right to a private and family life), 10 (right to freedom of expression), and 11 (right to freedom of peaceful assembly). It is worth noting here that the challenge failed at every level in the United Kingdom courts, despite the provisions of the European Convention on Human Rights having been incorporated in domestic law under the Human Rights Act 1998.

However, in January 2010 the European Court of Human Rights, in the case of *Gillan and Quinton v the United Kingdom*, upheld the challenge and struck down section 44 on the grounds that it constituted an interference with the right to respect of private life and that

the powers of authorisation and confirmation as well as those of stop and search under sections 44 and 45 of the 2000 Act are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. They are not, therefore, "in accordance with the law" and it follows that there has been a violation of Article 8 of the Convention.\*\*

In reaching this conclusion, the court found that 'the safeguards provided by domestic law [in respect of section 44 stops and searches] have not been demonstrated to constitute a real curb on the wide powers afforded to the executive so as to offer the individual protection against arbitrary interference.' This finding was based on a number of factors:

- authorisations to use section 44 stops and searches could be made when a senior officer consider it 'expedient' to prevent an act of terrorism, rather than 'necessary', and that therefore there was no requirement to make any assessment of the proportionality of doing so;
- although an authorisation required confirmation by the Secretary of State, s/he could not alter the geographical area specified and, although the authorisation might be refused or the time period altered, this had never been done;
- authorisations were renewable and could cover the whole of police force areas, which in the United Kingdom cover 'extensive regions with a concentrated population.' The lack of a check on authorisations was demonstrated by the fact that the whole of London had been continuously covered by such an authorisation throughout the period the Act had been in force;
- the Act confers a very wide discretion on the individual police officer and effectively does not provide any restriction on his or her decision to

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\*\* The ECtHR also indicated in its judgment that stop and search under section 44 was likely to constitute a 'deprivation of liberty' under Article 5.

stop and search. 'Not only is it unnecessary ... to demonstrate the existence of any reasonable suspicion; [the police officer] is not required even subjectively to suspect anything about the person stopped and searched.' While the search must be for articles for use in connection with terrorism, this covers a wide category of items 'commonly carried by people in the streets', nor does the officer have to have grounds for suspecting that the person may be carrying such an article.

- the statistics showed the very wide extent to which the power had been used in practice;
- there 'was a clear risk of arbitrariness in the grant of such a broad discretion and, while the present case did not concern black or Asian applicants, the risk of the discriminatory use of the power against such persons was a real consideration. There was also a risk of misuse against demonstrators and protestors in breach of Article 10 and/or 11 of the Convention;
- in the absence of any obligation to show reasonable suspicion for a stop and search under section 44, 'it is unlikely if not impossible to prove that the power was improperly exercised.'

## **5. Developments since the 2010 General Election**

The *Gillan* decision came just a few months prior to the 2010 General Election, which resulted in a Coalition Government between the Conservative and Liberal Parties taking the place of the previous Labour Government. One of the most immediate effects of the *Gillan* decision was to put paid to an idea that had been floated by the Conservative Party in opposition, that they would seek to remove the requirement of reasonable suspicion from all stops and searches, as part of a general move to relieve the police from 'unnecessary bureaucracy'. Nevertheless, the new Government has moved to make significant changes to the PACE *Code of Practice* governing stops and searches which do require reasonable suspicion. It has also introduced an amended version of the Terrorism Act power to stop and search without reasonable suspicion, in an attempt to meet the objections raised in the *Gillan* judgment.

### *Changes to the PACE Code of Practice*

Under the changes introduced to the PACE *Code of Practice*, the national requirement for the police to record 'stops and account' (i.e. stops that do not lead to searches), which had been introduced in response to the Stephen Lawrence Inquiry report in 2004, has now been dropped. This change has been introduced despite the fact that Her Majesty's Chief Inspector of Constabulary in 2007, whilst recommending that the process of recording be made less burdensome, still endorsed the need to record 'stops and accounts' in order to 'demonstrate accountability to individual members of the public' and as a means of 'building a national picture of our behaviour and actions as police officers'. In 2008-9, there were 2,211,598 stop and accounts in England and Wales, which indicates that there are approximately two such incidents for each stop and search that takes place or, to put it another way, that only around

one third of all stops result in a search.

With the removal of the national requirement for recording stops and account, it will be left to each local police force whether to continue such recording in order to meet local public concerns, and the evidence to date appears to indicate that two out of three police forces almost immediately decided to drop recording of stops and account. Currently, the Metropolitan Police in London are carrying out a consultation on this question, with a view to making a recommendation to the Mayor of London, who nevertheless has previously indicated that he is in favour of dropping the recording of stops and account.

