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Positive State Obligations Regarding Fundamental Rights and 'Changing the Hearts and Minds'

Kristin Henrard*

Human rights are also called 'fundamental rights', which emphasises the fundamental importance of these rights and their effective enjoyment. They should secure for human beings a dignified life, making human dignity an important underlying principle of human rights.¹ The need for these rights to be effectively enjoyed, and thus for the effective protection of fundamental rights² has resulted in the identification of an increasing detail and amount of positive state obligations,³ also in relation to civil and political rights, that initially were primarily conceived as 'defensive rights', implying a protection against arbitrary interferences by public authorities.⁴

Notwithstanding the common acceptance that states indeed have a range of positive obligations in relation to fundamental rights, many difficult questions remain as to the exact boundaries of these positive obligations. What can reasonably be expected from public authorities, also in terms of time span in which particular results should be reached? How do these positive state obligations relate to the negative state obligations of non-interference? In this respect, it is surely instructive to analyse and evaluate what relevant parameters international human rights courts have identified so far?

These boundary questions and possible tensions with negative state obligations are particularly an issue concerning these fundamental rights that would require the eradication of ingrained prejudice and stereotypical thinking. The fundamental right most centrally

involved is the prohibition of discrimination, triggering discussions about how far state obligations go to ensure an effective protection against discrimination in private relationships. Particular attention is needed for the prohibition of discrimination on so-called suspect grounds, referring to grounds of differentiation that are not only irrelevant for one's functioning in society but also have gone hand in hand with systemic discrimination.⁵ Grounds that have a long pedigree as 'suspect ground' include gender and race. Importantly, the identification of suspect grounds is not static, but dynamic, in that over time additional grounds are being added to the list of suspect grounds. To some extent, this is reflected in the development of conventions focusing on discrimination on particular (suspect) grounds, such as the United Nations Convention on the Elimination of All forms of Discrimination against Women (CEDAW, regarding gender), United Nations Convention on the Elimination of all forms of Racial Discrimination (CERD, regarding race) and United Nations Convention on the Rights of Persons with Disabilities (UN CRPD, disability). Nevertheless, there are also grounds that are (generally) considered as suspect, but that so far have not generated a distinct convention, such as sexual orientation and religion.⁶

In addition to the prohibition of discrimination, fundamental rights that imply state obligations to respect and protect one's distinct identity are relevant here as these also point to state obligations to counter stereotypes and prejudice in relation to these distinct identities. Minority-specific rights, and their intrinsic concern with the right to respect for a distinct ethnic, religious and or linguistic identity, on the one hand, and substantive, real equality, on the other, are indeed intertwined with the fight against prejudice and stereotypes. Relatedly, the interpretation of some general fundamental rights also point to state duties to respect distinct identity of particular groups, such as the freedom to manifest one's

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1. J. Waldron, *Dignity, Rank and Rights*, Oxford, OUP (2012). See also C. McCrudden, 'Dignity and Judicial Interpretation of Human Rights', 19 *European Journal of International Law*, 655 (2008).
2. The ECtHR has developed a steady line of jurisprudence to this effect; see e.g. *Airey v. Ireland*, ECHR (1979) Series A, No. 6389/73, at para. 24; *Artico v. Italy*, ECHR (1980) Series A, No. 6694, 74, at para. 33; *Mehmet Eren v. Turkey*, ECHR (2008) Series A, No. 32347, 2. See also A. Reinisch, 'The Changing International Legal Framework', in P. Alston (ed.), *Non-State Actors and Human Rights*, Oxford, OUP (2005), at 79-80.
3. See also V. Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights', 18 *Human Rights Law Review* 309-346 (2018).
4. Inter alia T. Van Boven, 'Distinguishing Criteria of Human Rights', in K. Vasak and P. Alston (eds.), *The International Dimensions of Human Rights*, Westport, Greenwood Press (1982), at 87.

5. See also J. Gerards, 'Intensity of Judicial Review in Equal Treatment Cases', 51 *Netherlands International Law Review* (2004), 162 et seq.
6. For an argument about the ambiguous protection of religious minorities due to (inter alia) the fact that no convention is adopted which focuses on religion as prohibited ground of discrimination, see K. Henrard, *The Ambiguous Relationship between Religious Minorities and Fundamental (Minority) Rights*, The Hague, Eleven (2011), at 43-44.

religion,⁷ and the right of respect for privacy, family life and home.⁸

When having regard to positive state obligations to (aim to) eradicate ingrained prejudice and stereotypical thinking, the ultimate question seems to be whether and, if so, to what extent, states are obliged (to try) to change people's hearts and minds. This undoubtedly controversial question was the subject of an international conference, organised at the Erasmus University Rotterdam in January 2020, with the generous financial support of the Erasmus Trust Fund, the EUR Initiative of Inclusive Prosperity and ESL's Rule of Law research programme.

In order to address this complex question in an appropriate manner, three avenues were identified, resulting in three strands of presentations. The first strand set out to develop the parameters for such positive state obligations from a multi-disciplinary perspective, more particularly combining the parameters visible in the human rights paradigm, as well as in sociology and ethics. When assessing and evaluating the extent to which states could be obliged to try to change hearts and minds, the preliminary non-legal questions about sociological possibilities (can states at all change the way people think and feel?) and possible ethical constraints need to be taken into account as well. The second strand of presentations zoomed in on the time factor involved, in the sense that countering deep-seated prejudice and discrimination is a process that takes considerable time, has a 'long durée', and is often not linear. The third strand of presentations charted the trends that emerge in the (quasi) jurisprudence of a range of international human rights courts, when zooming in on particular vulnerable groups, often targets of prejudice and discrimination, more particularly Roma, Muslim minorities in the Western world, LGBTI and persons with a disability. Each presentation focused on one particular vulnerable group, whilst having regard to various relevant conventions and related supervisory practice, so as to be able to paint an overall picture.

This special issue of Erasmus Law Review captures the presentations and subsequent discussions at the international conference, and thus reflects the three strands.

The first strand of three articles paints a multi-disciplinary picture, by highlighting, respectively, the relevant parameters of the human rights paradigm (Stephanie Berry), sociological considerations (Anita Böcker) and ethical perspectives (Ioanna Tourkochoriti) about state duties to change the hearts and minds of people in relation to prejudice. In the first article, Berry reframes the question as one about 'A Positive State Obligation to Counter Dehumanisation under International Human Rights Law'. She claims that every society has in-

groups and out-groups, with out-groups being particularly vulnerable to rights violations by the in-group. These rights violations are facilitated by the dehumanisation of the out-group by the in-group. Consequently, she argues that the creation of international human rights law (IHRL) treaties and corresponding monitoring mechanisms should be viewed as the first step towards protecting out-groups from human rights violations. In this respect, it is essential that IHRL monitoring mechanisms recognise the connection between dehumanisation and rights violations and develop a positive state obligation to counter dehumanisation. Berry welcomes in this regard that the four treaties reviewed in her article, the European Convention on Human Rights, the International Covenant on Civil and Political Rights, the Framework Convention for the Protection of National Minorities and the International Convention on the Elimination of All Forms of Racial Discrimination, all establish positive state obligations to prevent hate speech and to foster tolerant societies. Whilst these obligations should, in theory, allow IHRL monitoring mechanisms to address dehumanisation, Berry claims that as it stands the jurisprudence of these mechanisms remains too vague and general, and does not sufficiently counter unconscious dehumanisation.

Böcker in her article on 'Can Non-discrimination Law Change Hearts and Minds' explores a question which has preoccupied sociolegal scholars for ages, namely whether law, and more particularly non-discrimination law, can change 'hearts and minds'. The first part of her article examines how sociolegal scholars have theorised about the possibility and desirability of using law as an instrument of social change. The second part discusses the findings of empirical research on the social working of various types of non-discrimination law. Böcker reviews the extent to which non-discrimination law is able to create social change, and the factors that influence this ability. A recurring question is whether this change concerns only persons' outward behaviour or also their hearts and minds. In the end, she concludes that the research literature does not provide unequivocal answers. Nevertheless, the overall picture emerging from the sociolegal literature is that law is generally more likely to bring about changes in external behaviour, whilst attitudes and beliefs are only indirectly influenced, more particularly by altering the situations in which attitudes and opinions are formed.

Ioanna Tourkochoriti turns in her article to the related ethical question 'How far should the state go to counter prejudice?' She discusses the material and immaterial harm that discriminatory behaviour causes. Discrimination reinforces a broader context of social power; causes harm to the social standing of the person, psychological harm, economic and physical harm and even existential harm. All these harms threaten peaceful social coexistence. For liberals, a state can only intervene with the actions of a person when there is a risk of harm to others or a threat to social coexistence. The article distinguishes between appropriate and non-appropriate uses of government power. Appropriate uses are those

7. The ECtHR has a steady line of jurisprudence in which it underscores that states should work towards religious harmony and tolerance, and thus make religions respect one another: see inter alia ECtHR, *Metropolitan Church of Bessarabia v. Moldova*, 16 December 2008.

8. See in this respect the famous reasoning of the ECtHR in the *Chapman v. UK*, 18 January 2001, at para. 96.

which address the reasonable and emotional faculties of humanity and which encourage sympathetic understanding. Research in the areas of behavioural psychology, neuroscience and social psychology indicates that it is possible to bring a change in hearts and minds. Encouraging a person to adopt the perspective of the person who has experienced discrimination can lead to sympathetic understanding. Tourkochorití consequently claims that it is legitimate for the state to practice soft paternalism towards changing hearts and minds in order to prevent behaviour which is discriminatory.

The focus of the conference's second strand on the time factor involved is represented by the article of Anton Kok *et al.* (Anton Kok, Lwando Xaso, Annelize Steenkamp and Michelle Oelofse) on post-apartheid South Africa. Their article confirms not only the critical importance of education for strategies of public authorities to change the hearts and minds in relation to prejudice and stereotypes but also that this concerns a process that does not happen overnight but rather takes time, often several generations. They discuss the struggles in South Africa to obtain an equal society, with equal opportunities for all irrespective of racial or ethnic origin, by zooming in on the way in which the promotion of equality agenda is realised in the educational setting: 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Proposals for Legislative Reform to Promote Equality through Schools and the Education System'.

The article starts by highlighting the ways in which the education system can be used to promote equality in the context of changing people's hearts and minds – values, morals and mindsets. The duties contained in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('Equality Act') bind private and public schools, educators, learners, governing bodies and the state. Unfortunately, the part of the Act that concerns the duty of all actors to promote substantive equality has not been translated into measurable goals, and thus remains a dead letter. The authors make concrete suggestions as to how an enforceable duty to promote equality in schools could be fashioned, and what amendments would need to be made to the Equality Act to realise this. The authors also reflect on how the duty to promote equality should then play out practically in the classroom to facilitate a change in learners' hearts and minds.

The conference's third strand resulted in four articles, each of which zooms in on one particularly vulnerable group, victims of systemic discrimination, and the jurisprudence that can be distilled from several international human rights supervisory mechanisms concerning positive state obligations to counter this discrimination and the related prejudice (in people's hearts and minds). The supervisory practice concerned does not explicitly contain references to 'changing hearts and minds', but several of the positive obligations identified by these supervisory mechanisms can be seen in this frame.

Lilla Farkas in her article on Roma 'Positive Obligations' Potential to Turn the Tide on Romaphobic Attitudes and Support the Development of "Roma pride" analyses the case law and recommendations of international supervisory mechanisms concerning the education and housing of Roma and travellers to assess whether positive state obligations can be identified to change the hearts and minds of the majority and promote minority identities. She highlights a marked difference in this respect between the jurisprudence on education on the one hand and the supervisory practice on housing on the other. The supervisory practice concerning education deals with integration rather than with cultural specificities, whilst in the context of housing, it accommodates minority (Roma-specific) needs. In the latter context, positive obligations are pitched at a higher level in the sense that majorities are required to tolerate the minority way of life in overwhelmingly segregated settings. Conversely, in the educational setting, further legal and institutional reform, as well as a shift in both majority and minority attitudes, would be necessary to dismantle social distance and generate mutual trust. Farkas argues that the interlocking factors of accessibility, judicial activism, European politics, expectations of political allegiance and community resources explain jurisprudential developments. The weak justiciability of minority rights, the lack of resources internal to the community and dual identities among the Eastern Roma impede legal claims for culture-specific accommodation in education. Conversely, the protection of minority identity and community ties has gained importance in the housing context, subsumed under the right to private and family life.

Kristin Henrard zooms in on Islamophobia in the Western world. Islamophobia, like xenophobia, points to deep-seated, ingrained discrimination against a particular group, whose effective enjoyment of fundamental rights is impaired. She evaluates the way in which and the extent to which positive state obligations to counter Islamophobia become visible in the supervisory practice of the Human Rights Committee (International Covenant on Civil and Political Rights), the European Court of Human Rights and the Advisory Committee of the Framework Convention for the Protection of National Minorities. The supervisory practice is analysed in two steps: The analysis of each international supervisory mechanism's practice is, in itself, followed by the comparison of the fault lines in these respective supervisory practices. The latter comparison is structured around the two main strategies that states can adopt in order to counter intolerance: On the one hand, the active promotion of tolerance, inter alia through education, awareness-raising campaigns and the stimulation of intercultural dialogue; and on the other, countering acts informed by intolerance, in terms of the prohibition of discrimination (and/or the effective enjoyment of substantive fundamental rights). Overall, a rather mixed record emerges, as well as considerable scope for clarification of positive state obligations to counter Islamophobia. In terms of the active promotion of tolerance,

minority-specific rights provisions are more developed, in comparison with the general fundamental rights (also those concerning education). In this respect, various possibilities to engage in systematic interpretation are identified. The supervisory practice regarding counter-acting acts of intolerance and discrimination reveals that when international supervisory mechanisms do not have a strong base line protection against interferences with fundamental rights, it is essential that an Islamophobic context is factored in explicitly in the human rights analysis. Such a context should then trigger heightened scrutiny for the freedom of religion as well as an explicit non-discrimination analysis.

Alina Tryfonidou explores the range of positive state obligations that can be identified in order to provide sexual minorities with substantive equal access to and enjoyment of a range of fundamental rights: ‘Positive state obligations under European law: A tool for achieving substantive equality for sexual minorities in Europe’. She underscores that the law should respect and protect all sexualities and diverse intimate relationships without discrimination. For this purpose, the law needs to ensure that not only can sexual minorities be free from state interference when expressing their sexuality in private but that they should also be given the right to express their sexuality in public and to have their intimate relationships legally recognised. In addition, sexual minorities should be protected from the actions of other individuals, when these violate their legal and fundamental human rights. Tryfonidou joins the preceding two authors in their assessment that there is substantial scope for improvement regarding the identification of positive state obligations that can contribute to changing the hearts and minds of people. According to Tryfonidou, European law should not wait for hearts and minds to change before imposing additional positive obligations, especially since this gives the impression that the European Union (EU) and the European Court of Human Rights (ECtHR) are condoning or disregarding persistent discrimination against sexual minorities.

