

A CRITICAL PERSPECTIVE ON ECTHR JURISPRUDENCE ON RACIAL PROFILING IN POLICING: THREE PROPOSALS TO IMPROVE VICTIMS' ACCESS TO JUSTICE

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Abstract: In this article we undertake a critical analysis of the ECtHR jurisprudence regarding racial profiling in policing. The goal of the paper is to contribute to the discussion on ways to increase opportunities for access to justice for victims of racial profiling. Our proposals focus mainly on the following hypotheses: i) antidiscrimination law must clearly identify the social group that it aims to protect; ii) a “colour-blind” perspective of racial equality must be avoided to better define these cases; iii) courts must analyse, to determine whether racial profiling exists, police officers’ justification for the identity check process (not the existence of a racist attitude or motivation).

Keywords: Racial profiling in policing, Anti-discrimination law, European Court of Human Rights, Article 14 European Convention on Human Rights, Seydi and others v. France.

Summary: 1. INTRODUCTION. 2. RACIAL PROFILING IN POLICING: JURISPRUDENCE OF THE ECtHR. A. ECtHR cases on racial profiling. B. Gaps concerning the acknowledgment and mitigation of institutional, systemic and structural racism. 3. PROPOSALS. A. Regulations that specifically refer to subordinated or excluded social groups. B. Eradication of the “colour blind” perspective of racial equality. C. Focus on the search for reasonable elements that justify the identity check or arrest. 4. CONCLUSIONS. REFERENCES. CASE LAW.

1. INTRODUCTION

Racial profiling in policing has been widely denounced by both Non-Governmental Organisations (Ouled and Korriche, 2024) and public bodies (Polo Navarro, 2020; the European Union Agency for Fundamental Rights, 2010). Racial profiling in policing can be defined as “the use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities” (Recital 1 of the ECRI General Policy Recommendation n° 11 on combating racism and racial discrimination in policing adopted on 29 June 2007). For example, the results of a study conducted by Hopkins and Popovic (2025) show strong evidence that race is associated with decision-making by police in Victoria (Australia). This is a controversial issue, due to the difficult interaction between integrative measures aimed at eliminating discriminatory bias and measures that seek to exclude certain people due to their immigrant status under immigration regulations (Polo Navarro, 2020, p. 10). The consequences of racial profiling in policing affect not only communities of a certain race but also police legitimacy. This is because people’s perception of the police is influenced “if the law is enforced in ways that signal arbitrariness, exclusion,

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and a lack of protection to the communities being policed” (Jackson *et al.*, 2023, p. 79). García Añón argues that even though this practice has been condemned, its continuity is based on three aspects: the lack of information and data, the lack of mechanisms to control police discretion, and the “police culture” itself (García Anón, 2024, pp. 77-80). Regarding the lack of data, Lighten (2025, p. 424) and Oppenheimer (2008, pp. 736-737) argue that it can be a result of some States’ historical reluctance to engage in topics related to racial identity and disparities. Concerning the last factor, García Añón argues that “police culture” is currently based on effectiveness and the guiding principle of “fighting crime” and not on cooperation between police and the population, or a better operational response from police forces to public priorities and crime prevention.

Since 2022, four cases of alleged racial profiling in policing have reached the European Court of Human Rights (ECtHR): *Muhammad v. Spain* (2022);² *Basu v. Germany* (2022);³ *Wa Baile v. Switzerland* (2024)⁴ and *Seydi and Others v. France* (2025).⁵ The applicants argued that they experienced racial discrimination, which is forbidden in Article 14 of the European Convention on Human Rights (ECHR) of 4 November 1950 (and also under Article 1 of Protocol No. 12 to the Convention of 4 November 2000), in conjunction with Article 8 of the ECHR (right to respect for private life). In the cases ruled on by the ECtHR, the applicants reported arbitrary detention or identity check⁶ due to their racial and ethnic origin (Section 2).

It is important to consider the two perspectives that can be adopted in relation to the goal of anti-discrimination laws. The anti-subordination perspective of anti-discrimination defends the idea that anti-discrimination law must aim to protect people that belong to social groups that are stigmatised, subordinated or excluded. This is because people belonging to these groups have more limited life opportunities and lower access to goods and services produced by society and find themselves in a situation of imbalance in the development of their social relationships (Álvarez del Cuvillo, 2022, p. 189). This perspective is based on the idea that anti-discrimination law must take into account a “group, systemic and structural based” concept of power (Barrère Unzueta, 2018, p. 20). On the other hand, the anti-classification perspective of anti-discrimination defends the idea that anti-discrimination law must aim to protect people (whichever social group they belong to) from any arbitrary difference of treatment based on certain legally protected attributes. If looked at from a critical approach, the anti-classification perspective evades the social and economic differences between groups and generates a false universalism (Barrère Unzueta, 2018, p. 13).

Bearing all this in mind, in the third section, we will present different measures that could improve racial profiling in policing victims’ access to justice (Section 3).

² ECtHR, *Muhammad v. Spain*, Application No 34085/17, 18 October 2022.