The second change to the *Code of Practice* was to curtail the requirement under PACE for the police to record certain items of information in respect of stops and searches. Again, it will now be left to the discretion of each local police force whether or not to continue recording the name and address of the person stopped and searched, whether any injury or damage resulted from the search, or whether anything had been found, i.e. the outcome of the search. As a result, the only uniform information that will be available nationally about stops and searches will be the date, time and place of the search, the ethnicity of the person searched, the object of the search, the ground for the search, and the identity of the officer carrying it out. The time the police are required to maintain stop and search records has also been reduced from a year to six months.

These changes can be seen as undermining the potential for holding the police to account for stop and search through individual or collective legal action. In particular, with the name of the person stopped and searched being dropped from the records, it will be even more difficult than at present to prove that an individual or group has been subject to such action, perhaps on numerous occasions, and that this may constitute discrimination, harassment or victimisation under United Kingdom equalities legislation. Similarly, without the recording of injuries or damages caused by the stop and search, it will prove more difficult to prove a civil claim for damages. The dropping of the requirement to record the outcome of stops and searches, in particular arrests, will also render the statistics derived from these records much less useful in evaluating the effectiveness of stops and searches, either internally within the police or by external bodies.

Finally, it may be noted that the move away from uniform recording requirements for stop and search represents an important undermining of the whole ethos behind the Police and Criminal Evidence Act for the national regulation of police powers and their use. As discussed below, such a fragmentation of police regulation and accountability would be taken much further if the Coalition Government's current proposals for the reform of the police through the creation of local police and crime commissioners come to fruition.

### *Changes to stop and search without reasonable suspicion under the Terrorism Act*

Once the *Gillan* judgment was finalised in June 2010, the United Kingdom government suspended the use of section 44 stops and searches. However, in 2011 a Remedial Order was passed and a new *Code of Practice* issued to reinstate the power to stop and search without reasonable suspicion under the Terrorism Act. The key changes introduced in an attempt to meet the criticisms set out in the *Gillan* judgment are as follows:

- An authorisation may only be given when a senior officer reasonably suspects that an act of terrorism will take place;
- An authorisation may only be given where the senior officer considers that it is necessary, not merely expedient, to prevent an act of terrorism;
- An authorisation may last for a period no longer than the senior officer considers necessary and for a maximum of 14 days (not 28 days as under the previous provisions);
- The Secretary of State may substitute an earlier date or time for the expiry of an authorisation, or a more restricted area or place for the authorisation, when confirming it;
- A senior officer may substitute an earlier time or date or a more restricted area or place, or may cancel an authorisation;
- An officer exercising the stop and search powers may only do so for the purpose of searching for evidence that the person concerned is a terrorist or the vehicle concerned is being used for the purposes of terrorism.

The related *Code of Practice* indicates that authorisations will not normally be given for whole police force areas and that repeat authorisation will not normally be allowed, although much will depend on how the Secretary of State reacts to police requests of this type.

It remains to be seen whether these changes will in fact bring the operation of stop and search without reasonable suspicion under the Terrorism Act in conformity with the European Convention on Human Rights. In June 2011, the Parliamentary Joint Committee on Human Rights found that the Order in its current form does not go far enough in this respect. It recommended that the Order be modified to require the authorising officer to have a reasonable basis for his belief (as opposed to suspicion) as to the necessity of the authorisation and to provide an explanation of those reasons; prevent the renewal of authorisations other than on the basis of new or additional information or a fresh assessment of the original intelligence that the threat remains immediate and credible; require prior judicial authorisation of the availability of the power to stop and search without reasonable suspicion; and that the Code of Practice accompanying the Order should contain stronger recording requirements in order to facilitate monitoring and supervision of the use of the replacement power to stop and search without suspicion and require that there be public notification once the authorisations have expired.

To date, there have been no related changes to the power under schedule 7 of

the Terrorism Act to stop persons entering or leaving the UK without reasonable suspicion. In fact, data relating to the use of this power was only recently released following a Freedom of Information Act request. These showed that over 85,000 persons had been stopped under schedule 7, the majority from various minority ethnic groups, including 19% Asians, 8% blacks, and 22% other minority ethnic groups. These groups were even more heavily represented among those who were stopped for over an hour - 41% Asian, 10% black, and 30% other ethnic minorities. The data also indicate that only 0.57% of schedule 7 stops result in an arrest.

A recent report by the Equality & Human Rights Commission (EHRC) exploring the impact of counter-terrorism powers on Muslim communities found that Schedule 7 is "having the single most negative impact on Muslim communities."<sup>13</sup> In particular, the intrusive questioning of people over their social, religious and political views; the taking of their fingerprints and DNA; and refusing to await the arrival of a solicitor before conducting the search and questioning, have all created feelings of alienation, being targeted due to religious belief and a sense in some communities that they are being treated as 'suspect communities'. The report found evidence of some travelers re-routing their journeys to allow them to go through other airports further away where they feel that they are less likely to be targeted for Schedule 7 stops.