Finally, Andrea Broderick delves into positive obligations to counter stereotypes and ensure inclusive equality for people with disabilities: ‘Ensuring Slow but Steady Transformations in Hearts and Minds concerning People with Disabilities: Viewing the UN Treaty Bodies and the Strasbourg Court through the Lens of Inclusive Equality’. She underscores that the entry into force of the CRPD pushed state obligations to counter prejudice and stereotypes concerning people with disabilities to the forefront of international human rights law. The CRPD is underpinned by a model of inclusive equality, which views disability as a social construct that results from the interaction between persons with impairments and barriers, including attitudinal barriers, that hinder their participation in society. The recognition dimension of inclusive equality, together with the CRPD’s provisions on awareness raising, mandates that state parties target prejudice and stereotypes about the capabilities and contributions of persons with disabili-

ties to society. She shows that certain human rights treaty bodies, including the Committee on the Rights of Persons with Disabilities and, to a much lesser extent, the Committee on the Elimination of Discrimination against Women, require states to eradicate harmful stereotypes and prejudice about people with disabilities in various forms of ‘interpersonal’ relationships. The CRPD Committee goes beyond legal measures and focuses strongly on awareness-raising and training measures aimed at removing attitudinal barriers that are at the core of the marginalisation of people with disabilities. A further differentiation is made in relation to the ECtHR, in the sense that notwithstanding its recognition that the CRPD embraces a European and world-wide consensus on the need to protect people with disabilities from discriminatory treatment, the Court has – unfortunately – wavered in its approach to positive state duties to tackle stereotypes and prejudice.

Concluding Observations

Throughout the conference, and the resulting articles, a recurring point was made about the fact that law can never be enough when aiming to change peoples’ hearts and minds. Law can set out to steer behaviour, but can it really change the former? There is no straightforward answer to this sociological question. It could be argued that when the law is successful in steering behaviour, it will over time also become successful in changing hearts and minds. Nevertheless, in certain respects, the ideas and minds may change sooner than the actual behaviour. Also in this regard, change requires time.

The ethical constraints identified by Tourkochoriti could also explain why international supervisory mechanisms so far have not developed a strong and coherent supervisory practice pertaining to positive state obligations to counter prejudice and stereotypes, and ultimately to change the hearts and minds. The four articles evaluating the international supervisory practice have revealed a mixed record. To be sure, supervisory bodies identify positive state obligations, several of which can be related to changing the hearts and minds, but there are significant divergencies. Overall, considerable work can and still needs to be done in order to arrive at a coherent body of supervisory practice that can be translated into concrete action at the domestic level.⁹ The importance of education, and more particularly education of different groups together, and of awareness-raising campaigns is highlighted throughout the special issue, as well as the often decisive role of civil society in the latter respect. Full and equal inclusion and participation of all ‘vulnerable’ groups in society is at the same time a goal and a means in regard to ‘changing the hearts and minds’ so as to eradicate prejudice and stereotypes.

9. See also E. Brems and A. Timmer, ‘Introduction’, in E. Brems and A. Timmer (eds.), *Stereotypes and Human Rights Law*, Antwerp, Intersentia (2016), at 4.

A Positive State Obligation to Counter Dehumanisation under International Human Rights Law

Stephanie Eleanor Berry*

Abstract

International human rights law (IHRL) was established in the aftermath of the Second World War to prevent a reoccurrence of the atrocities committed in the name of fascism. Central to this aim was the recognition that out-groups are particularly vulnerable to rights violations committed by the in-group. Yet, it is increasingly apparent that out-groups are still subject to a wide range of rights violations, including those associated with mass atrocities. These rights violations are facilitated by the dehumanisation of the out-group by the in-group. Consequently, this article argues that the creation of IHRL treaties and corresponding monitoring mechanisms should be viewed as the first step towards protecting out-groups from human rights violations. By adopting the lens of dehumanisation, this article demonstrates that if IHRL is to achieve its purpose, IHRL monitoring mechanisms must recognise the connection between dehumanisation and rights violations and develop a positive State obligation to counter dehumanisation. The four treaties explored in this article, the European Convention on Human Rights, the International Covenant on Civil and Political Rights, the Framework Convention for the Protection of National Minorities and the International Convention on the Elimination of all forms of Racial Discrimination, all establish positive State obligations to prevent hate speech and to foster tolerant societies. These obligations should, in theory, allow IHRL monitoring mechanisms to address dehumanisation. However, their interpretation of the positive State obligation to foster tolerant societies does not go far enough to counter unconscious dehumanisation and requires more detailed elaboration.

Keywords: Dehumanisation, International Human Rights Law, Positive State obligations, Framework Convention for the Protection of National Minorities, International Convention on the Elimination of all forms of Racial Discrimination

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1 Introduction

International human rights law (IHRL) was established in the aftermath of World War II with the aim of preventing a reoccurrence of the atrocities committed in the name of fascism. The need to protect *the other* from rights violations committed by the majority was a central concern of the drafters of IHRL treaties in the post-War period and was recognised as key to preventing the commission of future atrocities. It is no coincidence that the first three IHRL treaties drafted under the auspices of the United Nations addressed genocide, refugees and racial discrimination, respectively.¹ Yet it is increasingly apparent that the mere existence of IHRL is insufficient to prevent violations of the rights of minorities and that mass atrocities including ethnic cleansing and genocide have not been confined to history.

This article takes as its starting point that the creation of IHRL treaties and corresponding monitoring mechanisms should be viewed as the first step towards protecting the rights of out-groups. It argues that IHRL monitoring mechanisms must both recognise and seek to address dehumanisation as a root cause of human rights violations, if IHRL is to achieve its purpose. Thus, they must develop the preventative part of their mandates and elaborate a positive obligation for States to disrupt the process of dehumanisation and change societal attitudes towards out-groups.

The term 'out-group' is used in this article as a catch-all term to denote a group bound by a common identity, distinct from that of the majority – in-group – population, that is used as a pretext for the commission of rights violations.² While it is human nature for members of in-groups to stereotype or be prejudiced

1. Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277; Convention relating to the Status of Refugees, 14 December 1950, 189 UNTS 150; International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 UNTS 195 (hereinafter ICERD).
2. This includes ethnic, linguistic or religious and national minorities, as recognised in international minority rights law, but also encompasses other groups that may be identified as 'other' by the in-group such as sexual minorities (sexual orientation or gender identity), persons with disabilities, migrants, refugees and political minorities. It is not relevant for the purposes of this article if the societal out-group self-identifies on the basis of this identity, as long as the in-group views the out-group as 'other' and this has the potential to result in human rights violations.

towards out-groups,³ this becomes problematic when it is used to legitimise the ill-treatment of these out-groups, particularly at a societal level. The concept of dehumanisation (and *infrahumanisation*) has been developed within social psychology, and the associated field of genocide studies, in order to explain the social process that underpins the commission of harm against out-groups. In contrast, concepts such as prejudice, stereotyping and intolerance, which are perhaps more familiar to a legal audience, form just one stage in the process of dehumanisation. The concept of dehumanisation has, further, informed academic literature that has explored how these social processes can be countered or prevented in practice. Thus, the conceptual framework provided by dehumanisation allows this article to expose the social processes that legitimise human rights abuses and reveal how these processes can be countered through the elaboration of a positive State obligation.

IHRL scholarship has not previously engaged in detail with the insights provided by social psychology, and related fields, in relation to the process of dehumanisation. By adopting the lens of dehumanisation, this article sheds new light on why the IHRL project has not been able to achieve its stated aim of protecting out-groups from rights violations and how the current IHRL framework can be repurposed and reframed to address dehumanisation as the root cause of these rights violations.

In order to provide a comprehensive picture of current IHRL practice, this article explores four IHRL treaties, and the practice of their respective monitoring bodies in relation to European States. The European Convention on Human Rights (ECHR)⁴ and the International Covenant on Civil and Political Rights (ICCPR)⁵ are generally applicable instruments that seek to prevent a range of rights violations, including those most obviously connected to mass atrocities, such as the right to life and the prohibition of torture. In contrast, the Framework Convention for the Protection of National Minorities (FCNM)⁶ and the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) are targeted instruments, which seek to protect the rights of out-groups. The mandates and working practices of each instrument's monitoring mechanism notably impact their ability to address dehumanisation as a root cause of rights violations. The European Court of Human Rights (ECtHR) serves an entirely judicial function, whereas the Advisory Committee to the FCNM (AC-FCNM) is limited to a State reporting process and issuing interpretative guidance in the form of Thematic Commentaries. In contrast, the two treaty

bodies, the Committee on the Elimination of Racial Discrimination (CERD) and the Human Rights Committee (HRC), consider State reports, issue interpretative guidance through General Recommendations/Comments and serve a quasi-judicial function. Nonetheless, this article asserts that it is possible for all four mechanisms considered here to establish and elaborate a positive State obligation to counter dehumanisation, albeit to varying degrees.

Following this introduction, Section 2 of this article draws on literature from Social Psychology and Genocide Studies in order to introduce the concept of dehumanisation and demonstrate how dehumanisation impacts the realisation of rights. Section 3 explores whether it is possible for IHRL to be interpreted to imply a positive State obligation to counter or prevent dehumanisation. Here it is revealed that pre-existing positive State obligations to prevent hate (and other forms of intolerant) speech and to create tolerant societies have the potential to address both implicit and explicit dehumanisation. Sections 4 and 5 analyse whether the current practice of IHRL monitoring mechanisms is sufficient to respond to the threat posed by dehumanisation to the human rights of out-groups. Section 4 focuses on whether IHRL monitoring mechanisms have sufficiently recognised that dehumanisation undermines the realisation of rights. Section 5 draws on Social Psychology, and related fields, to evaluate whether current interpretations of the positive State obligations identified in Section 3 are sufficient to prevent or counter dehumanisation and to ascertain how these interpretations can be strengthened in practice.

2 Dehumanisation as a Cause of Rights Violations

Drawing on research from Social Psychology and Genocide Studies, this section sets out the premise of this article: dehumanisation facilitates and legitimises the violation of the human rights of out-groups. Consequently, it identifies the key characteristics of dehumanisation and establishes the connection between dehumanisation and human rights violations. Examples from the AC-FCNM's Opinions on States Reports are used to demonstrate the contemporary relevance of dehumanisation as a cause of human rights violations in Europe, specifically in relation to migrants, Muslims and Roma.

Dehumanisation, broadly defined, involves the categorisation of an out-group as lacking human characteristics. Categorisation does not need to be overt and explicit; it can also be unconscious and implicit.⁷ The process is closely related to phenomena including prejudice, stereotyping, othering and delegitimation.⁸ Dehumanised

3. See further, I. Tourkochorit, 'How Far Should the State Go to Counter Prejudice? On the Legitimacy of the Role of the State to Change Hearts and Minds', in this special edition.

4. Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 222 (hereinafter ECHR).

5. International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (hereinafter ICCPR).

6. Framework Convention for the Protection of National Minorities, 1 February 1995, CETS No 157 (hereinafter FCNM).

7. N. Haslam and S. Loughan, 'Dehumanization and Infrahumanization', 64 *Annual Review of Psychology* 399, at 405 (2014).

8. D. Bar-Tal, 'Delegitimation: The Extreme Case of Stereotyping', in D. Bar-Tal, C.F. Grauman, A. Kruglanski & W. Stroebe (eds.), *Stereotyping*

groups may be likened to animals, diseases⁹ or ‘superhuman creatures such as demons, monsters, and satans’.¹⁰ In less blatant forms of dehumanisation, the humanity of the out-group may not be denied outright. Instead the out-group will be categorised as *less* human than the in-group or as having undesirable characteristics (*infrahumanisation*).¹¹ Notably, dehumanisation is observed primarily in relation to ‘low-status/disadvantaged targets’.¹²

Both blatant and less blatant forms of dehumanisation of out-groups, which fall into the category of ‘low-status/disadvantaged’, can be observed in Europe. For example, in the United Kingdom, the description of migrants as cockroaches in a tabloid newspaper was singled out for criticism by the HRC.¹³ The AC-FCNM has criticised the portrayal of Roma as ‘inadaptable’,¹⁴ ‘asocial’,¹⁵ ‘lazy’¹⁶ and ‘criminal’,¹⁷ all of which suggest *infrahumanisation*. While these are all human characteristics, *infrahumanisation* results in these characteristics being attributed to the entire out-group rather than to individuals belonging to the out-group. Specifically, such classifications may lead an out-group to be perceived as being ‘outside the boundaries of the commonly accepted groups, and ... thus excluded from the society’.¹⁸ Accordingly, the AC-FCNM has expressed concern that the instrumentalisation of xenophobia by political parties has led to the stratification of society in Cyprus:

members of the predominant Greek Cypriot linguistic and religious community are viewed as “first class citizens”, EU citizens and wealthy immigrants are regarded as coming second, and Turkish Cypriots, Roma, refugees and asylum-seekers are considered as falling into a third category.¹⁹

Here, the latter category is viewed as *less* human than the first two categories and, therefore, as excluded from society. Similar exclusion from society has been observed by the AC-FCNM in relation to Roma, who are frequently subject to ‘social rejection’ and viewed as

‘foreigners’,²⁰ and, in the Netherlands, where younger Muslims have reported feeling that ‘they are seen as members of an ethnic and religious group first and citizens of the Netherlands second’.²¹

While for Bar-Tal, dehumanisation can occur in ‘any context of intergroup relations: international, interreligious, intercultural, or interideological’,²² it appears to require facilitating factors, which support the construction of the out-group as a threat to the in-group.²³ Thus, adverse societal conditions,²⁴ a perceived conflict of interests²⁵ or the presence of conflict²⁶ have been identified as potential motivating factors behind dehumanisation. Again, this is borne out in Europe, where migrants are currently blamed for a range of societal ills, ranging from ‘the economic situation and high unemployment’,²⁷ to ‘austerity policies to public health and security’.²⁸ Language that portrays migrants as an ‘alien invasion’,²⁹ Roma as criminals³⁰ and Muslims as terrorists³¹ serves to heighten the sense of threat.

The value of dehumanisation as a concept, for the purposes of this article, derives from the social process it reveals. This perception of threat combined with the denial of the humanity of the victim out-group, allows the in-group to legitimise and rationalise human rights violations. As observed by Haslam and Loughnan ‘[d]ehumanization has also been shown to predict forms of aggression that are perceived as reactive and retaliatory – and often righteous – by the perpetrator’.³² Specifically, Bar-Tal suggests that dehumanisation reduces prosocial and increases antisocial behaviour towards out-groups.³³ The reduction of prosocial behaviour, or collective helping, has the potential to result in discrimination and reduce the mobility of dehumanised out-groups³⁴ on the basis that they are perceived ‘as less worthy of help, forgiveness, and empathy’.³⁵ In the case of migrants in Hungary, the perceived threat posed by immigrants to the State has been linked to a lack of support for the admission of asylum seekers.³⁶

and Prejudice: Changing Conceptions (1989) 169, at 169. See further, Tourkochariti, above n. 3.