³ ECtHR, *Basu v. Germany*, Application No 215/19, 18 October 2022.

⁴ ECtHR, *Wa Baile v. Switzerland*, Application No. 43868/18 and 25883/21, 20 February 2024.

⁵ ECtHR, *Seydi and others v. France*, Application No. 35844/17, 26 June 2025.

⁶ Detention implies a person’s deprivation of liberty by the police and an arbitrary identity check implies a person’s unreasonable identity verification by the police.”

Lastly, we will present some conclusions (Section 4).

From a methodological perspective, we undertook our analysis from a socio-legal perspective, borrowing different sociological concepts to address a legal problem. For example, terms such as “systems of oppression”,⁷ “dominating social forces”,⁸ or “perpetual underclass”⁹ are used to explain and justify both the anti-subordination perspective of anti-discrimination and the different proposals that are presented in the article to enhance the understanding of racial profiling in legal regulations and among those who interpret them.

2. RACIAL PROFILING IN POLICING: JURISPRUDENCE OF THE ECtHR

In this Section we aim to analyse the cases of racial profiling in policing that have reached the ECtHR and the evolution of the Court’s jurisprudence. Firstly, we will refer to ECtHR jurisprudence on racial profiling: the cases *Muhammad v. Spain*; *Basu v. Germany and Wa Baile v. Switzerland* and *Seydi and others vs. France (A)*. Then, we will address the gaps that these rulings represent in relation to the acknowledgment and mitigation of institutional, systemic and structural racism (B).

A. ECtHR cases on racial profiling

The ECtHR ruling *Muhammad v. Spain* resolves a case related to police identity check. According to the plaintiff’s account of the events, on 19 May 2013, the police asked him to identify himself, while on the street. When he inquired as to why they were seeking his documentation, the police officer replied that he was doing so because he was black (para. 6). On the other hand, according to the police, the plaintiff’s lack of respect for authority and insolent attitude was the reason for the identity check. The ECtHR ruling stated that there was no violation of Article 14 of the ECHR in conjunction with Article 8 since it could not be considered proven that a racist attitude played a role in the police’s demand to provide identification (para. 102-103).

In his dissenting opinion, judge Zünd disagreed with the majority since he considered that there had been deficiencies in the investigation of the facts. Judge Zünd stressed that it did not seem sufficient that the Administrative Court had dismissed the plaintiff’s complaint

⁷ Following Young (1990, p. 40) when referring to oppressed people, systems of oppression can be defined as a set of elements working together as parts of a mechanism that result in the fact that people that belong to certain social groups suffer some inhibition of their ability to develop and exercise their capacities and express their needs, thoughts and feelings.

⁸ Following Ellwood definition (1912, p. 278) social forces are “every factor which has some degree of active influence in shaping and molding the forms of association and the interaction of individuals”. Dominating social forces are, consequently, factors that prevail over others that actively influence the association with and interaction between individuals.

⁹ Van Haitsma (1989, p. 27) states that the underclass has been defined according to different characteristics: chronic poverty; non-normative behaviour with respect to income generation and family formation; the spatial concentration of such poverty and/or behaviour; and the intergenerational transmission of such poverty and behaviour. When referring to a perpetual underclass, we refer to people that respond to these characteristics and are unable to change their situation.

on the basis that the evidence presented by the parties was essentially contradictory and the plaintiff had not been able to provide further evidence that could support his version of the facts - thereby assuming that the police statements were true - (para. 5 of his opinion).

In a similar case, *Basu v. Germany*, the plaintiff alleged that two police officers asked him and his daughter to identify themselves on a train crossing the border between the Czech Republic and Germany because they were dark-skinned. The plaintiff alleged that the police officers did not demand that other people in the same compartment identify themselves. The Government, in its turn, argued that they were not the only people to have their identity checked on the train (para. 5-6). In this case, the ECtHR considered that Germany violated Article 14 of the ECHR in conjunction with Article 8, since it failed to comply with its duty to take all reasonable steps to verify through an independent body whether or not a discriminatory attitude had played a role in the identity check (para. 38). Ochoa Ruiz points out that this case differs from the *Muhammad v. Spain* case because in the former there was only a simple internal investigation carried out by a hierarchical superior and the German courts did not investigate the matter in depth (Ochoa Ruiz, 2023, p. 30).

From our perspective, which we will further develop in section 3.3, it is not so much about investigating whether the identity check was motivated by a racist attitude, but rather about investigating whether there was reasonable justification for carrying it out (understanding that the justification for carrying out identity checks is clearly defined by law). If there is no justification for the police action, the identity check should not be valid. Sánchez Tomás (2024, p. 11) argues that police officers should be obliged to document and justify each of the identity requests made, to both the affected citizens and the supervisory authorities.