#### *Potential further legal challenges on stop and search*

The *Gillan* has also raised the issue, which has so far not been addressed publicly by the UK government, of the legality under the Human Rights Act and the European Convention of Human Rights, certainly of other powers to stop and search without reasonable suspicion. These would include schedule 7 and section 60 of the Criminal Justice and Public Order Act 1994. Indeed, it is notable that authorisations under section 60, unlike section 44 of the Terrorism Act, are solely in the hands of local police, with no requirement of confirmation by the Secretary of State or other external authority. As previously noted, there has also been a pattern of virtually continuous authorisation of section 60 in some areas. These factors, along with the targeting of section 60 stops and searches on ethnic minority groups, may make it particularly vulnerable to legal challenge on the basis of the considerations set out in the *Gillan* judgment.

Consideration is also currently being given to legally challenging the decisions of various police forces, following changes to the PACE *Code of Practice*, to discontinue the recording of stops and account and of other items of information in respect of stops and searches. Such challenges would be based on the Equalities Act 2010 and in particular the duty of public bodies, in exercising their functions, to have regard to the need to eliminate discrimination and advance equality of opportunity.

#### *General police reform - a fragmentation of accountability?*

All of these recent developments should be viewed in the context of the Coalition Government's general plans for police reform, as set out in the Police

Reform and Social Responsibility Bill currently before Parliament. This proposed to introduce into the United Kingdom a system of elected police and crime commissioners for each local police area, with responsibilities for producing a police and crime plan and for appointing and potentially dismissing Chief Constables. These proposals have proven highly controversial, especially among senior police, to the extent that the Government was defeated on them recently in the House of Lords. Although the Government has indicated that it will attempt to re-introduce plans for elected police and crime commissioners, there is a risk that it will be further derailed by the recent events surrounding the 'phone hacking' scandal in Britain, which has led to official inquiries being established to investigate the relations between the police, the media and politicians.

However, if proposals for elected police and crime commissioners, or even more limited plans for the introduction of local police and crime plans, go ahead, it could move the United Kingdom closer to the American model of police organisation and to a more localised, and possibly fragmented, system of police accountability. One implication of this would be to shift the political debate on aspects of policing, such as stop and search, away from a national level and issues relating to the regulation of policing under PACE and the *Codes of Practice*, and down to each local policing area and the provisions of the local police and crime plan. It could also have implications for mounting legal challenges to police practices, creating a necessity to bring actions against each local police force in turn. It is even possible to speculate that there would be a return to the pre-PACE situation of local police seeking their own particular powers in respect of stop and search or that the role in authorising extraordinary stop and search powers could be placed in the hands of the local police and crime commissioners.

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<sup>1</sup> *The Scarman Report: The Brixton Disorders - 10-12 April 2001*, London, Penguin Books, 1986.

<sup>2</sup> *Ibid*, p. 105.

<sup>3</sup> Cmnd 8092 *Report of the Royal Commission on Criminal Procedure*, London, HMSO, 1981

<sup>4</sup> A Sanders, R. Young and M Burton, *Criminal Justice*, Fourth Edition, Oxford, Oxford University Press, 2010.

<sup>5</sup> *Police and Criminal Evidence Act Codes of Practice, Code A*.

<sup>6</sup> Section 95 of the *Criminal Justice Act 1991*.

<sup>7</sup> C Phillips and D. Brown, *Entry into the criminal justice system: a survey of police arrests and their outcomes*, London, Home Office Research Study 185, 1998.

<sup>8</sup> For a recent, detailed analysis of the statistics on ethnic disproportionality in stop and search, see *Stop and Think: A critical review of the use of stop and search powers in England and Wales*, London, Equality and Human Rights Commission, 2010.

<sup>9</sup> CM 4262-J *The Stephen Lawrence Inquiry: Report*, London, The Stationary Office, 1999.

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<sup>10</sup> MVA and J. Miller, *Profiling Populations Available for Stop and Search*, London, Home Office Police Research Series Paper 131, 2000.

<sup>11</sup> *Stop and Think*, *op. cit.*

<sup>12</sup> J. Miller, N. Bland and P. Quinton, *The Impact of Stops and Searches on Crime and the Community*, London, Home Office Police Research Paper 127, 2000.

<sup>13</sup> Choudhury, T. and Fenwick, H (2011) The impact of counter-terrorism measures on Muslim communities, Research report 72. London: EHRC, at 86.