9. Bar-Tal, above n. 8, at 172; N.S. Kteily and E. Bruneau, ‘Darker Demons of Our Nature: The Need to (Re)Focus Attention on Blatant Forms of Dehumanization’, 26 *Current Directions in Psychological Science* 487, at 488 (2017).
10. Bar-Tal, above n. 8, at 172.
11. Haslam and Loughnan, above n. 7, at 405.
12. Kteily and Bruneau, above n. 9, at 488.
13. HRC, *Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland*, UN doc. CCPR/C/GBR/CO/7 (2015), at para. 10.
14. AC-FCNM, *Fourth Opinion on the Czech Republic* adopted on 16 November 2015 ACFC/OP/IV(2015)004, at para. 53.
15. *Ibid.*
16. AC-FCNM, *Fourth Opinion on the Slovak Republic* adopted on 3 December 2014 ACFC/OP/IV(2014)004, at para. 35.
17. *Ibid.*
18. Bar-Tal, above n. 8, at 171.
19. AC-FCNM, *Fourth Opinion on Cyprus* adopted on 18 March 2015 ACFC/OP/IV(2015)001, at para. 34.

20. AC-FCNM, *Fourth Opinion on Germany* adopted on 19 March 2015 ACFC/OP/IV(2015)003, at para. 54.
21. AC-FCNM, *Third Opinion on the Netherlands* adopted on 6 March 2019 ACFC/OP/III(2019)003, at para. 55.
22. Bar-Tal, above n. 8, at 179.
23. *Ibid.*, at 171.
24. S. Opatow, ‘Moral Exclusion and Injustice: An Introduction’, 46 *Journal of Social Issues* 1, at 4 (1990).
25. J. Vaes, M.P. Paladino, L. Castelli, J.P. Leyens & A. Giovanazzi, ‘On the Behavioral Consequences of Infrahumanization: The Implicit Role of Uniquely Human Emotions in Intergroup Relations’, 85 *Journal of Personality and Social Psychology* 1016, at 1031 (2003).
26. Kteily and Bruneau, above n. 9, at 490.
27. AC-FCNM Cyprus, above n. 19, at para. 34.
28. AC-FCNM, *Fourth Opinion on Italy* adopted on 19 November 2015 ACFC/OP/IV(2015)006, at para. 58.
29. *Ibid.*
30. AC-FCNM Slovak Republic, above n. 16, at para. 35.
31. AC-FCNM, *Fourth Opinion on Denmark* adopted on 20 May 2014 ACFC/OP/IV(2014)001, at para. 64.
32. Haslam and Loughnan, above n. 7, at 415.
33. *Ibid.*, at 414.
34. Opatow, above n. 24, at 9.
35. Haslam and Loughnan, above n. 7, at 416.
36. AC-FCNM, *Fourth Opinion on Hungary* adopted on 25 February 2016 ACFC/OP/IV(2016)003, at paras. 75-76.

In contrast, antisocial behaviour underpinned by the dehumanisation of the out-group is likely to include acts of aggression and punitive behaviours.³⁷ Goff and others suggest that '[d]ehumanization is a method by which individuals and social groups are targeted for cruelty, social degradation, and state-sanctioned violence'.³⁸ As a result, dehumanisation might underpin discrimination or punitive criminal justice legislation.³⁹ At the extreme end of the scale, Kteily and Bruneau emphasise that

the depiction of groups such as Africans, Native Americans, Tutsis, the Roma, and Jews (alongside others) as apes, savages, or vermin not only accompanied colonization, slavery, and extermination but facilitated these atrocities.⁴⁰

Significantly, for Stanton and Bar-Tal, dehumanisation is one stage in a larger process that facilitates the commission of mass atrocities.⁴¹

In the context of Europe, both violent and non-violent anti-social behaviour has been observed by the AC-FCNM. Specifically, the AC-FCNM has linked physical attacks against Roma in the UK and Italy,⁴² '[t]he heinous fatal stabbing of an Eritrean man in Dresden'⁴³ and 'physical attacks... against local reception centres for immigrants from the Middle East and Africa'⁴⁴ in Italy to prejudice in these societies. In Spain 'persisting discrimination against Roma in all fields of daily life, including in private-law relations such as access to goods and services, employment or housing' has also been linked to prejudice.⁴⁵ Thus, the dehumanisation of out-groups has the potential to result not only in discrimination and violations of identity rights but also in the denial of core human rights found in the ECHR and ICCPR, such as the right to life and the prohibition of torture.

However, as the process of dehumanisation allows the in-group to morally legitimise these extreme behaviours, out-groups are frequently not recognised as victims of rights violations or blamed for their own treatment. Opatow explains, '[t]hose who are morally excluded are perceived as nonentities, expendable, or undeserving; consequently, harming them appears acceptable, appro-

priate, or just'.⁴⁶ This can also be observed in Europe, where, for example, the AC-FCNM has expressed concern that in the UK, 'Gypsies and Travellers are often portrayed as perpetrators and a "criminal" group rather than as victims',⁴⁷ and in Spain that 'large parts of Spanish society do not recognise as unacceptable the notion that individuals may be insulted or treated less well because of their Roma ethnic origin'.⁴⁸ Thus, dehumanisation is how the in-group not only rationalises anti-social behaviour against out-groups but also allows the in-group to deny that out-groups are the bearers of rights in the first place.

Dehumanisation can occur at the individual, societal and institutional levels. As a result, the potential human rights violations that flow from dehumanisation can be perpetrated by private individuals, acting alone or in concert with others, or by societal institutions, including organs of the State.⁴⁹ Of particular concern in the European context is the institutionalisation of dehumanisation, within societal institutions such as the mainstream media. This has the potential to have more far-reaching consequences than individualised dehumanisation 'because institutionalized harm occurs on a much larger scale'.⁵⁰ However, institutions are able to legitimise harming out-groups only if dehumanisation has been first normalised and accepted at an individual level.⁵¹ As explained by Opatow, '[m]oral exclusion emerges and gains momentum in a recursive cycle in which individuals and society modify each other'.⁵² Whereas, historically, negative portrayals of out-groups have frequently been associated with far-right political parties and extreme elements in Europe, IHRL monitoring mechanisms have expressed concern at the adoption of divisive and intolerant rhetoric by the mainstream press and politicians.⁵³ This has led dehumanisation to become increasingly acceptable within European societies.⁵⁴ As institutional, societal and individual dehumanisation interact and are mutually reinforcing, this has the potential to gradually legitimise more extreme responses to the perceived threat posed by out-groups.

Consequently, out-groups, including migrants, Muslims and Roma, have been and continue to be dehumanised in Europe. Dehumanisation requires, first, the categorisation, be it explicit or implicit, of the out-group as

37. Haslam and Loughnan, above n. 7, at 415.

38. P.A. Goff, J.L. Eberhardt, M.J. Williams & M.C. Jackson, 'Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences', 94 *Journal of Personality and Social Psychology* 292, at 305 (2008).

39. Kteily and Bruneau, above n. 9, at 490. See further Opatow, above n. 24, at 9.

40. Kteily and Bruneau, above n. 9, at 487, 490. See also Bar-Tal, above n. 8, at 176.

41. D. Bar-Tal, 'Causes and Consequences of Delegitimization: Models of Conflict and Ethnocentrism', 46 *Journal of Social Issues* 65 at 66 (1990); G.H. Stanton, 'Could the Rwandan Genocide Have Been Prevented?', 6 *Journal of Genocide Research* 211, at 213-17 (2004).

42. AC-FCNM, *Fourth Opinion on the United Kingdom* adopted on 25 May 2016 ACFC/OP/IV(2016)005, at para. 72; AC-FCNM Italy, above n. 28, at para. 59.

43. AC-FCNM Germany, above n. 20, at para. 56.

44. AC-FCNM Italy, above n. 28, at para. 58.

45. AC-FCNM, *Fourth Opinion on Spain* adopted on 3 December 2014 ACFC/OP/IV(2014)003, at para. 40.

46. Opatow, above n. 24, at 1.

47. AC-FCNM United Kingdom, above n. 42, at para. 72.

48. AC-FCNM Spain, above n. 45, at para. 40.

49. Opatow, above n. 24, at 12.

50. *Ibid.*, at 13.

51. *Ibid.*

52. *Ibid.*, at 11.

53. AC-FCNM, *Fourth Opinion on Croatia* adopted on 18 November 2015 ACFC/OP/IV(2015)005rev, at para. 41; AC-FCNM United Kingdom, above n. 42, at para. 73; HRC United Kingdom, above n. 13, at para. 10; HRC, *Concluding observations on the fourth periodic report of Switzerland*, UN doc. CCPR/C/CHE/CO/4 (2017), at para. 20; CERD, *Concluding observations on the combined eighteenth to twenty-fifth periodic reports of Hungary*, UN doc. CERD/C/HUN/CO/18-25 (2019), at para. 16; CERD, *Concluding observations on the combined twenty-third and twenty-fourth periodic reports of Norway*, UN doc. CERD/C/NOR/CO/23-24 (2019), at para. 12.

54. AC-FCNM the Netherlands, above n. 21, at para. 54.

not human or *less* human than the in-group; second, the perception that the out-group poses a threat or undermines the interests of the in-group; and, finally, that these factors are used to legitimise interferences with the rights of the out-group. Dehumanisation not only facilitates discrimination and violations of identity rights but, once institutionalised, has the potential to legitimise widespread and coordinated rights violations by organs of the State. In Europe, the dehumanisation of Roma has long been institutionalised in Central Europe and has legitimised discrimination, ethnic cleansing and genocide.⁵⁵ While the dehumanisation of migrants and Muslims is less ingrained, it is increasingly institutionalised – most clearly, in Hungary.⁵⁶ If IHRL law is to achieve its purpose, then IHRL monitoring mechanisms must recognise that dehumanisation underpins violations of the rights of these out-groups.

3 A Positive State Obligation to Counter Dehumanisation under IHRL

Dehumanisation is a social process that is reinforced by interactions at an institutional, societal and individual level. As identified earlier, prior to giving rise to rights violations, dehumanisation requires the categorisation of out-groups as not human or *less* human than the in-group alongside the categorisation of out-groups as a threat to the interests of the in-group. However, it is not clear whether IHRL is equipped to counter the social processes behind dehumanisation. While dehumanisation undermines the realisation of rights, the social processes underpinning it are not necessarily rights violations in themselves, for example, the categorisation of out-groups may be unconscious or unspoken. Thus, it is not enough for IHRL to simply require that States refrain from actively violating rights. If dehumanisation is to be addressed, IHRL must require that States adopt positive measures to disrupt the process of dehumanisation at a societal level. Specifically, they must seek to change societal attitudes towards out-groups.

The existence of positive obligations derived from IHRL treaties has been clearly established by their monitoring mechanisms and in academic literature.⁵⁷ Notably, within the UN system, States are under an obligation not only to *respect* rights by not actively violating them, but also to *protect* individuals from rights violations perpetrated by private actors. Specifically, the

HRC's General Comment No. 31 establishes that States must 'take appropriate measures or to exercise due diligence to *prevent*, punish, investigate or redress the harm caused by such acts by private persons or entities' [emphasis added].⁵⁸ If States are 'to prevent... the harm', then it follows that they must adopt measures to challenge the root causes of this harm. This interpretation is supported by the UN's 'respect, protect, fulfil' framework: the obligation to *fulfil* requires that States proactively adopt measures to facilitate 'the full realisation of rights'.⁵⁹ Similarly, the ECtHR has emphasised that 'the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective',⁶⁰ in order to legitimise reading positive State obligations into the ECHR.⁶¹ As dehumanisation is a root cause of rights violations perpetrated against out-groups, it follows that States must counter or prevent dehumanisation in order to both *protect* out-groups from private actors and *fulfil* their human rights obligations by removing obstacles to the realisation of rights.

However, the substance of States' positive obligations differs between instruments and between rights. As a result, this section establishes the scope of States' positive obligation to prevent or counter dehumanisation under the ECHR, FCNM, ICCPR and ICERD. Notably, while an explicit obligation to counter or prevent dehumanisation has not been recognised, all four instruments establish two types of positive obligations that, in combination, have the potential to serve the same purpose: the obligation to prevent intolerant and/or hate speech and the obligation to create tolerant societies.

The categorisation of out-groups as not human or *less* human than the in-group is central to the process of dehumanisation. While not all forms of categorisation are explicit or overt, when they are, it is possible for States to intervene by prohibiting forms of expression that categorise the out-group. Article 6(2) FCNM and Article 20(2) ICCPR both establish a positive obligation for States to prevent 'discrimination, hostility or violence' motivated by the identity of the out-group. While the ICCPR explicitly requires that incitement to such acts 'shall be prohibited by law', the FCNM requires that States 'take appropriate measures to protect', allowing space for broader measures at a societal level to address the root causes of hate speech. In contrast, although ICERD does not expressly establish a positive obligation to prevent hate speech, this obligation has been read into the Convention by the CERD.⁶² Significantly, in elaborating the content of this positive obligation, all three bodies have focused on ensuring the

55. C. Cahn, 'CERD and Discrimination Against Roma', in D. Keane and A. Waughray (eds.) *Fifty Years of the International Convention on the Elimination of All Forms of Racial Discrimination: A Living Instrument* (2017), at 107-108.

56. CERD Hungary, above n. 53, at para. 16; HRC, *Concluding observations on the sixth periodic report of Hungary*, UN doc. CCPR/C/HUN/CO/6 (2018), at para. 17.

57. See generally, L. Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (2016).

58. HRC, *General Comment No. 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN doc. CCPR/C/21/Rev.1/Add.13 (2004), at para. 8.

59. Lavrysen, above n. 57, at 12; Committee on Economic Social and Cultural Rights, *General Comment No. 12 on The right to adequate food* (art. 11), UN doc. E/C.12/1999/5 (1999), at para. 15.

60. *Airey v. Ireland*, ECHR (1979) Series A. No. 32, at para. 24.

61. Lavrysen, above n. 57, at 6.

62. CERD, *General recommendation No. 35 on Combating racist hate speech*, UN doc. CERD/C/GC/35 (2013).

accountability of perpetrators of hate speech, hate crimes or discrimination, through appropriate legal frameworks, prosecution and punishment.⁶³

The ECHR does not contain a provision that expressly requires that States adopt positive measures to give effect to their rights obligations. However, in practice, the ECtHR has pointed to Article 1 ECHR, which requires that States ‘secure to everyone within their jurisdiction the rights and freedoms’ [emphasis added], in conjunction with substantive convention rights as the basis of positive obligations.⁶⁴ While the ECtHR initially focused on legislative change when elaborating the content of States’ positive obligations under the Convention,⁶⁵ it has increasingly read a variety of positive obligations into almost all of the Convention rights.⁶⁶ Thus, although no express obligation to prevent hate speech exists in the ECHR, the ECtHR has established that

as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance.⁶⁷

Further, in the case of *Karaahmed v. Bulgaria*, while the ECtHR accepted that an appropriate legal framework existed, the failure to investigate instances of hate speech that incited violence against a religious community amounted to a violation of Article 9 ECHR.⁶⁸ Thus, a positive obligation exists under the ECHR for States to ensure not only that hate speech is prohibited in law but also that this law is implemented in practice.