In the *Wa Baile v. Switzerland* case, the ECtHR concluded that in the absence of a valid reason for carrying out an identity check, there was a presumption in favour of the argument that the request had discriminatory motives. In this case, three police officers asked a Swiss citizen of African descent to identify himself at Zurich railway station because, according to the police officer who asked for identification, the plaintiff looked away when he identified himself as a police officer and this made him suspicious (para. 5). The police officers searched him until they found his documentation. The Government argued that the plaintiff was not the only one who was asked to identify himself. However, the ECtHR considered that the Government's argument was too vague to be able to rebut the presumption of discriminatory treatment (para. 134). This vagueness was related to the fact that only the State was in a position to provide information related to how many others had been subjected to an identity check on that day (para. 134).

The last ECtHR ruling on racial profiling policing is *Seydi and others v. France*, that was issued on the 26th of June 2025. This case was about police identity checks between 2011 and 2012 of six persons who identified themselves as being of African or north African origin. The plaintiffs stated that no investigation to explore potential racist motives for the checks was carried out and that the level of evidence that was required of them was impossible to provide (para. 70). Also, they stated that the authorities did not provide an objective and reasonable justification for their identity check, meaning that there was no justification for it other than their ethnic origin, either real or supposed (para. 75).

On the other hand, the government argued that there was no evidence proving that the identity check was based on ethnic discrimination or any facts that lead to the existence of a difference in treatment being presumed (para. 78), adding that no racist insults were uttered by the police officers (para. 79).

The Court highlighted the existence of an obligation of the authorities to investigate the existence of a potential link between racial discrimination and the police officers' actions (para. 88). Moreover, the ECtHR affirmed that the domestic courts had properly established whether there was a *prima facie* case of discrimination considering that serious, precise and consistent circumstances could be constituted in particular by general statistical reports, factual and legal circumstances surrounding the checks and testimonies of third parties who attended the identity checks (para. 96).

The Court examined each individual case to look at whether a presumption of discrimination existed, and whether the State had provided objective elements that justified the check. The Court considered that the fact that the first plaintiff exhibited clearly suspicious conduct, such as walking fast with a hood up, obscuring his face, in a neighbourhood with frequent delinquency (para. 118), was sufficient to rebut the presumption of discrimination. Nonetheless, regarding the judgement of appearance to presume delinquency, Schclarek Mulinari (2025, p. 6) affirms that “police use their sensory abilities when deciding whom to stop and search” and certain forms of aesthetics need to be explored as part of broader societal racist patterns.

Regarding the second, third, fourth, and fifth plaintiffs, the Court considered that they were in dangerous neighbourhoods, and the witnesses did not bring an element of comparison or provide evidence of any different treatment (para. 119-121). The Court presented this sentence even though the disputed identity checks did not result in the drafting of any reports, were not recorded, nor were they acknowledged.

Concerning the last plaintiff, the Court considered that there was a presumption of discrimination because i) the applicant was stopped three times in ten days; ii) there was no legal basis for the police check; iii) there was a witness who did not belong to the applicant's group of friends who stated that the plaintiff received insults, inappropriate remarks about his physique and even physical violence from one of the police officers during the operation (a slap); and iv) there was official statistical data reporting on racial profiling in policing in France (para. 126 - 127). This is relevant because it opens up the opportunity to provide proof of *prima facie* discrimination based on the existence of sufficiently strong, clear and concordant inferences or similar un rebutted presumptions of fact. However, “sufficiently strong, clear and concordant inferences” remains an undetermined legal concept.

B. Gaps concerning the acknowledgment and mitigation of institutional, systemic and structural racism

After reviewing the ECtHR rulings on racial profiling in policing, we aim to analyse the different gaps they display concerning i) institutionalised racism and ii) the burden of proof in cases where there is an existence of conflicting versions of the same facts.

Regarding the first issue, it is important to bear in mind the work of Carmichael and Hamilton (1967, pp. 10-11), that distinguishes between individual racism and institutional racism. Individual racism consists, based on the authors' perspective, of overt discriminatory acts by individuals that cause harm. Institutional racism is more subtle, less identifiable, and originates in the operation of established and respected forces in society. It receives much less public condemnation than individual racism. This institutional racism follows unquestioned norms, habits, symbols, assumptions, underlying institutions and rules, and the collective consequences of following these norms. Beyond institutions, racism is a form of oppression, that refers to the vast and profound injustices suffered by some social groups due to certain assumptions and reactions, often subconscious, of well-intentioned people in ordinary interactions that are influenced by the media and social stereotypes as well as bureaucratic hierarchies and market mechanisms (Young, 1990, p. 41). Deutsch suggests that while oppression does not need to be extreme or violent, it does require the legal system to be involved (Deutsch, 2006, p. 10). Therefore, oppression cannot be eliminated by changing who legislates or creating new laws since it is replicated by large economic, political and cultural institutions, making the people who benefit from it retain an interest (consciously or subconsciously) in its continuity, without typically seeing themselves as agents of oppression.