These positive obligations have the potential to both *protect* out-groups from rights violations perpetrated by individuals and *prevent* additional violations that are legitimised by the explicit dehumanising portrayal of the out-group. However, legal regulation alone is insufficient to address the societal causes of rights violations.⁶⁹

63. AC-FCNM, *Fifth Opinion on Finland* adopted on 27 June 2019 ACFC/OP/V(2019)001, at para. 105; AC-FCNM Hungary, above n. 36, at para. 103; HRC, *Concluding observations on the fifth periodic report of the Netherlands*, UN doc. CCPR/C/NLD/CO/5 (2018), at para 16(c); HRC, *Concluding observations on the third periodic report of Bosnia and Herzegovina*, UN doc. CCPR/C/BIH/CO/3 (2017), at para. 22; CERD General recommendation No. 35 (2013), above n. 62, at para. 9; CERD, *Concluding observations on the combined second to fifth periodic reports of Serbia*, UN doc. CERD/C/SRB/CO/2-5 (2018), at para. 14.

64. *Assenov v. Bulgaria*, ECHR (1998) Reports 1998-VIII, at para. 102; *Vgt Verein Gegen Tierfabriken v. Switzerland*, ECHR (2001) Reports 2001-VI, at para. 45; *Assanidzé v. Georgia*, ECHR (2004) Reports 2004-II, at para. 182. See further, J.-F. Akandji-Kombe, *Positive Obligations Under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights* (2007), at 8-9.

65. M. Bossuyt, *International Human Rights Protection: Balanced, Critical, Realistic* (2018), at 139.

66. Lavrysen, above n. 57, at 60.

67. *Erbakan v. Turkey*, ECHR (2006) Application no. 59405/00, at para. 56. Translation from ECtHR, Factsheet on Hate Speech, February 2020, www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf.

68. *Karaahmed v. Bulgaria*, ECHR (2015) Application no. 30587/13, at para. 110.

69. See further, A. Böcker, ‘Can Non-discrimination Law Change Hearts and Minds?’, in this special edition.

Significantly, while all four bodies have focused on the legal prohibition of hate speech, they have also suggested that States are under a positive obligation to attempt to address the societal root causes of such speech. Thus, the AC-FCNM, CERD and HRC have all advised that States should introduce ‘awareness-raising campaigns’, as part of their strategy to address hate and other forms of intolerant speech.⁷⁰ Similarly, in *Nachova and Others v. Bulgaria*, the ECtHR established that

the authorities must *use all available means* to combat racism and racist violence, thereby reinforcing democracy’s vision of a society in which diversity is not perceived as a threat but as a source of enrichment [emphasis added].⁷¹

Thus, it appears that a positive obligation exists under the ECHR, FCNM, ICCPR and ICERD for States to adopt not only legal measures to prohibit hate speech but also non-legal measures to counter the societal attitudes that underpin such hate speech.

However, the categorisation that underpins dehumanisation is not always articulated through speech. Stereotypes may be so ingrained that they no longer require articulation.⁷² Further, implicit or even unconscious forms of categorisation may legitimise structural discrimination or undermine the realisation of the rights of out-groups.⁷³ If implicit categorisation is to be addressed, then measures are required to challenge societal attitudes towards out-groups, more generally. Significantly, under all four instruments, States are also under a general obligation to create tolerant societies. For example, Article 6(1) FCNM requires that States parties ‘*encourage a spirit of tolerance and intercultural dialogue*’ and ‘*take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory*’. In interpreting the purpose of Article 6(1) FCNM, the AC-FCNM has established that States should ‘enhance the majority population’s openness towards diversity’,⁷⁴ promote ‘an overall positive attitude towards diversity and societal integration’,⁷⁵ and equip their populations ‘with the knowledge and understanding to identify and combat intolerance and prejudice’.⁷⁶

70. AC-FCNM, *Fourth Opinion on Sweden* adopted on 22 June 2017 ACFC/OP/IV(2017)004, at para. 54; AC-FCNM, *Fourth Opinion on Switzerland* adopted on 31 May 2018 ACFC/OP/IV(2018)003, at para. 64; CERD Norway, above n. 53, at para. 12(e); CERD, *Concluding observations on the combined twelfth and thirteenth periodic reports of Czechia*, UN doc. CERD/C/CZE/CO/12-13 (2019), at para. 11(b); HRC the Netherlands, above n. 63, at para. 16; HRC United Kingdom, above n. 13, at para. 10.

71. *Nachova and others v. Bulgaria*, ECHR (2005) Reports 2005-VII, at para. 145.

72. Goff, Eberhardt, Williams & Jackson, above n. 38, at 304-306.

73. *Ibid.*, at 305; Kteily and Bruneau, above n. 9, at 492.

74. AC-FCNM Croatia, above n. 53, at para. 46.

75. AC-FCNM, *Fourth Opinion on Austria* adopted on 14 October 2016 ACFC/OP/IV(2016)007, at para. 34.

76. AC-FCNM Germany, above n. 20, at para. 60.

Similarly, Article 2 ICERD requires that States adopt ‘*other means of eliminating barriers between races, and ... discourage anything which tends to strengthen racial division*’ [emphasis added]. Further, Article 7 ICERD requires that States ‘adopt *immediate and effective measures*, particularly in the fields of teaching, education, culture and information’ [emphasis added]. Notably, the text of Article 7 ICERD not only requires that States seek to change societal attitudes in order to counter existing racial discrimination but also establishes that such measures must be pre-emptive insofar as they must be adopted ‘with a view to combating prejudices *which lead to racial discrimination*’ [emphasis added]. Through its Concluding Observations on State Reports, the CERD has emphasised that the purpose of these provisions is to ‘combat stereotypes’,⁷⁷ ‘promote tolerance and understanding...’⁷⁸ and ‘address the root causes of prejudices’.⁷⁹

In contrast to the targeted instruments, the ICCPR does not contain a provision that expressly requires that States adopt positive measures to create tolerant societies. However, Article 2(2) ICCPR explicitly requires that States ‘adopt such laws *or other measures as may be necessary* to give effect to the rights’ [emphasis added]. This suggests that the drafters foresaw the need for States to adopt a range of positive measures, beyond the adoption of legislation, to give full effect to the provisions of the treaty. The text of the preamble to the ICCPR recognises that it is not enough for rights to be enshrined in law, but that they ‘can only be achieved if conditions are created’, suggesting that societal change may be necessary if these rights are to be enjoyed in practice. Further, Article 2(1) ICCPR requires that States ‘undertake *to respect and ensure* to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind’. Here ‘ensure’ has been interpreted by the HRC to require proactive steps by the State to prevent human rights violations by private persons,⁸⁰ an interpretation that also aligns with the ‘respect, protect, fulfil framework’.⁸¹ Through its practice, the HRC has reaffirmed this interpretation by elaborating the content of a positive obligation for States to address intolerance

and prejudice. Much like the AC-FCNM and CERD, the HRC has required that States adopt positive measures to ‘promote tolerance and respect for diversity’,⁸² ‘respect for human rights’⁸³ and to ‘eradicate stereotyping and discrimination’.⁸⁴

Finally, while no explicit obligation to foster tolerant societies exists under the ECHR, Lavrysen has identified a ‘cluster of cases ... where the Court has imposed obligations on the State under a variety of Convention provisions to act as a guarantor of pluralism within society’.⁸⁵ Specifically, the ECtHR has recognised that States have a positive obligation to address the societal causes of rights violations, insofar as ‘[t]he role of the authorities is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other’.⁸⁶ Further, in *S.A.S. v. France*, the ECtHR emphasised that the State ‘has a duty ... to promote tolerance’.⁸⁷ This again suggests that in order to discharge their duties under the ECHR, States are under a positive obligation to adopt non-legal measures to foster tolerant societies.

Under all four treaties considered here, a positive State obligation to counter or prevent dehumanisation has not been recognised. However, States are under a positive obligation to adopt effective legal and societal measures to prevent hate speech. This has the potential to reduce dehumanisation, by limiting forms of expression that overtly categorise out-groups and by signalling that such categorisation is unacceptable at a societal level. Further, the obligation to take measures to foster tolerant societies establishes an obligation for States to address the root causes of intolerance, including implicit or unconscious forms of categorisation.

These positive obligations are more clearly articulated in the text of some instruments than others. Further, the mandates of their respective monitoring bodies have impacted their ability to elaborate positive State obligations. Through the State reporting processes as well as the adoption of General Comments or Thematic Commentaries, the AC-FCNM, CERD and HRC have been able to elaborate the measures that States are required to take in order to *prevent* rights violations. In contrast, as a court, the ECtHR is limited to hearing the facts of the case before it, after the alleged violation has occurred. As a result, it does not serve the same preventative function as the other mechanisms considered here. Nonetheless, the two identified positive obligations allow all four mechanisms to require that States adopt measures to

77. CERD, *Concluding observations on the combined fifth to ninth reports of Ireland*, UN doc. CERD/C/IRL/CO/5-9 (2019), at para. 24(b); CERD, *Concluding observations on the combined twentieth to twenty-second periodic reports of Bulgaria*, UN doc. CERD/C/BGR/CO/20-22 (2017), at para. 20(c).

78. CERD, *Concluding observations on the combined twenty-second to twenty-fourth periodic reports of Poland*, UN doc. CERD/C/POL/CO/22-24 (2018), at para. 16(c); CERD, *Concluding observations on the twenty-third periodic report of Finland*, UN doc. CERD/C/FIN/CO/23 (2017), at para. 23.

79. CERD, *Concluding observations on the combined tenth and eleventh periodic reports of the Republic of Moldova*, UN doc. CERD/C/MDA/CO/10-11 (2017), at para. 13(c).

80. HRC General Comment No. 31 (2004), above n. 58, at para. 8.

81. Although initially developed in relation to socio-economic rights, this framework has subsequently been acknowledged to apply more generally. For example, Committee on Economic Social and Cultural Rights General Comment No. 12, above n. 59, at para. 15; UN General Assembly, *Interim Report of the Special Rapporteur on Freedom of Religion or Belief*, UN doc. A/71/269 (2016), at para. 23.

82. HRC Hungary, above n. 56, at para. 18; HRC, *Concluding observations on the sixth periodic report of Italy*, UN doc. CCPR/C/ITA/CO/6 (2017), at para. 13.

83. HRC, *Concluding observations on the seventh periodic report of Sweden*, UN doc. CCPR/C/SWE/CO/7 (2016), at para. 17; HRC United Kingdom, above n. 13, at para. 10(b).

84. HRC Hungary, above n. 56, at para. 18; HRC Sweden, above n. 83, at para. 17.

85. Lavrysen, above n. 57, at 94.

86. *Supreme Holy Council of the Muslim Community v. Bulgaria*, ECHR (2004) Application No. 39023/97, at para. 96.

87. *S.A.S. v. France*, ECHR (2014) Reports 2014, at para. 149.

address dehumanisation as a root cause of rights violations, albeit to varying degrees.

4 Recognising Dehumanisation as a Cause of Rights Violations in Practice

This article has identified that under IHRL, States are under a positive obligation to both address hate speech and create tolerant societies. This should allow IHRL monitoring mechanisms to not only require that States counter dehumanisation but to also elaborate the content of this obligation, through their monitoring practice. However, if they are to do so, these mechanisms must first recognise that dehumanisation undermines the realisation of rights. While these mechanisms have not expressly engaged with dehumanisation as a concept, it is possible to ascertain the extent to which they have engaged with the factors that contribute to dehumanisation. This section thus focuses on the extent to which the AC-FCNM, CERD, ECtHR and HRC have expressed concern about the explicit categorisation of out-groups through hate speech and related phenomena such as prejudice, intolerance and stereotyping as well as the explicit portrayal of the out-group as a threat. Further, the extent to which these mechanisms have connected the categorisation of out-groups, including implicit and unconscious categorisation, to other human rights violations reveals whether they recognise dehumanisation to be a cause of rights violations. The practice of these mechanisms is again illustrated with reference to the situation of migrants, Muslims and Roma in Europe.

As has been illustrated earlier, the AC-FCNM has consistently expressed concern at the treatment of migrants, Muslims and Roma in Europe. It has explicitly identified discourse that stigmatises or stereotypes minorities as problematic⁸⁸ and has expressed concern at the increased acceptability of xenophobic discourse⁸⁹ and the role of mainstream media and politicians ‘in spreading intolerant and racially hostile narratives’.⁹⁰ In so doing, the AC-FCNM has identified the danger of not only hate speech but also the role that ‘stigmatization and stereotyping’ plays in feeding hostility towards out-groups.⁹¹ Furthermore, the AC-FCNM has recognised that minorities may be scapegoated with the aim of ‘nur-

turing and instrumentalising xenophobic sentiments in the population’⁹² or for political gain.⁹³

Significantly, the AC-FCNM has expressed concern about the impact of these forms of categorisation on broader societal conditions and, specifically, the potential for them to impact out-groups’ enjoyment of rights. Thus, it has highlighted the impact of xenophobia and intolerance on ‘society’s understanding of minority identities and issues’,⁹⁴ ‘a climate in which Muslims and persons with a migration or minority background feel unsafe’⁹⁵ as well as ‘an attitude of impunity in which the far right extremists feel emboldened to stage anti-Roma demonstrations and physical attacks’.⁹⁶ All of this has been explicitly connected by the AC-FCNM to rights violations, including hate crime,⁹⁷ discrimination⁹⁸ and access to rights,⁹⁹ including freedom of religion or belief.¹⁰⁰ Furthermore, the AC-FCNM has identified how xenophobia and the construction of out-groups as a threat combine in order to legitimise rights violations:

Anti-gypsyism and Islamophobia are reported to be growing in particular on social media, and the negative public debate fed by stereotypes and the construction of enemy images has also led to more frequent violent attacks.¹⁰¹

Thus, through its practice, the AC-FCNM has identified explicit dehumanisation as a cause of rights violations. However, it tends not to engage with the impact of unconscious or implicit categorisation on the realisation of rights. This is perhaps because it is much easier to identify the resultant rights violations than it is to identify implicit or unconscious categorisation as their underlying cause.