Johnson (2000, p. 293) points out that a system of oppression¹⁰ should not be confused with oppressive behaviour by specific people, so a white man may not actively participate in oppressive behaviour towards non-white people or women but, nevertheless, benefit from the system of oppression towards non-white people and women simply because he is a white man. Similarly, a white woman can benefit from the oppression of non-white people simply by being white. Foucault (1992, p. 156) urges us to understand oppression (which he calls domination) as techniques and tactics of power, abstracting from the Leviathan model, which operates in a field delimited by political sovereignty and state institutions. Oppressed and oppressor groups can be understood as watertight and separate. However, we can also consider a more fluid way of understanding oppression. This perspective would be based on the idea that individuals, due to their characteristics and life trajectories, come together in different groups that can both receive oppression and exert it for different reasons. This question invites us to reflect on the complex manners in which oppression is exercised, not only through different tactics, techniques, institutions and political, social, economic, cultural and legal systems, but also through the junction between people in positions that involve both exercising and receiving oppression¹¹ (however, an in-depth study of this question is beyond the scope of this article).

These systems of oppression are a key element in understanding the existence of racial profiling in policing and how the Courts address these cases. From our perspective, judicial procedure must not ignore the existence of certain stigmatised, subordinated or

¹⁰ The fact that the exercise of oppression incorporates different multi-localised elements that feed back on each other (people, social practices, cultural customs, regulations or economic plans), which depend on each other, means that we are referring not so much to oppression as to systems of oppression.

excluded social groups, and that people belonging to these groups suffer an impact on their lives, such as hypervigilance by the police, for this reason.

Racial profiling in policing is analysed in light of Article 14 of the ECHR in relation to Article 8 of the ECHR. These rights might be violated whenever non-white people are asked to identify themselves without there being any objective reason for doing so, making them feel stigmatised. As Mogensen (2019, p. 467) states, racial profiling is “one of a number of injustices that together constitute racial oppression, where oppression represents an injustice that pertains, in the first instance, to the overall standing of a group of persons”. Gil (1998) argues that oppression typically results in the most disadvantaged living conditions for victims, such as having exponentially more likelihood than others of seeing their right to non-discrimination or to not suffer interference in their private life violated. Gascón Cuenca (2025, p. 222) affirms that racial profiling in policing illegitimately limits people’s right to freedom of movement and promotes stereotypes that connect immigration with crime.

Therefore, the fact that none of the plaintiffs belonged to the majority ethnic group in a specific location where the identity check or arrest took place should have been considered when analysing the *Muhammad v. Spain*; *Basu v. Germany* and *Wa Baile v. Switzerland*; *Seydi and others vs. France* cases.

In relation to the second question (connected to the first question we discussed), in cases of discrimination, the ECtHR points out that it is the plaintiff who must prove his or her allegation and, only when it has been proven that a difference in treatment exists, the burden of proof shifts to the Government to prove that this different treatment was justified (*Muhammad v. Spain*, para. 94; *D. H. and others v. The Czech Republic*,¹² para. 177 i *Timishev contra Russia*,¹³ para. 57). This can be very difficult in cases of discrimination where there are often two contradictory versions of the same events. Santos (2002, p. 246) argues that systems of oppression have the capacity to determine what exists and what does not, with what is categorised as “non-existent” not being a believable or valid alternative to what exists. An evidentiary scheme that requires the injured person to provide evidence of a fact that in many cases the people judging it consider to be non-existent points to what Johnson (2000, p. 293) describes as an institutionalised system of oppression.

For example, the cases presented analyse the conflicting versions of the applicants and police officers and investigate whether the state has properly investigated the

¹¹ In this sense, oppressive actions can be directed towards people from the same disadvantaged social group, for example we can refer to women who, due to their position as public figures, raise anti-emancipatory and oppressive discourses against their peers, or they can be directed towards people from another disadvantaged social group, for example the recent case of the racist opinions of the trans actress Karla Sofia Gascón. See: The Guardian, Emilia Pérez star Karla Sofia Gascón faces backlash over offensive tweets, 30.01.2025. Available at: <https://www.theguardian.com/film/2025/jan/30/emilia-perez-karla-sofia-gascon-inflammatory-tweets> [last accessed 14 January 2026].

¹² ECtHR, *D.H. and others v. The Czech Republic*, Application No. 57325/00, 13 November 2007.

¹³ ECtHR, *Timishev v. Russia*, Application No. 55762/00 and 55974/0013, 13 December 2005.

applicants' allegations. In most cases the identity checks and detentions took place without any witnesses, and the people who underwent them were unable to provide any basis for comparison. It is possible to question whether the interpretation of the facts would have changed if the Court had not started its reasoning based on the assumption that the police did not have any reason to have racist motives, but rather from the belief that, in consequence of being raised and live in racist societies, implicit racial bias ends up having an impact on the majority of people's attitude (Levy, 2017, pp. 548-549). This interpretation is viable to the extent that, as Payne and Hannay (2021, p. 928) point out, implicit bias can be considered a "cognitive reflection of systemic racism in the environment". In the latter case, it would have been necessary to require the police to be more precise in their investigation of a person's actions that led to their identity check or arrest. Araújo and Maeso (2021, p. 190) affirm that racism continues to be separated from the routine forms of political practice inherent in the founding of the nation-state in European history, identifying racism as dependent on motivation and intention. They point out that identifying the racist person and the affected person - by asking for evidence of racist motivation or intention - is a fallacy (Araújo and Maeso, 2021, p. 199). As we see in the *Muhammad v. Spain*; *Basu v. Germany* and *Seydi and others vs. France* rulings, racist motivation or intention is the axis on which discrimination cases pivot (in only one case, *Wa Baile v. Switzerland*, the focus shifted slightly to the person's actions that led to their identity check).