Although the CERD, like the AC-FCNM, is a targeted mechanism, its approach to dehumanisation aligns more closely with that of the HRC. The Concluding Observations of the CERD and HRC since 2015 reveal that both treaty bodies recognise express forms of categorisation, such as hate speech and intolerant speech, as constituting rights violations, especially when such speech is linked to hate crime. Thus, in relation to Switzerland, the HRC expressed concern ‘about the increasing prevalence of hate speech and acts of hatred against the Muslim, Jewish and Roma communities’.¹⁰² Similarly, in relation to Poland, the CERD expressed concern at ‘the prevalence of racist hate speech against minority groups ... which fuels hatred and intolerance’.¹⁰³ While both bodies tend to focus on speech that meets the threshold

88. AC-FCNM Czech Republic, above n. 14, at paras. 53-54; AC-FCNM Slovak Republic, above n. 16, at paras. 35-37.

89. AC-FCNM the Netherlands, above n. 21, at para. 54; AC-FCNM Italy, above n. 28, at para. 58.

90. AC-FCNM United Kingdom, above n. 42, at para. 73; AC-FCNM the Netherlands, above n. 21, at para. 54.

91. AC-FCNM, *Fourth Opinion on the Republic of Moldova* adopted on 25 May 2016 ACFC/OP/IV(2016)004, at para. 6.

92. AC-FCNM Cyprus, above n. 19, at para. 34.

93. AC-FCNM Austria, above n. 75, at para. 31; AC-FCNM Italy, above n. 28, at para. 59.

94. AC-FCNM Denmark, above n. 31, at para. 65.

95. AC-FCNM Germany, above n. 20, at para. 56.

96. AC-FCNM Italy, above n. 28, at para. 59.

97. AC-FCNM Austria, above n. 75, at para. 36.

98. AC-FCNM Spain, above n. 45, at para. 40.

99. AC-FCNM Czech Republic, above n. 14, at para. 57.

100. AC-FCNM Spain, above n. 45, at para. 42.

101. AC-FCNM Austria, above n. 75, at para. 36.

102. HRC Switzerland, above n. 53, at para. 20.

103. CERD Poland, above n. 78, at para. 15.

of hate speech, they have also suggested that less explicit forms of categorisation such as stereotyping,¹⁰⁴ prejudice,¹⁰⁵ stigmatisation¹⁰⁶ and ‘chronic negative portrayal’¹⁰⁷ constitute rights violations. The proliferation of hate and intolerant speech by the media and politicians has been singled out as particularly problematic by both treaty bodies.¹⁰⁸

Significantly, both mechanisms have explicitly recognised that hate speech may result in human rights violations, insofar as it legitimises hate crime, violence and ‘acts of intimidation’ towards out-groups.¹⁰⁹ Further, the CERD has recognised that hate speech serves the function of excluding out-groups from societal membership, a practice that is recognised by social psychologists as legitimising rights violations: ‘racist hate speech ... seeks to degrade the standing of individuals and groups in the estimation of society’.¹¹⁰ Yet, with the exception of hate crime and violence, these bodies tend not to explicitly recognise the connection between categorisation, on the one hand, and rights violations, on the other.

In some Concluding Observations, this link is made implicitly, insofar as the negative portrayal of an out-group is mentioned in the same paragraph as other rights violations. For example, in relation to Sweden, the CERD mentioned ‘stereotypical representation of Muslims’, ‘reports of racist hate crimes and hate speech against Muslim ethno-religious minority groups’, ‘reports of attacks against mosques’ and ‘difficulties ... in accessing employment and housing outside of minority-populated areas’.¹¹¹ This suggests that the CERD is aware that these are not unrelated issues, but it does not expressly connect the rights violations with the underlying cause. However, in other instances, these mechanisms have failed to make this connection even when societal debates surrounding the adoption of laws that violate rights, such as bans on building minarets¹¹² or wearing religious clothing,¹¹³ have explicitly categorised out-groups.¹¹⁴ This is significant, as only when this link

is identified by the CERD and HRC, in the same paragraph of Concluding Observations, do they require that States adopt positive measures to address intolerance as a cause of rights violations.¹¹⁵

Further, both Treaty Bodies have struggled to connect rights violations to broader societal conditions, when the categorisation of out-groups is not expressly articulated. Thus, although the CERD has singled out the forced sterilisation of Roma women in the Czech Republic and Slovakia to be of particular concern,¹¹⁶ it has not explicitly linked this to the broader moral exclusion and implicit categorisation of Roma in these societies. In contrast, the HRC has connected patterns of societal exclusion, in the form of ‘rejection, exclusion and violence’ faced by Roma in France, to broader rights violations in the form of discrimination in relation to ‘access to health care, social benefits, education and housing which is compounded by forced evictions from settlements and a frequent lack of resettlement solutions’.¹¹⁷ However, this is the exception in the monitoring practice of the CERD and HRC. Notably, both bodies have consistently expressed concern about discrimination against migrants, foreigners, ethnic minorities and Roma in the employment, education, housing and healthcare sectors,¹¹⁸ the failure to provide sufficient stopping sites for travellers and Roma,¹¹⁹ and forcible evictions.¹²⁰ Widespread or structural discrimination, as disclosed by these patterns of exclusion, suggest that categorisation is implicit or even unconscious. However, the Treaty Bodies do not identify dehumanisation, if the categorisation of the out-group is not explicitly articulated. This directly impacts whether IHRL mechanisms are able to ask States to address the societal conditions that have facilitated these rights violations.

In contrast to the mixed approach of the CERD and HRC, the ECtHR not only fails to identify the relevance of dehumanisation to interferences with the rights of migrants, Muslims and Roma, but has also allowed States to explicitly dehumanise migrant and Muslim applicants in order to legitimise interferences with their rights. Under Article 8 ECHR, migrants are frequently accepted by the ECtHR to be a threatening ‘other’,

104. CERD Czechia, above n. 70, at para. 11. See also CERD Hungary, above n. 53, at para. 22; HRC Italy, above n. 82, at para. 74.

105. CERD Czechia, above n. 70, at para. 11. See also CERD Hungary, above n. 53, at para. 22.

106. HRC Italy, above n. 82, at para. 74. See also CERD, *Concluding observations on the combined nineteenth and twentieth periodic reports of Italy*, UN doc. CERD/C/ITA/CO/19-20 (2017), at para. 14.

107. HRC Sweden, above n. 83, at para. 16.

108. HRC Switzerland, above n. 53, at para. 20; HRC Sweden, above n. 83, at para. 16; CERD Poland, above n. 78, at para. 15; CERD, *Concluding observations on the combined twenty-first to twenty-third periodic reports of the United Kingdom of Great Britain and Northern Ireland*, UN doc. CERD/C/GBR/CO/21-23 (2016), at para. 15.

109. CERD United Kingdom, above n. 108, at para. 15; CERD Poland, above n. 78, at para. 15; HRC Switzerland, above n. 53, at para. 20.

110. CERD General recommendation No. 35 (2013), above n. 62, at para. 10.

111. CERD, *Concluding observations on the combined twenty-second and twenty-third periodic reports of Sweden*, UN doc. CERD/C/SWE/CO/22-23 (2018), at para. 18.

112. HRC Switzerland, above n. 53, at para. 42.

113. HRC, *Concluding observations on the fifth periodic report of France*, UN doc. CCPR/C/FRA/CO/5 (2015), at para. 22.

114. See, for example, AC-FCNM, *Second opinion on Switzerland* adopted on 29 February 2008 ACFC/OP/II(2008)002, at para. 89; European

Commission against Racism and Intolerance, *ECRI Report on Switzerland (fourth monitoring cycle)* adopted on 2 April 2009 CRI(2009)32, at para. 120; A. Vakulenko, *Islamic Veiling in Legal Discourse* (2012) at 17-18; H. Elver, *The Headscarf Controversy: Secularism and Freedom of Religion* (2012), at 117-120.

115. CERD Sweden, above n. 111, at paras. 18-19; HRC Italy, above n. 82, at paras. 12-13.

116. CERD, *Concluding observations on the combined eleventh and twelfth periodic reports of Slovakia*, UN doc. CERD/C/SVK/CO/11-12 (2018), at para. 23; CERD, *Concluding observations on the combined tenth and eleventh periodic reports of the Czech Republic*, UN doc. CERD/C/CZE/CO/10-11 (2015), at para. 22; CERD Czechia, above n. 70, at para. 19.

117. HRC France, above n. 113, at para. 13.

118. HRC, *Concluding observations on the sixth periodic report of Spain*, UN doc. CCPR/C/ESP/CO/6 (2015), at para. 9; HRC, *Concluding observations on the seventh periodic report of Norway*, UN doc. CCPR/C/NOR/CO/7 (2018), at para. 8.

119. HRC Switzerland, above n. 53, at para. 50.

120. HRC Italy, above n. 82, at para. 14.

whose rights must give way to immigration control¹²¹ or the economic well-being of the State.¹²² This has led scholars to criticise the ECtHR for endorsing the portrayal of migrants as *less* human than citizens and, therefore, for accepting that migrants do not have the same entitlement to rights as members of the in-group.¹²³

Similarly, the ECtHR has been accused of relying on stereotypes of Islam and of unfavourably comparing Islam and, by extension, Muslims with 'European values' and 'Europeans', in order to legitimise not finding a violation of the applicant's rights under Article 9 ECHR.¹²⁴ For example, the ECtHR has accepted that the visible presence of Islam poses a threat to the in-group, insofar as it has a 'proselytising' effect,¹²⁵ challenges the secular foundations of the State¹²⁶ and undermines societal cohesion.¹²⁷ Thus, by accepting the in-group's portrayal of Muslim applicants as *less* human and, therefore, as *less* deserving of rights, the ECtHR has not only failed to recognise the connection between categorisation and the realisation of rights but has also participated in this process. Nonetheless, in *S.A.S. v. France*, concerning the so-called French '*burqa* ban', the ECtHR did express concern at the institutionalisation of dehumanisation, insofar as

a State which enters into a legislative process of this kind takes the risk of contributing to the consolidation of the stereotypes which affect certain categories of the population and of encouraging the expression of intolerance, when it has a duty, on the contrary, to promote tolerance.¹²⁸

However, by deferring to the State through the margin of appreciation in this case, the ECtHR signalled its

unwillingness to challenge the majority's perception of threat and effectively endorsed the dehumanisation of the Muslim applicant.

In contrast to its treatment of migrants and Muslims, the ECtHR has explicitly recognised that travellers and Roma may be subject to rights violations as a direct result of intolerance and prejudice linked to their identity.¹²⁹ Nonetheless, the ECtHR has historically been slow to recognise that violations of the rights of Roma or traveller applicants are enabled by widespread dehumanisation, in the absence of explicit articulations of discriminatory motives.¹³⁰ While, more recently, the ECtHR has begun to identify violations of Article 14 ECHR, the prohibition of discrimination, in cases concerning Roma,¹³¹ its approach has been inconsistent.¹³² Thus, in *V.C. v Slovakia*, concerning the forced sterilisation of a Roma woman, the ECtHR found a violation of Articles 3 and 8, but not Article 14 ECHR as it was unconvinced 'that it was part of an organised policy or that the hospital staff's conduct was intentionally racially motivated'.¹³³ Despite a wealth of evidence from the AC-FCNM, CERD and HRC¹³⁴ and a dissenting opinion of Judge Mijovic, which emphasised that this was a specific issue faced by Roma women in Slovakia that had been legitimised by the broader societal context,¹³⁵ the ECtHR failed to recognise the role played by dehumanisation in this rights violation. By individualising human rights violations committed against Roma, the ECtHR fails to recognise that the implicit categorisation of this out-group by the broader society underpins individual rights violations.

Thus, while the AC-FCNM, CERD and HRC have recognised that the explicit categorisation of out-groups results in rights violation, the ECtHR has not only failed to recognise the significance of dehumanisation but has also contributed to this process itself. To some extent, this pattern can again be attributed to the mandates and working methods of these mechanisms. The AC-FCNM, CERD and HRC all monitor State reports, a process that allows them to obtain a broad understanding of the situation prevailing in a State and how this pertains to the realisation of the rights of out-groups.

121. *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, ECHR (1985) Series A No. 94, at para. 67; *Boujlifa v. France*, ECHR (1997) Reports 1997-VI, at para. 42; *Nunez v. Norway*, ECHR (2011) Application No. 55597/09, at para. 71.

122. *Berrehab v. the Netherlands*, ECHR (1988) Series A No. 138, at para. 26.

123. C. Costello, *The Human Rights of Migrants and Refugees in European Law* (2016), at 128; A. Desmond, 'The Private Life of Family Matters: Curtailing Human Rights Protection for Migrants under Article 8 of the ECHR?', 29 *European Journal of International Law* 261, at 265 (2018). M.-B. Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (2015), at 504.

124. See further, K. Henrard, 'State Obligations to Counter Islamophobia: Comparing Fault Lines in the Supervisory Practice of the HRC/ICCPR, the ECtHR and the AC/FCNM', in this special edition. See, also, C. Evans, 'The "Islamic Scarf" in the European Court of Human Rights', 7 *Melbourne Journal of International Law* 52, at 65-67 (2006); C.H. Skeet, 'Orientalism in the European Court of Human Rights', 14 *Religion and Human Rights* 31 (2019); K. Henrard, 'Integration Reasoning at the ECtHR: Challenging the Boundaries of Minorities' Citizenship', 38 *Netherlands Quarterly of Human Rights* 55, at 70-72 (2020).

125. *Dahlab v. Switzerland*, ECHR (2001) Reports 2001-V.

126. *Ibid.*; *Leyla Şahin v. Turkey*, ECHR (2005) Reports 2005-XI, at para. 115; *Dogru v. France*, ECHR (2008) Application No. 27058/05, at para. 72.

127. *S.A.S.*, above n. 87, at para. 141; *Osmanoğlu and Kocabaş v. Switzerland*, ECHR (2017) Application No. 29086/12, at paras. 96-97. For a more detailed discussion of this point, see generally, Henrard (2020), above n. 124.

128. *S.A.S.*, above n. 87, at para. 149.

129. *Chapman v. United Kingdom*, ECHR (2001) Reports 2001-I, at para. 96.

130. See further, R. Sandland, 'Developing a Jurisprudence of Difference: The Protection of the Human Rights of Travelling Peoples by the European Court of Human Rights', 8 *Human Rights Law Review* 475, at 485 (2008). See for example, *Buckley v. the United Kingdom*, ECHR (1996) Reports 1996-IV; *Velikova v. Bulgaria*, ECHR (2000) Reports 2000-VI; *Angelova v. Bulgaria*, ECHR (2002) Reports 2002-IV.

131. See, for example, *Nachova*, above n. 71; *Moldovan and Others v. Romania* (No. 2), ECHR (2005) Reports 2005-VII; *Stoica v. Romania*, ECHR (2008) Application No. 42722/02; *D.H. and others v. the Czech Republic*, ECHR (2007) Reports 2007-IV.

132. *Balogh v. Hungary*, ECHR (2004) Application No. 47940/99; *Bekos and Koutropoulos v. Greece*, ECHR (2005) Reports 2005-XIII; *Cobzaru v. Romania*, ECHR (2007) Application No. 8254/99.

133. *V.C. v. Slovakia*, ECHR (2011) Application No. 18968/07, at para. 177.

134. S.E. Berry, 'The Siren's Call? Exploring the Implications of an Additional Protocol to the European Convention on Human Rights on National Minorities', 23 *International Journal on Minority and Group Rights* 1, at 30-31 (2016).

135. *V.C.* (2011), above n. 133, at dissenting opinion Judge Mijovic.

This facilitates the identification of dehumanisation at a societal and institutional level. In contrast, as the ECtHR does not monitor State reports, its competence is restricted to the facts of the case before it. As the facts of the case are, inevitably, individualised, this restricts the ECtHR's ability to identify whether the interference with the applicant's rights was a result of the dehumanisation of the out-group.