Moreover, it is pointed out by the Ligue des droits de l'homme (Human Rights League) in the *Seydi and others v. France* case, that this legal conflict should always be engaged by requiring that a connection be made to the behaviour of the identified person (to avoid any identity checks based on skin colour) (para. 83). However, this link to the behaviour can also be disputed, such as in the case *Muhammad vs. Spain*, where it is also discussed whether the plaintiff did or did not show the "lack of respect for authority and insolent attitude" that justified the identity check.

In the *Seydi and others v. France* case, the ECtHR acknowledges, only in the case of the last plaintiff, that racial discrimination took place. The Court bases its arguments, among others, on the fact that there was an independent witness who supported the plaintiff's version of the facts. It is not only this witness account, but other "sufficiently serious, precise and consistent elements" that made the Court consider that racial discrimination had taken place. Judge Mourou-Vikström issued a dissenting opinion to the majority ruling, arguing that evidence of different treatment must be provided to recognise discrimination, and this evidence of different treatment cannot be substituted by a set of "sufficiently serious, precise and consistent elements". Judge Mourou-Vikström focused on the use of general statistical reports, arguing that those cannot be used as evidence of a concrete case of discrimination. In this regard, Judge Mourou-Vikström seemed to omit the fact that the search for other elements of proof is due to the circumstance that proving that there has been different treatment in cases of racial profiling in policing is almost impossible in most situations. From her perspective, admitting this evidence involves the risk that the *feeling* of being discriminated against will take precedence and replace rigorous and objective proof of the existence of discrimination. This argument is in line with the individualistic perspective of anti-discrimination law that Fitzpatrick (1987, p. 124)

highlighted, when he stated that “evidence going beyond the individualistic nature of the relation and dispute between the parties will be rejected or given little weight”.

This comparative conflict is rooted in the disagreement between the anti-classification and anti-subordination perspectives to understand anti-discrimination. In accordance with the anti-classification perspective, it is the different treatment in a comparative and one-off situation that is considered to be discrimination. However, in accordance with the anti-subordination perspective, it is the treatment itself that is demeaning, because it is due to a situation of stigmatisation, subordination or exclusion. Reibetanz Moreau (2006, p. 90) explains that people from stigmatised, subordinated or excluded groups ask to receive the same kind of treatment, the same kind of respect that people from other social groups receive. As Khanna (2025) points out, for racialised individuals facing identity checks on streets and in public places could in itself result in indignity, stereotyping, and stigmatisation. This does not mean that in each situation a person from another group with which a comparison can be established exists. Timmer (2015, p. 252) defends the idea that the wrongs of stereotyping are not based on a comparison with another group that has been treated better.

Questioning the fact that not all situations where a discriminatory action occurs are comparative in nature does not mean that evidence is not necessary, and the *feeling* of the person is enough to claim that a violation of antidiscrimination law has taken place. What is argued is that it can be questioned if, even though the requirement to objectively verify what happened must prevail, the option to prove racial profiling must be broadened and not rely as much as it does today on whether a comparison exists or not.

3. PROPOSALS

Taking into account what the gaps in the rulings analysed above represent from our perspective, in this section we suggest different measures to mitigate these: i) antidiscrimination law should specifically refer to the subordinated or excluded social groups it aims to protect (A); ii) a colour-blind perspective on racial equality should be avoided (B); and iii) Courts must only analyse whether the identity check or the arrest was justified without searching for racist motivations or attitudes (C).

A. Regulations that specifically refer to subordinated or excluded social groups

Article 14 of the ECHR (and also Article 1 of Protocol No. 12 to the Convention of 4 November 2000) refers to the enjoyment of rights “without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”. The wording of this article is equidistant: both people from the majority ethnic origin and people from the minority ethnic origin can make a claim of discrimination.

We also find this equidistant position in the following antidiscrimination directives: Article 1 of the Directive 2000/43/EC on racial equality states that the aim of the directive is “to lay down a framework for combating discrimination on the grounds of racial or

ethnic origin”. The expression “discrimination on the grounds of racial or ethnic origin” is used and not “discrimination on the grounds of not being part of the majority ethnic group in a specific Member State”, that would connect with the purpose of the anti-subordination perspective of anti-discrimination law, which is to fight against subordination and exclusion. The same argument can be extrapolated to Directive 2000/78/EC on equality in the field of employment; Directive 2004/113/EC on equality between men and women in access to and supply of goods and services; Directive 2006/54/EC on equal opportunities and treatment of men and women in matters of work and employment; Directive 2024/1499/EU on rules relating to equality bodies with an impact in areas of equality relating to race or ethnic origin, religion or belief, disability or age; Directive 2024/1500/EU on rules relating to equality bodies in the field of sex equality; or articles 21 and 23 of the Charter of Fundamental Rights of the European Union (CFREU).

The directives listed above do not correspond, for example, to the line of action followed in the Convention on the Elimination of All Forms of Discrimination against Women, approved in New York on the 18th of December 1979 by the United Nations General Assembly in Resolution 34/180. This Convention aims to adopt all necessary measures to eliminate this type of discrimination in all its forms and manifestations and specifies that it is women who suffer discrimination.

Similarly, the Convention on the Rights of Persons with Disabilities, approved on 13 December 2006 by the United Nations General Assembly in its Resolution 61/106, aims to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. It is therefore specified here that it is people with disabilities who suffer discrimination.

However, in the International Convention on the Elimination of All Forms of Racial Discrimination, approved on the 21 December 1965 by the United Nations General Assembly in Resolution 2106 A (XX), it is not specified that discriminated social groups are minority races or ethnic groups that have been prevented from participating effectively in the political context (Hart Ely, 1998, p. 7).¹⁴ It can be argued that this convention does not explicitly refer to the races or ethnic groups that it aims to protect because it does not refer to one single group such as women or people with disabilities (in opposition to the majority/dominant group), but instead refers to many potential groups (all races and ethnicities other than white).

It is understood that it is not necessary to categorise all ethnic origins that could trigger a discriminatory action to avoid not considering them all (for example, considering discrimination took place based on an Ethiopian ethnic origin, and not on Mongolian or African American ethnic origin). However, this aim to be exhaustive (not leave anyone out) should not imply that people who are part of the majority or/and the privileged social groups and who have not suffered any history of exclusion

¹⁴ This argument is drawn from Hart Ely’s interpretation of footnote number four in the ruling of the Supreme Court of the United States of America: *United States v. Carolene Products Co.* 304 U.S. 144 (1938).

and subordination benefit from the special protection conferred by anti-discrimination legislation. That anti-discrimination law is put together in this way seems to respond to the accommodation (or adaptation, transformation, distortion) to a society where patriarchal, racial, economic, ableist, ageist, heteronormative, etc. systems of oppression converge, of a proposal that clearly intended to fight against these exact systems of oppression, exclusion and subordination.

From our perspective, the law is drafted in such an equidistant way that it opens up a space that is too open to interpretation, where dominating social forces can infiltrate and reverse the gains of the legislation. To reverse this situation, a negative formulation of the special protection provided by the regulations could be put forward as an alternative. For example: discrimination on the grounds of race or ethnicity will be considered proven when the person receiving unequal treatment is not part of the majority race or ethnic origin in the region where the discriminatory action took place.¹⁵

Still, one criticism of this proposal is that explicitly naming the oppressed social group can be dangerous as it can lead to essentialising¹⁶ a group. The idea of naming the system of oppression and not the specific group is that this can also be adapted to different contexts.

With regards to the previously mentioned ECtHR cases of racial profiling, this proposal could help detect the groups that should be protected by anti-discrimination law more precisely and prevent further incidents involving a colour-blind perspective of racial equality, as we will look at in the next sub-section.

¹⁵ Regarding other protected attributes: discrimination on the grounds of sex will be considered when the person receiving unequal treatment is not a man; discrimination on the grounds of religion or beliefs will be considered when the person receiving unequal treatment does not have a majority opinion, religion or belief; discrimination on the grounds of sexual orientation will be considered when the person receiving unequal treatment does not identify as heterosexual; discrimination on the grounds of disability will be considered when the person receiving unequal treatment does not possess abilities considered normative (following Gesser *et al.* (2022) and their anti-ablism doctrine), or finally, discrimination on the basis of age will be assessed when the person receiving unequal treatment has an age considered unproductive or that determines that the person has less capacity within the context of the socio-economic system. Particularly, age discrimination as understood in this article can be defined as the result of beliefs, actions, practices or vocabularies intended to devalue the social status of people, causing their exclusion or subordination, solely because of their age. Macnicol (2015: 171) argues that “older” people tend to be devalued in advanced industrial societies for psychological, social, cultural or economic reasons (e.g. in the psychological sphere due to deeply internalised fears of one’s own old age and in the economic sphere due to the high cost of their wages, the accumulation of seniority, or the lack of productivity that is associated with them when leaving the labour market). If we consider the exclusion or subordination of specific social groups as the central axis of discrimination, although “adult” people may fall under this consideration, the same does not happen with minors, who do not form an excluded social group, since they are not stigmatised and denigrated, and, although they should be specially protected, we doubt that this should be done through anti-discrimination regulations.

¹⁶ In one of its meanings in the Collins Dictionary essentialism is defined as “any theory that views certain ideas, behaviours, or traits as being natural to or inherent in either sex, in an ethnic group, etc.”