However, in *D.H. and others v. the Czech Republic*, the ECtHR demonstrated that it is able to find a violation of Article 14 ECHR, when the facts of the case before it form part of a broader pattern of discrimination or intolerance against an out-group.¹³⁶ Thus, moving forward, there are opportunities for the ECtHR to strengthen its work in this area. The ECtHR could, for example, solicit information from third party interveners in order to inform its decisions in cases where broader societal intolerance appears to have undermined access to rights, rather than individualising violations that are clearly structural. The ECtHR could also, through *obiter dicta*, engage with the impact of dehumanisation on the realisation of rights and more clearly establish the scope of States' positive obligation to counter such dehumanisation. Further, States are frequently afforded a margin of appreciation in cases concerning the rights of persons belonging to minorities.¹³⁷ The ECtHR could make recognition of this margin of appreciation contingent on the State's compliance with its positive obligation to foster tolerant societies, in cases where patterns of discrimination or intolerance appear to underpin the interference with the applicant's rights or where the actions of the State have increased intolerance towards out-groups, as the ECtHR explicitly recognised in *SAS v. France*.¹³⁸

Despite the existence of positive States obligations to prevent hate speech and to foster tolerant societies under all instruments, the IHRL mechanisms explored in this section have yet to fully appreciate the impact of dehumanisation on the realisation of rights. In particular, while they are aware of the connection between hate speech and hate crime, they are much less aware of the impact of categorisation on a wider range of rights, especially when categorisation is implicit or unconscious. This directly impacts whether the recommendations of these mechanisms require that States address dehumanisation as a cause of rights violations. Consequently, if IHRL is to achieve its purpose and protect out-groups from rights violations, then IHRL monitoring bodies must explicitly recognise the root causes of these violations.

5 The Content and Scope of a Positive State Obligation to Counter Dehumanisation

Under IHRL, States are required to both adopt measures to restrict forms of speech that facilitate dehumanisation and address the societal intolerance that underpins dehumanisation. However, in practice, IHRL monitoring mechanisms have yet to fully appreciate the impact that dehumanisation has on the realisation of rights. Drawing on social psychology and related fields, this section analyses whether monitoring mechanisms' interpretation of the scope of States' obligations to prevent hate and/or intolerant speech and to create tolerant societies is sufficient to counter dehumanisation as a cause of rights violations. Further, it identifies how the current practice of these mechanisms can be strengthened in order to encourage States to adopt a more robust response to dehumanisation. Significantly, despite the existence of these obligations under the ECHR, in practice, the ECtHR has rarely found a violation in cases where the State has failed to ensure tolerance of out-groups¹³⁹ and has not elaborated the content of these obligations. Consequently, this section focuses exclusively on the practice of the AC-FCNM, CERD and HRC. It is revealed that while a comprehensive interpretation of States' obligation to prevent hate and/or intolerant speech has been developed by these mechanisms, they must elaborate the substance of the obligation to create a tolerant society in more detail, if States are to effectively counter dehumanisation.

5.1 Preventing Hate and/or Intolerant Speech

Intolerant speech, including hate speech, explicitly categorises out-groups. Further, it has the potential to reinforce and strengthen the dehumanisation of out-groups, particularly when such expressions are legitimised by those with authority, either expressly, through repetition, or implicitly, by failing to condemn.¹⁴⁰ Consequently, reducing the space for intolerant speech in the public sphere has the potential to reduce the dehumanisation of out-groups. The AC-FCNM, CERD and HRC have identified two main components of the positive obligation to prevent intolerant and/or hate speech: first, an obligation to adopt effective laws to prohibit hate speech, and, second, an obligation to regulate the speech of individuals who have the ability to influence public opinion, such as politicians and the media. In developing the content of these obligations, the three mechanisms have provided States with specific guidance and have sought to balance the need to restrict hate speech with the needs of democratic society.

136. *D.H. and others* (2007), above n. 131, at paras. 191-95.

137. Berry (2016), above n. 134.

138. *S.A.S.*, above n. 87, at para. 149.

139. See, for example, *S.A.S.*, above n. 87, at *dissenting opinion of Judges Nussberger and Jäderblom*, at para. 14. Cf. *Supreme Holy Council of the Muslim Community*, above n. 86, at para. 96.

140. W.A. Donohue, 'The Identity Trap: The Language of Genocide', 31 *Journal of Language and Social Psychology* 13 (2011).

At the most fundamental level, the AC-FCNM and CERD have stressed that States must ensure that domestic legislation prohibiting hate speech is comprehensive¹⁴¹ and is implemented in practice,¹⁴² through proper investigation, prosecution and sanctions.¹⁴³ Beyond this basic standard, the AC-FCNM and CERD have emphasised that law enforcement, prosecutors and the judiciary should receive appropriate and regular training to ensure the effectiveness of these laws.¹⁴⁴ In order to improve reporting, States should seek to raise out-groups' awareness of the existence of hate speech legislation¹⁴⁵ and improve trust between out-groups and law enforcement authorities,¹⁴⁶ including by increasing diversity in the police force.¹⁴⁷ Thus, in addition to adopting laws to prohibit hate speech, monitoring mechanisms have also required that States ensure these laws are effective in practice.

The AC-FCNM, CERD and HRC have also required that States adopt measures to reduce the impact of hate or intolerant speech by those who have the potential to influence public opinion. As noted by Donohue, '[c]learly, public language matters; it creates a context for how people interact with one another'.¹⁴⁸ Here, the media and politicians have the potential to lead public opinion in a way that individual acts of intolerance do not. Within social psychology and genocide studies, both the media and the politicians have been recognised as playing a key role in the dehumanisation of out-groups¹⁴⁹ and have been implicated in the commission of mass atrocities.¹⁵⁰ Thus, it is clear that if IHRL is to achieve its purpose, politicians and the media cannot be

permitted to spread hate or intolerance without intervention. However, IHRL – particularly in Europe – is premised on the understanding that democracy and human rights are mutually reinforcing.¹⁵¹ Given the central role that politicians and the media play in ensuring effective democracy, the regulation of hate and intolerant speech is a complex area for IHRL mechanisms to navigate. Significantly, CERD has sought to adopt a nuanced approach and has explicitly acknowledged that whether speech constitutes hate speech is context specific and that factors including 'the economic, social and political climate', 'the position or status of the speaker', and 'the reach of the speech' must be taken into account.¹⁵²

The AC-FCNM and CERD have both emphasised the need for the authorities to publicly condemn acts of hate speech and related phenomena such as racist propaganda and 'derogatory and intolerant language',¹⁵³ particularly when perpetrated by politicians or others in the public eye.¹⁵⁴ Such condemnation serves to prevent intolerant speech from being normalised in society through the silence or acquiescence of those in authority. Further, if the authorities challenge the categorisation of the out-group, this also has the potential to break the recursive cycle whereby society and the public authorities legitimise the adoption of increasingly extreme measures in response to a perceived threat posed by out-groups. Significantly, both the AC-FCNM and CERD have recognised that such condemnation is a necessary component of 'promoting a culture of tolerance and respect',¹⁵⁵ thus reaffirming the mutually reinforcing nature of measures to restrict the impact of hate speech and measures to foster tolerance.

Beyond condemnation, both the AC-FCNM and CERD have recommended that States adopt measures to restrict hate and intolerant speech in political discourse and the media. In relation to hate speech in political discourse, the AC-FCNM has asked States to call 'on all political parties to refrain from using it',¹⁵⁶ and take steps 'to combat stereotypes and prejudice in political discourse'.¹⁵⁷ Similarly, the CERD has asked that the authorities 'call upon politicians to ensure that their public statements do not contribute to intolerance, stigmatization or incitement to hatred'.¹⁵⁸ Further, the

141. CERD General recommendation No. 35 (2013), above n. 62, at para. 9; AC-FCNM Finland, above n. 63, at para. 105; AC-FCNM Germany, above n. 20, at paras. 61 and 70.

142. CERD Ireland, above n. 77, at para. 22(a); CERD Norway, above n. 53, at para. 14(b).

143. CERD United Kingdom, above n. 108, at para. 16(a); CERD Poland, above n. 78, at paras. 22(e) and 24(e); AC-FCNM Austria, above n. 75, at para. 39; AC-FCNM Finland, above n. 63, at para. 57. See also, HRC United Kingdom, above n. 13, at para. 10(d); HRC Hungary, above n. 56, at para. 18.

144. CERD, *Concluding observations on the twentieth to twenty-second periodic reports of Greece*, UN doc. CERD/C/GRC/CO/20-22 (2016), at para. 17(b); CERD Sweden, above n. 111, at para. 11(c); AC-FCNM Finland, above n. 63, at para. 104; AC-FCNM Cyprus, above n. 19, at para. 39.

145. AC-FCNM the Netherlands, above n. 21, at para. 66; AC-FCNM, *Fourth Opinion on Norway* adopted on 13 October 2016 ACFC/OP/IV(2016)008, at para. 58; CERD Greece, above n. 144, at paras. 17(d) and (e); CERD United Kingdom, above n. 108, at para. 16(c). See also, HRC, *Concluding observations on the fifth periodic report of Austria*, UN doc. CCPR/C/AUT/CO/5 (2015), at para. 16.

146. AC-FCNM Finland, above n. 63, at para. 57; AC-FCNM Germany, above n. 20, at para. 77; CERD United Kingdom, above n. 108, at para. 16(c); CERD Greece, above n. 144, at paras. 17(e).

147. AC-FCNM Finland, above n. 63, at para. 57; AC-FCNM Germany, above n. 20, at para. 77.

148. Donohue, above n. 140, at 28.

149. Goff, Eberhardt, Williams & Jackson, above n. 38, at 304; Donohue, above n. 140, at 14; 25; Stanton, above n. 41, at 214-15; Opatow, above n. 24, at 13; A. De Buyse, 'Words of Violence: "Fear Speech," or How Violent Conflict Escalation Relates to the Freedom of Expression', 36 *Human Rights Quarterly* 779, at 779- 81 (2014).

150. Donohue, above n. 140, at 13, 14, 25; Stanton, above n. 41, at 214-15.

151. S.E. Berry, 'Democracy and the Preservation of Minority Identity: Fragmentation within the European Human Rights Framework', 24 *International Journal on Minority and Group Rights* 205, at 212-13 (2017).

152. CERD General recommendation No. 35 (2013), above n. 62, at para. 15.

153. AC-FCNM Norway (2016), above n. 145, at para. 53.

154. CERD United Kingdom, above n. 108, at para. 16(d); CERD, *Concluding observations on the combined nineteenth to twenty-second periodic reports of Germany*, UN doc. CERD/C/DEU/CO/19-22 (2015), at para. 9; AC-FCNM Austria, above n. 75, at para. 40; AC-FCNM Finland, above n. 63, at para. 53.

155. CERD General recommendation No. 35 (2013), above n. 62, at para. 37. See also CERD United Kingdom, above n. 108, at para. 16(d); AC-FCNM United Kingdom, above n. 42, at para. 76; AC-FCNM Spain, above n. 45, at para. 48.

156. AC-FCNM United Kingdom, above n. 42, at para. 76.

157. AC-FCNM Czech Republic, above n. 14, para. 57.

158. CERD Finland, above n. 78, at para. 11(c).

CERD has explicitly emphasised the need to apply legislation on hate speech to politicians and public officials.¹⁵⁹ Significantly, neither mechanism has required that States legislate to prohibit forms of intolerant political speech that do not meet the threshold of hate speech but, nonetheless, have the potential to categorise out-groups.

This is perhaps where these mechanisms have sought to strike a balance between protecting out-groups from speech that categorises, on the one hand, and allowing space for democratic debate, on the other. The prohibition of forms of speech that the in-group perceives to be legitimate would not only remove the opportunity for such ideas to be contested but would also run the risk of reducing confidence in the democratic process. Once dehumanisation has been institutionalised and/or normalised in political discourse, as it has in many European States, then the in-group is unlikely to respond positively to the condemnation of speech that it perceives to be legitimate.¹⁶⁰ This is because, as noted by Haslam and Loughnan, ‘people actively resist information that challenges them’ and the self-identification of the in-group is based on negative comparisons with the out-group.¹⁶¹ Consequently, the condemnation of intolerant speech in public discourse is more likely to be effective if it is adopted to prevent rather than counter dehumanisation.

Both the AC-FCNM and CERD have expressed concern that the portrayal of minorities by the media has the potential to perpetuate intolerance.¹⁶² Media expressions that negatively categorise out-groups but do not constitute hate speech pose particularly complex issues for monitoring mechanisms. Thus, the AC-FCNM and CERD have emphasised the need for media professionals to undertake training to improve reporting on minority groups and diversity.¹⁶³ While both bodies have recognised the need for some form of press regulation,¹⁶⁴ the AC-FCNM has emphasised that measures should not impact the freedom or independence of the press.¹⁶⁵ In contrast, the CERD has recommended formal regulatory measures, through legislation,¹⁶⁶ professional codes of conduct or professional ethics¹⁶⁷ and media supervisory mechanisms.¹⁶⁸ However, some forms of reporting

that reinforce negative stereotypes tend to avoid regulation, for example when newspapers report only the ethnicity of minority criminals. In this respect, rather than formal regulation, the CERD has suggested that the ‘[m]edia should avoid referring unnecessarily to race, ethnicity, religion and other group characteristics in a manner that may promote intolerance’.¹⁶⁹ Further, the AC-FCNM has called on the authorities in the UK

to engage with media outlets to promote a more nuanced understanding and reporting of facts to avoid fuelling intolerant and ethnically hostile behaviour while promoting the use of less derogatory language.¹⁷⁰

While this is a complex area for IHRL monitoring mechanisms to navigate, the AC-FCNM and CERD have clearly sought to balance the need to counter dehumanisation with the requirements of a democratic society. These mechanisms have sought to develop precise and nuanced guidance for States that requires the prohibition of hate speech but also recognises the dangers of the over-regulation of intolerant speech, especially if the negative categorisation of out-groups is already ingrained within society.

5.2 Creating Tolerant Societies

While regulation and condemnation have the potential to reduce the influence of speech that categorises, they do not address the societal root causes of dehumanisation nor do they address implicit or unconscious categorisation. In order to address these issues, States must seek to change societal attitudes and create societies that are tolerant of diversity. Significantly, the AC-FCNM, CERD and HRC have recommended that States adopt measures to address the societal root causes of hate speech as well as other forms of intolerant speech through, for example, ‘awareness-raising campaigns’.¹⁷¹ IHRL also establishes a positive State obligation to create tolerant societies. This section draws on social psychology, and the related fields of interculturalism and genocide studies, in order to analyse whether IHRL mechanisms’ interpretation of States’ positive obligation in this respect is sufficient to improve societal tolerance and, thereby, reduce the dehumanisation that legitimises rights violations.

During State reporting processes, the AC-FCNM, CERD and HRC have frequently recommended that States ‘promote tolerance and understanding’ or develop integration policies and strategies,¹⁷² without elaborating what this entails in practice. More specific recom-

159. CERD Italy, above n. 106, at paras. 15(a) and (g); CERD Norway, above n. 53, at paras. 14(a) and (c). See also, AC-FCNM Austria, above n. 75, at para. 38.

160. Haslam and Loughnan, above n. 7, at 416.

161. *Ibid.*

162. CERD Czechia, above n. 70, at para. 11(c); CERD Hungary, above n. 53, at para. 16; AC-FCNM Denmark, above n. 31, at para. 64; AC-FCNM Italy, above n. 28, at para. 58.

163. AC-FCNM Austria, above n. 75, at para. 40; AC-FCNM Germany, above n. 20, at para. 65; AC-FCNM United Kingdom, above n. 42, at para. 76; CERD Czechia, above n. 70, at para. 12(c).

164. AC-FCNM United Kingdom, above n. 42, at para. 97; CERD General recommendation No. 35 (2013), above n. 62, at para. 39.

165. AC-FCNM Germany, above n. 20, at para. 65; AC-FCNM, *Fifth Opinion on Denmark* adopted on 7 November 2019 ACFC/OP/V(2019)003, at para. 76.

166. CERD Slovakia, above n. 116, at para. 14(a).

167. CERD Italy, above n. 106, at para. 15(f).

168. CERD Greece, above n. 144, at para. 17(c).

169. CERD General recommendation No. 35 (2013), above n. 62, at para. 40.

170. AC-FCNM United Kingdom, above n. 42, at para. 76.

171. AC-FCNM Norway (2016), above n. 145, at para. 53; AC-FCNM Switzerland, above n. 70, at para. 64; CERD Czechia, above n. 70, at para. 12(b); HRC the Netherlands, above n. 63, at para. 16; HRC Hungary, above n. 56, at para. 18.

172. AC-FCNM, *Fourth Opinion on Malta* adopted on 14 October 2016 ACFC/OP/IV(2016)009, at para. 25; AC-FCNM the Netherlands, above n. 21, at para. 57.

mendations focus on the adoption of awareness-raising activities and educational campaigns to promote tolerance¹⁷³ or eliminate prejudice and counteract stereotypes.¹⁷⁴ However, these recommendations tend not to elaborate the form such activities should take. The most detailed guidance provided by the AC-FCNM and CERD concerns the design of inclusive education curricula to increase knowledge of the history and culture of out-groups.¹⁷⁵ For example, the CERD has required that Italy ‘ensure that the school curriculum includes the history of the State party’s colonial past in order to convey the consequences and the continued impact of racially discriminatory policies’.¹⁷⁶

From the perspective of social psychology, while inclusive school curricula and public awareness campaigns have the potential to improve societal cohesion,¹⁷⁷ they are insufficient to create tolerant societies.¹⁷⁸ This is because knowledge alone is unlikely to counter dehumanisation, especially if groups tend not to interact with one another or when such interactions are primarily negative.¹⁷⁹ If the out-group has already been dehumanised, the in-group is likely to view stereotypes as legitimate, not see the need to address intolerance against out-groups, and/or have a vested interest in the negative categorisation of the out-group.¹⁸⁰ In this case, the in-group is unlikely to engage with educational activities that actively challenge their beliefs. Consequently, measures that seek to counter pre-existing dehumanisation are less likely to be successful than measures that seek to prevent dehumanisation in the first place. In order to counter pre-existing dehumanisation, IHRL mechanisms must adopt more robust recommendations that require that States combine educational measures with more wide-ranging measures designed to create tolerant societies.

Building on Allport’s Contact Theory,¹⁸¹ social psychologists and interculturalists have suggested that increased interactions between different societal groups, with the

aim of developing affective ties and intergroup friendship, are necessary to reduce the prejudice that underpins dehumanisation.¹⁸² Similarly, within genocide studies, Donohue highlights the potential for everyday interactions in the workplace to reduce dehumanisation: ‘[u]nderlying these efforts could also be attempts to initiate dialogue groups that allow individuals from different sides to simply become more comfortable with one another’.¹⁸³ The cohesion strand of interculturalism likewise requires the creation of spaces and opportunities for intercultural interactions to take place¹⁸⁴ and the removal of barriers to successful interactions,¹⁸⁵ with the aim of breaking down ‘prejudices, stereotypes and misconceptions of others’ and generating ‘mutual understanding, reciprocal identification, societal trust and solidarity’.¹⁸⁶

Notably, monitoring mechanisms have been able to interpret States’ positive obligation to create tolerant societies to encompass an obligation to foster affective ties and intergroup friendships. While ‘awareness-raising activities’ have been the default recommendation of monitoring mechanisms, both the AC-FCNM and CERD have occasionally highlighted the need for States to facilitate interactions between different groups in society through ‘trust-building activities’ and the creation of platforms to facilitate dialogue between different groups.¹⁸⁷ Further, in the educational setting, the AC-FCNM has emphasised the importance of ‘bringing together pupils’¹⁸⁸ from different backgrounds and organising ‘classes and school activities in ways that facilitate intercultural exchanges and the development of friendships’.¹⁸⁹ It has also highlighted examples of best practice during the State reporting process, such as the ‘BookEdu’ programme in Copenhagen, which promotes intercultural dialogue in schools.¹⁹⁰ These activities have the potential to facilitate meaningful contact between the in-group and out-groups. However, these recommendations are rare, and when they are made, the terminology used, such as ‘trust building exercises’, is

173. AC-FCNM Czech Republic, above n. 14, at para. 57; AC-FCNM Finland (2016), above n. 63, at para. 52; CERD Poland (2018), above n. 78, at para. 16(c); CERD Norway, above n. 53, at para. 12(e); HRC Hungary, above n. 56, at para. 18; HRC Italy, above n. 82, at para. 13; HRC Sweden, above n. 83, at para. 17.

174. CERD Czechia, above n. 70, at para. 12(b); CERD Norway, above n. 53, at para. 12(e); HRC Hungary, above n. 56, at para. 18.

175. Art. 12 FCNM; CERD General recommendation No. 35 (2013), above n. 62, at paras. 34–35.

176. CERD Italy, above n. 106, at para. 26(e). See also, CERD United Kingdom, above n. 108, at para. 35(c).

177. L. Bekemans, ‘Educational Challenges and Perspectives in Multiculturalism vs. Interculturalism: Citizenship. Education for Intercultural Realities’, in M. Barrett (ed.), *Interculturalism and Multiculturalism: Similarities and Differences* (2013), at 177, 183; G. Bouchard, ‘Interculturalism: What Makes it Distinctive?’, in M. Barrett (ed.), *Interculturalism and Multiculturalism: Similarities and Differences* (2013), at 107.

178. W.G. Stephan and C.W. Stephan, ‘An Integrated Threat Theory of Prejudice’, in S. Oskamp (ed.), *Reducing Prejudice and Discrimination* (2000), at 40–41.

179. A. Rodríguez Pérez, N. Delgado Rodríguez, V. Betancor Rodríguez, J.P. Leyens & J. Vaes, ‘Infra-humanization of Outgroups throughout the World. The Role of Similarity, Intergroup Friendship, Knowledge of the Outgroup, and Status’, 27 *Anales de Psicología* 679, at 685–86 (2011).

180. Haslam and Loughnan, above n. 7, at 416.

181. See generally, G.W. Allport, *The Nature of Prejudice* (1954).

182. Rodríguez Pérez, Delgado Rodríguez, Betancor Rodríguez, Leyens & Vaes, above n. 179, at 681; P. Loobuyck, ‘Towards an Intercultural Sense of Belonging Together: Reflections on the Theoretical and Political Level’, in N. Meer, T. Modood & R. Zapata-Barrero (eds.), *Interculturalism and Multiculturalism* (2016), at 225; T. Cantle, ‘Interculturalism as a New Narrative for the Era of Globalisation and Super-Diversity’, in M. Barrett (ed.), *Interculturalism and Multiculturalism: Similarities and Differences* (2013), at 69, 83. See also, Tourkochoiti, above n. 3, for a discussion of how instrumental intergroup interventions can reduce prejudice.

183. Donohue, above n. 140, at 27.

184. Cantle, above n. 182, at 79.

185. M. Barrett, ‘Intercultural Competence: A Distinctive Hallmark of Interculturalism?’, in M. Barrett (ed.), *Interculturalism and Multiculturalism: Similarities and Differences* (2013), at 157.

186. Loobuyck, above n. 182, at 230.

187. AC-FCNM Norway, above n. 140, at para. 53; AC-FCNM Cyprus, above n. 19, at para. 36; CERD Norway, above n. 53, at para. 24; CERD, *General recommendation No. 27 on discrimination against Roma*, UN doc. A/55/18, annex V (2000), at para. 9.

188. AC-FCNM, *Fourth Opinion on Estonia* adopted on 19 March 2015 ACFC/OP/IV(2015)002, at para. 84.

189. AC-FCNM Cyprus, above n. 19, at para. 59.

190. AC-FCNM Denmark (2019), above n. 166, at para. 91. See also, AC-FCNM Austria, above n. 75, at para. 31.

vague. Guidance for States is specifically needed because the in-group is likely to resist measures that aim to facilitate intergroup contact if they perceive that the out-group poses a threat to its well-being.¹⁹¹ If participation in intercultural activities is not voluntary and does not respect the rights of all members of society, including freedom of association, it risks breeding resentment and becoming counterproductive.

Further, if measures to facilitate intercultural contact are to be successful, IHRL mechanisms must require that States address structural discrimination. Interculturalists have emphasised that structural discrimination poses barriers to successful interactions, by reducing the opportunities for everyday interactions between the in-group and out-groups.¹⁹² Desegregation in the educational context has the potential to facilitate interactions between pupils of different backgrounds and presents the opportunity for sources of intergroup tension to be directly addressed.¹⁹³ Significantly, both the AC-FCNM and CERD have consistently highlighted the need for States to adopt a range of measures to tackle societal segregation, specifically in relation to Roma in the context of education, employment and housing, under rights relating to non-discrimination, equality and education.¹⁹⁴ Significantly, neither body has recognised the central role played by measures to counter segregation and structural discrimination in fostering societal tolerance. Nonetheless, the elaboration of States' obligations in this respect has the potential to facilitate the creation of tolerant societies.

However, there is a danger that measures intended to remove structural disadvantage by creating mixed neighbourhoods, for example, run the risk of serving an assimilatory function and violating the rights of out-groups.¹⁹⁵ Notably, this appears to have been anticipated by the AC-FCNM and CERD, insofar as they have emphasised that States must consult with out-groups in the development of policies or strategies that pertain to their own social inclusion.¹⁹⁶

Finally, Haslem and Loughnan suggest that a 'way to reduce dehumanization is to promote a common or superordinate identity, thereby emphasizing the similarities and shared fate of different subgroups and de-

emphasizing their boundaries'.¹⁹⁷ As the creation of a common identity aims to reduce prejudice, it is possible for this to fall within States' positive obligation to create tolerant societies. However, national identity is often a politically sensitive subject, especially if the in-group believes that the out-group poses a threat to its cultural existence.¹⁹⁸ Thus, official attempts to create an inclusive identity may be viewed as a threat to national identity, heighten the sense of threat that underpins dehumanisation and may even be counterproductive.¹⁹⁹ It is, then, perhaps unsurprising that IHRL mechanisms have rarely recommended that States seek to create an inclusive identity, with the exception of the AC-FCNM in relation to Moldova. Here, the AC-FCNM recommended that the authorities

implement a long-term strategy for the formation of a *civic identity* that is inclusive and firmly based on respect for ethnic and linguistic diversity as an integral part of Moldovan society [emphasis added].²⁰⁰

It is, however, possible for IHRL mechanisms to recommend less divisive measures that, nonetheless, have the potential to facilitate the creation of an inclusive superordinate identity. Here, interculturalist Zapata-Barrero suggests 'redesigning institutions and policies in all fields to treat diversity as a potential resource and a public good, and not as a nuisance to be contained'.²⁰¹ Notably, both the AC-FCNM and CERD have recognised the potential for the public authorities to develop a 'positive political culture'²⁰² and send a positive message about diversity.²⁰³ Further, the AC-FCNM has recommended that States seek to create a sense of societal belonging for all groups²⁰⁴ and adopt strategies to ensure the integration of society as a whole, rather than focusing only on the integration of out-groups.²⁰⁵ It has also stressed the importance of an inclusive public discourse for both negotiating space for diversity within society and ensuring that such negotiations do not become a source of conflict.²⁰⁶ Thus, a number of the measures suggested by the AC-FCNM have the potential to create an inclusive superordinate national or civic identity, but its measured approach has the potential to offset the divisiveness of the subject.

191. Stephan and Stephan, above n. 178, at 38; Haslam and Loughnan, above n. 7, at 416.

192. Barrett, above n. 185, at 157.

193. See further, A. Kok, 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Proposals for Legislative Reform to Promote Equality Through Schools and the Education System', in this special edition.

194. CERD Germany, above n. 154, at para. 13(c); CERD Czechia, above n. 70, at para. 18; CERD, *Concluding observations on the combined twelfth and thirteenth periodic reports of Bosnia and Herzegovina*, UN doc. CERD/C/BIH/CO/12-13 (2018), at para. 23(b); CERD Slovakia, above n. 116, at para. 12(b); CERD Serbia, above n. 63, at para. 23; CERD Finland, above n. 78, at para. 13.

195. S.E. Berry, 'Aligning Interculturalism with International Human Rights Law: "Living Together" without Assimilation', 18 *Human Rights Law Review* 441, at 459 (2018).

196. AC-FCNM Austria, above n. 75, at para. 34; AC-FCNM Spain, above n. 45, at para. 50; CERD Poland, above n. 78, at para. 22; CERD General recommendation No. 27 (2000), above n. 187, at para. 9.

197. Haslam and Loughnan, above n. 7, at 416.

198. G. Bouchard, 'What is Interculturalism?', 56 *McGill Law Journal* 435, at 445 (2011).

199. Haslam and Loughnan, above n. 7, at 416.

200. AC-FCNM Moldova, above n. 91, at 1.

201. R. Zapata-Barrero, 'Theorising Intercultural Citizenship', in N. Meer, T. Modood & R. Zapata-Barrero (eds.), *Interculturalism and Multiculturalism* (2016), at 64.

202. CERD General recommendation No. 27, above n. 187, at para. 11.

203. AC-FCNM Moldova, above n. 91, at para. 38; AC-FCNM Slovak Republic, above n. 16, at para. 37.

204. AC-FCNM, *Third Opinion on Poland* adopted on 28 November 2013 ACFC/OP/III(2013)004, at 2; AC-FCNM, *Fourth Opinion on Bosnia and Herzegovina* adopted on 9 November 2017 ACFC/OP/IV(2017)007, at para. 73.

205. AC-FCNM Italy, above n. 28, at para. 95; AC-FCNM Malta, above n. 172, at para. 25.

206. AC-FCNM Austria, above n. 75, at para. 34.

The AC-FCNM and CERD have recognised that a range of measures are required to create tolerant societies. While their recommendations broadly correspond with those identified within social psychology and interculturalism, these recommendations must be strengthened if dehumanisation is to be successfully countered. Specifically, monitoring mechanisms must explicitly recognise that educational measures alone are insufficient to foster a tolerant society. Recommendations should regularly emphasise that education must be bolstered with measures to facilitate intercultural dialogue alongside measures to create an inclusive superordinate identity. Barriers to tolerance, such as structural discrimination, must be removed as part of these efforts.