B. Eradication of the “colour blind” perspective of racial equality

The equidistance that we find in most current regulations has consequences, such as the reverse discrimination¹⁷ (the maximum expression of this is in the field of discrimination on the basis of sex) and which it is not illogical to think derives from patriarchal society, or the “colour-blind” perspective of racial equality which it is not illogical to think derives from a racist society. The colour-blind perspective of racial equality is founded on an interpretation of equality based on ignorance of the racial factor (Rey Martínez, 2023, p. 270) which ignores the effects of past and contemporary discrimination on the social, economic, and educational status of minorities (Bonilla-Silva, 2003, p. 324). This approach understands contrary to equality legal regulations that differentiate based on the ethnicity. It presupposes that any unequal legal treatment based on race is unlawful discrimination (and therefore not positive action) (Rey Martínez, 2023, p. 270).

We can find different examples of this colour-blind racial perspective in some rulings of the Supreme Court of the United States such as *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*.¹⁸ Basically, this perspective defends that the only admissible approach to racial equality between ethnic groups is indifference to the racial factor (according to the anti-classification perspective of anti-discrimination).

The Spanish Constitutional Court has also taken a colour-blind perspective when dealing with racial discrimination cases. The most interesting case, while taking into account the subject of this article, is judgment 13/2001, of 29 January.¹⁹ In this judgment Ms Williams alleged that she was asked by a police officer to identify herself because she was not white (at a bus station where no one else was asked for identification). The United Nations’ Human Rights Committee considered that the facts constituted a violation of article 26, read in conjunction with article 2, paragraph 3, of the International Covenant on Civil and Political Rights and urged Spain to both provide Ms. Williams with an effective remedy, including a public apology, and to take all necessary steps to ensure that its officials did not repeat the type of actions observed in this case.²⁰

As Rey Martínez (2021, pp. 314-316) explains, in a debatable argument, the Spanish Constitutional Court used a colour-blind perspective in a case in which the Court did not take into account the fact that the casuistry that was being presented could only occur if the person harmed was not white.

¹⁷ Reverse discrimination happens when affirmative action measures cause prejudice to people who belong to dominant or majority social groups precisely due to the fact they belong to these groups.

¹⁸ *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. (2023). In this case the Supreme Court of the United States examined whether the admissions policy of these universities, which value as a positive factor, among others, the fact that student belongs to an ethnic minority that is under-represented in the university, comply with the equal protection clause of the XIV Amendment to the US Constitution. The court ruled that this admission policy does not comply with the equal protection clause.

¹⁹ Spanish Constitutional Court (Second Chamber) 13/2001, of 29 January 2001 (BOE 52, 1st March 2001).

²⁰ United Nations’ Human Rights Committee, Communication No. 1493/2006, Ninety-sixth session 13-31 July 2009, CCPR/C/96/D/1493/2006.

Without the colour-blind perspective of racial equality, it would be clearer that the possibility of facing racial profiling in policing is limited to individuals belonging to certain social groups. When dealing with this type of case, it is important to consider that it is only belonging to certain social groups that leads to people experiencing these situations (which in turn can cause their life conditions to worsen).

On this matter, Freeman's (1978, pp. 1052-1054) conception of the perspective from which racial discrimination is approached seems relevant. From the "victims" perspective, racial discrimination describes worse living conditions as members of a perpetual underclass. In this case, to fight against discrimination the focus should be placed on the conditions associated with their worse living conditions. That would require affirmative social efforts from the "perpetrators" to improve their living conditions. On the other hand, from the "perpetrators" perspective, racial discrimination is not viewed as living conditions, but instead as actions, or a series of actions, inflicted on the "victims", and therefore its remedial perspective is based on neutralising the inappropriate conduct of the "perpetrators". According to this author, antidiscrimination law follows, the "perpetrators" perspective: the affirmation of the principle that "discrimination based on race is prohibited" and the neutralisation of the specific impact of all those human behaviours and practices that violate the same principle.

It must be considered that, besides affirmative action (highly limited by the legal framework and not observed in cases of racial profiling in policing - e. g. police officers do not undertake training courses to become more sensible of their own racial biases, for example-), anti-discrimination law does not require any affirmative efforts to change the subordinate or excluded condition of certain social groups but instead only offers a reaction to inappropriate conduct.

The studied ECtHR cases of racial profiling in policing show that the law, so far, does not require active action from the "perpetrators" to change their conduct to improve the "victims" life conditions. Instead, "victims" must comply with the obligations established by the law to prove inappropriate action undertaken by the "perpetrators". In this regard, to better understand racism and racial profiling in policing, it would be important to shift from the "perpetrators" perspective to the "victims" perspective, with the aim of acknowledging the need for "perpetrators" to undertake affirmative social action (beyond their current passive attitude).

C. Focus on the search for reasonable elements that justify the identity check or arrest

In this section, we argue that what is relevant in cases of racial profiling in policing is not whether police officers had racist motivation or attitudes, but whether there were enough reasonable elements that justified the identity check or arrest carried out by the police officers. Streicher (2022) argues that recognising the systematic nature of racial profiling, creating a reasonable suspicion standard for all control, surveillance, and investigation activities in law and practice, and scrutinising institutional policing practices is crucial.

The ECtHR cases of racial profiling in policing show that the existence or non-existence of racist motivation or intention is the axis on which discrimination cases have pivoted, in which often the proof of the case falls on the contradictory story between the police officers and the plaintiff. There are different examples in ECtHR judgments where the Court places racial motivation at the centre of its reasoning: in the *Muhammad v. Spain* case for example: “The Court observes, however, that this cannot be taken as an indication *per se* of any racial motivation behind the request for him to show his identity document” (para. 99); in the *Basu v. Germany* case: “In determining whether, in the present case, the State authorities complied with their obligation to take all reasonable measures to identify whether there were racist motives for the identity check, the Court (...)” (para. 36); in the *Wa Baile v. Switzerland* case: “indicative of the fact that the measure in question had been motivated by the skin colour of the person thereby targeted” (para. 108); or in the *Seydi and others v. France* case: “the Court considers (...) that no tangible evidence has established that discriminatory attitudes based on racial grounds played a role in the identity checks of the applicants by the police forces” (para. 124).²¹

Even though the *Seydi and others v. France* judgment still mostly relied on the evidence (or lack of it) that the plaintiffs brought before the Court (more than the motivations that police officers could provide for their own actions in the arrest), it admitted that a set of “sufficiently serious, precise and consistent elements” can prove a discriminatory outcome, and this should be positively valued. Nonetheless, more measures should be implemented to alleviate plaintiffs’ responsibility to prove they have been subject to discrimination (due to the power imbalance situation between them and the police officers). On this matter, Henrard (2023, p. 446) argues that the ECtHR should examine under what circumstances flaws in the official investigations have had an impact on the findings of racial discrimination. Going beyond this, Várnagy and Ní Chinnéide (2024, p. 81) state that any flaws in the investigations may be in itself a form of racist discrimination.

It could be interesting to implement periodic training courses for police officers on how to identify their own racial biases, independent audits or establish a procedure that includes a slip for each identity check in paper form. This slip for each identity check that states its motivation can also provide information regarding the geographical locations in which the activity took place or the characteristics of the people police officers target, thus making it possible to study police officers’ own biases in their routine activities. Still, relying on information provided by police officers can be also problematic (López Riba, 2021, p. 19). For example, it cannot be assumed that the data precisely reflects police officers’ activity on the streets (particularly regarding racial profiling in policing, which, as we have stated previously, often present contradictory versions of the same events). In this regard, police officers might avoid registering certain problematic identity checks or lie in the information registered.

²¹ The translation of this fragment into English is ours. The original fragment is as follows: “la Cour considère (...) qu’aucun commencement de preuve tangible n’a établi que des attitudes discriminatoires fondées sur des motifs raciaux ont joué un rôle dans les contrôles d’identité des requérants par les forces de police.”

Beyond this last affirmation, what we are arguing is that institutional racism and oppression affect us all. Acknowledging that we have biases towards people from different ethnic origins is positive in the sense that we can undertake self-corrective action to mitigate these biases. As Freeman (1978, p. 1119) affirms: “I cannot regard the Court as autonomous and separate from the society that orchestrates it and therefore cannot regard that one institution as *the villain of the tale*”. And the same can apply to police officers. In this regard, it seems more plausible to shift the focus of the evidence to the motivations that police officers provide for identity checks or arrests, than to presume that victims can provide evidence of racist attitudes or motivations, given that this can be very difficult to prove.

4. CONCLUSIONS

ECtHR cases of racial profiling in policing show that the existence or non-existence of racist motivation or intention is the axis on which discrimination cases have pivoted, in which often the proof of the case falls on the contradictory story between the police officers and the plaintiff, the former still retaining a presumption of truth, as pointed out by Judge Zünd in the *Mohammad v. Spain* case.

In this context, we have proposed different changes to improve racial profiling in policing victims’ access to justice.

First, most anti-discrimination laws do not identify the social groups they seek to protect but instead use equidistant terms (e. g. people discriminated against on the grounds of race or ethnic origin). We have proposed that it would be more logical to ensure that it is the groups of people who effectively suffer stigmatisation, subordination or exclusion, who receive the protection of anti-discrimination law. Continuous research must be carried out to determine which social groups are stigmatised, subordinated or excluded. Regulatory protection should be created on the basis that discrimination is only considered to be such when people who receive unequal treatment on the grounds of race or ethnic origin do not belong to the majority social group in the place where the discriminatory action occurred.

From our point of view, the equidistant configuration of anti-discrimination law has opened too wide a space for interpretation where dominating social forces have infiltrated, thus reversing the initial purpose of the legislation. In this sense, a colour-blind perspective of racial equality has proliferated. We argue that a perspective of racial equality that admits the possibility to resolve a case of racial discrimination while disregarding the fact that the casuistry presented could only occur if the person harmed was not a member of the majority ethnic origin in a concrete location is not admissible.

Lastly, we propose that the fact that plaintiffs must prove that police officers had a racist attitude or motivation does not seem logical, taking into account the fact that racist behaviour, even unconscious racism, can be protected and self-justified by institutions and social dynamics. It would be useful, then, to change this approach to one in which police officers must demonstrate that they had a valid justification to carry out an identity check (as demonstrated in the *Wa Baile v. Switzerland* case).

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