Significantly, the AC-FCNM has elaborated the content of States' positive obligation to foster a tolerant society in the most detail. This can be attributed to the existence of an explicit obligation in Article 6(1) FCNM but also to the fact that its Opinions on State Reports are far more detailed than Treaty Bodies' Concluding Observations. However, if dehumanisation as a root cause of rights violations is to be successfully addressed and IHRL is to achieve its purpose, then all IHRL monitoring mechanisms must urgently develop their practice in this area. The potential for the ECtHR to elaborate the content of a positive obligation to foster tolerant societies has been considered above. However, the other three IHRL monitoring mechanisms considered here serve a more preventative function than the ECtHR, and as a result have greater opportunities to elaborate the content of this obligation through State reporting processes and General Comments/Recommendations or Thematic Commentaries. While it is not the role of IHRL monitoring mechanisms to prescribe how States meet their obligations, these three mechanisms can provide detailed, non-prescriptive, guidance for States that draw on best practices and elaborate the purpose of different types of activities and the prerequisites for their success. This guidance is all the more important as agents of the State frequently perpetrate or are complicit in rights violations that are underpinned by the dehumanisation of the out-group. States should be given discretion regarding *how* they meet their obligation to create tolerant societies, not *if*.

6 Conclusion

Dehumanisation requires the categorisation of an out-group as not human or *less* human than the in-group and as a threat to the in-group. This serves to legitimise the violation of the rights of the out-group. These rights violations are not limited to hate speech, acts of discrimination and violations of identity rights but also extend to the commission of mass atrocities. By adopting the lens of dehumanisation, this article has demonstrated that if IHRL is to achieve its purpose, it is imperative that all IHRL monitoring mechanisms seek to address dehumanisation as a root cause of rights vio-

lations. To date, IHRL monitoring mechanisms have insufficiently recognised that dehumanisation undermines the realisation of rights, particularly when dehumanisation is implicit or unconscious.

The insights provided by social psychology have allowed this article to demonstrate how IHRL monitoring mechanisms can interpret the pre-existing IHRL framework to address dehumanisation through their monitoring practice. Specifically, pre-existing positive State obligations to prevent hate speech and foster tolerant societies, in theory, should be sufficient to counter dehumanisation as a cause of rights violations. Significantly, the AC-FCNM, CERD and HRC have clearly elaborated the content of States' positive obligation to prevent hate speech and have struck a balance between competing rights in this respect. However, the interpretation of the positive State obligation to foster tolerant societies requires strengthening and further elaboration by all IHRL mechanisms if out-groups are to be protected from rights violations. This obligation is central to challenging unconscious and implicit dehumanisation as well as the societal conditions that allow dehumanisation to occur. IHRL mechanisms must require that States not only educate their societies about out-groups but also create opportunities for intercultural interactions to take place, during which friendship and affective ties can be forged. The removal of structural barriers is central to the success of these measures. Finally, States must be required to create a positive public culture, which recognises out-groups as an integral part of society. Significantly, all of these measures have a greater prospect of success if adopted to prevent rather than counter dehumanisation.

The most detailed elaboration of the content of the positive State obligation to create tolerant societies has, perhaps unsurprisingly, originated from targeted mechanisms. However, dehumanisation not only results in discrimination and violations of identity rights but also underpins serious and widespread rights violations, including the commission of mass atrocities. Consequently, the HRC and ECtHR must also engage with the impact of dehumanisation on the realisation of rights and require that States take measures to address dehumanisation, if absolute rights, such as the prohibition of torture, are to be guaranteed.

If IHRL is to achieve its purpose and protect out-groups from rights violations, IHRL monitoring mechanisms must seek to strengthen States' positive obligation to create tolerant societies within their respective frameworks and provide non-prescriptive guidance regarding how this can be achieved in practice.

Can Non-discrimination Law Change Hearts and Minds?

Anita Böcker*

Abstract

A question that has preoccupied sociolegal scholars for ages is whether law can change ‘hearts and minds’. This article explores whether non-discrimination law can create social change, and, more particularly, whether it can change attitudes and beliefs as well as external behaviour. The first part examines how sociolegal scholars have theorised about the possibility and desirability of using law as an instrument of social change. The second part discusses the findings of empirical research on the social working of various types of non-discrimination law. What conclusions can be drawn about the ability of non-discrimination law to create social change? What factors influence this ability? And can non-discrimination law change people’s hearts and minds as well as their behaviour? The research literature does not provide an unequivocal answer to the latter question. However, the overall picture emerging from the sociolegal literature is that law is generally more likely to bring about changes in external behaviour and that it can influence attitudes and beliefs only indirectly, by altering the situations in which attitudes and opinions are formed.

Keywords: law and society, social change, discrimination, non-discrimination law, positive action

1 Introduction

Can law change ‘hearts and minds’, and can it change attitudes and beliefs as well as external behaviour? This question, often in tandem with the question of whether law should attempt to do so, has preoccupied sociolegal scholars for ages, and it is also a central question in this article. The article examines, first, how sociolegal scholars have theorised and written about the strengths and limitations of law in general in creating (different types of) social change. Second, it focuses on the ability of non-discrimination law to create social change. What have been the findings of empirical research on the effects of (different types of) non-discrimination law? When and under what circumstances and conditions can it create (what types of) social change?

The article does not aim to provide a complete or systematic overview of the literature. The first part is based predominantly on a survey of introductions to the disci-

pline of law and society, nearly all of which devote a chapter to the relationship between legal change and social change or the use of law as an instrument of social change. Laws and legal rules aimed at eliminating discrimination or promoting equality are typical examples of law being used as an instrument of social change. The second part of the article is based on a survey of empirical sociolegal studies of the effects of non-discrimination law. I searched not only for studies evaluating (from a top-down perspective) the effectiveness of, or compliance with, specific laws or legal rules or rulings, but also, or rather, for studies shedding light (from a bottom-up perspective) on the social working of non-discrimination law, i.e. its effects on the shop floor of social life, where it is just one factor among others.

A shortcoming of the literature I reviewed for the first part of the article is that it tends to use the concept of social change in a rather loose manner. An explicit definition is often not provided.¹ For the purpose of this article, the discussion of the concept by Joel and Mary Grossman, although somewhat older, is still useful. The Grossmans distinguished three types or levels of social change. The first level or type would consist of changes in patterns of individual behaviour. The second level would involve changes in group norms and/or changes in the relations of individuals or groups to each other or to the political, economic or social system. The third type or level would consist of changes in a society’s basic values or mores; the Grossmans note that this is ‘the most difficult to describe and undoubtedly the most difficult to achieve’.² The three levels are, of course, inter-related and should be viewed on a continuum rather than as discrete types. For the question of whether law can change ‘hearts and minds’, the second and third types of social change are most relevant. They are also most difficult to identify, and it is even more difficult to identify the role played by law in these processes.

Law’s impact on social change may be direct or indirect. A direct impact occurs when law itself affects behaviour. Changes in group norms and group relations and changes in basic attitudes and beliefs are typically an indirect or ‘ripple’ effect of legal change.³ The impact of legal change on these types of social change can hardly

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1. Cf. R. Cotterrell, *The Sociology of Law: An Introduction* (1993), at 47.
2. J.B. Grossman and M.H. Grossman, ‘Introduction’, in J.B. Grossman and M.H. Grossman (eds.), *Law and Change in Modern America* (1971) 1, at 6.
3. L. Friedman, *Impact. How Law Affects Behavior* (2016), at 48; S.E. Barban, *Law and Society* (2018), at 151.

be measured, as law is just one factor among others that play a role in such processes. Moreover, legal change is often itself an effect of social change. There is often a reciprocal relationship between legal and social change in the sense that social forces or movements and social change help to put in place new legislation that, in turn, spurs further change.

As a final preliminary remark, although this article focuses on the role that law can play in creating social change and promoting equality, it should be recognised that throughout history there have been more examples of law being used to maintain the status quo. Law, as many introductions to the sociology of law point out, has a tendency towards conservatism:

Once a scheme of rights and duties has been created by a legal system, continuous revisions and disruptions of the system are generally avoided in the interests of predictability and continuity.⁴

Moreover, certain kinds of discrimination are inherent in law itself: 'The law in its majestic equality ... forbids the rich as well as the poor from sleeping under bridges, begging in the streets, and stealing bread.'⁵

2 Theorising on the Relation between Law and Social Change

This section examines how sociolegal scholars have theorised about law's ability to bring about social change. Over the last two centuries, views on the relationship between law and social change have changed. The prevailing view has long been that law merely reflects the sense of justice and the current mores and opinions of the population; rather than an independent force acting on society, law was seen as an aspect of society. This started to change in the late eighteenth century, a period of rapid social change in Europe. Jeremy Bentham (1748-1832), English philosopher and jurist, and one of the founders of utilitarianism, advocated that legal reforms should respond quickly to new social needs. However, he also held that 'legislation has the same centre with morals, but not the same circumference',⁶ meaning that law and morality have a common goal, namely to regulate people's behaviour in such a way as to produce the greatest possible sum of good, but differ in their extent:

[T]here are many acts useful to the community which legislation ought not to command. There are also

many injurious actions which it ought not to forbid, although morality does so.⁷

One reason for this difference is, according to Bentham, that legal duties and offences must be defined in a very clear and precise manner, which is simply not possible for many moral duties or vices.⁸

In the early twentieth century, the prevailing view on the relationship between law and society still held that legal change could not have an impact unless it conformed to prevailing trends in social mores and norms. In his classic work *Folkways*, American sociologist William Graham Sumner (1840-1910) posited that 'legislation cannot make mores' (often misquoted as 'stateways cannot change folkways').⁹ Sumner wrote, among other topics, about race relations in southern US society, pointing out that after the civil war, the whites had not been 'converted from the old mores', and that attempts to control the new order by legislation had been vain.¹⁰ Sumner did not claim that it is absolutely impossible to induce a change in mores or customs, but he emphasised that legislation alone would not restrain people from doing what they have always believed to be right or appropriate or make them do something they have always thought wrong or unwise. Lawmakers should therefore estimate the probable support for proposed changes and the amount of enforcement power probably required.¹¹

In the course of the twentieth century, law, and especially legislation, came to be seen as separate from the society it regulates, and it came to be used as an instrument for social engineering in ways these earlier writers could not have imagined.¹² This development is mirrored in twentieth-century sociolegal writing. Arguments against the possibility and desirability of using law to induce social change were, as Yehezkel Dror put it, 'overruled by the facts of reality', and the growing use of law as an instrument of social change came to be seen as a characteristic of modern society that required intensive study.¹³ Many twentieth-century sociolegal scholars reflected on the advantages and limitations of law as an instrument of social change. Most of them, however, avoided making generalised statements about the role of law in social change.¹⁴

Section 2.1 provides an overview of what contemporary law and society scholars regard as strengths and limitations of law as an instrument of social change. Section

4. S. Vago, *Law and Society* (2012), at 21-2.

5. D. Black, *The Behavior of Law* (1989), at 72.

6. J. Bentham, *An Introduction to the Principles of Morals and Legislation* (1907) (first printed 1780), at 60.

7. *Ibid.*, at 60.

8. *Ibid.*, at 60-1.

9. W.G. Sumner, *Folkways: A Study of the Sociological Importance of Usages, Manners, Customs, Mores, and Morals* (1960) (first printed 1907), at 81.

10. *Ibid.*, at 81.

11. H.V. Ball, G.E. Simpson & K. Ikeda, 'Law and Social Change: Sumner Reconsidered', 67 *American Journal of Sociology* 532, at 538 (1962).

12. Cf. Cotterrell, above n. 1, at 44-6; S. Vago and S.E. Barkan, *Law and Society* (2018), at 208-10.

13. Y. Dror, 'Law and Social Change', 33 *Tulane Law Review* 787, at 796 (1958-1959).

14. Cf. J. Morison, 'How to Change Things with Rules', in S. Livingstone and J. Morison (eds.), *Law, Society and Change* (1990) 5.

2.2 takes a brief look at attempts to specify factors and conditions maximising the impact of legal change. Section 2.3 examines John Griffiths' attempt to develop a systematic sociological theory of the social impact of law.

2.1 Strengths and Limitations of Law as an Instrument of Social Change

Most sociolegal scholars would agree that there are a few important advantages of law in creating social change.¹⁵ The first is the binding force of law. Particularly in parliamentary democracies, people tend to consider law as something that should be obeyed. An important factor is the belief in legitimate authority, or, as Lawrence Friedman put it:

People obey the law, 'because it is the law.' ... If they were forced to explain why, they might refer to some concept of democracy, or the rule of law, or some other popular theory sustaining the political system.¹⁶

Steven Vago regarded the socialisation process as an important factor in the binding force of law: 'People, in general, are brought up to obey the law. The legal way of life becomes the habitual way of life.' Moreover, as this habitual way of life 'requires less personal effort than any other and caters well to a sense of security ... it also pays to follow the law'.¹⁷

Another advantage of law as an instrument of social change is that 'it is backed by mechanisms of enforcement and sanctions'.¹⁸ Alternatively, as Friedman put it,

Law has its hidden persuaders – its moral basis, its legitimacy – but in the last analysis it has force, too, to back it up.... This is the fist inside its velvet glove.¹⁹

Some people may obey the law merely to avoid punishment. However, most sociolegal scholars would probably agree with Tom Tyler's assessment that people, in general, obey the law not primarily because they believe they will be punished for disobedience but because 'they believe it is proper to do so'.²⁰

Other scholars pointed to law's ability to shape bargaining and dispute handling processes outside the courts, in everyday social life. Parties in a dispute 'do not bargain in a vacuum They bargain in the shadow of the law'. The outcome that the law will impose if no agreement is reached casts its shadow over private negotia-

tions; it gives the parties in a dispute certain 'bargaining endowments'.²¹

Because of these strengths, and particularly because of law's legitimate authority, social movements may see litigation as an effective tool in helping advance their aims. Steven Barkan emphasised the indirect benefits of legal mobilisation:

[Even if it] does not produce significant tangible results in and of itself, it may still give aggrieved groups a sense of legal entitlement by suggesting that their claims and grievances are in fact their legal rights. This sense may in turn give them new hope for social and political change and spur members of these groups to work for such change.²²

Law thus offers important advantages as an instrument of social change. However, the lists of limitations that can be found in introductions to the field of sociology of law are much longer.

Some limitations are inherent in the law itself. First, as was already argued by Sumner, legislation cannot enforce itself. In an article entitled *The Limits of Effective Legal Action*, Roscoe Pound pointed out that a statutory rule (unlike common-law rules) is made a priori and is not necessarily a 'living rule' when it is laid down. Statutory rules cannot enforce themselves:

Human beings must execute them, and there must be some motive setting the individual in motion to do this above and beyond the abstract content of the rule and its conformity to an ideal justice or an ideal of social interest.²³

Pound concluded that lawmakers must therefore study how to ensure that people will have a motive for mobilising the law 'in the face of the opposing interests of others in infringing it'.²⁴ A second limitation, which was already mentioned by Bentham, is that if laws are to be applied and enforced by courts or other legal actors, a high degree of clarity must be sought. Pound therefore held that law, unlike morals, can only be used to control external, observable behaviour. He gave as an example that law cannot protect against purely subjective mental suffering because of 'obvious difficulties of proof'.²⁵ Other limitations originate from a variety of forces that directly or indirectly may reduce law's ability to create change. Steven Vago distinguished between social, psy-

15. See, e.g., Vago, above n. 4, at 319 ff.

16. L. Friedman, *The Legal System: A Social Science Perspective* (1975), at 114.

17. Vago, above n. 4, at 323.

18. *Ibid.*, at 320.

19. L.M. Friedman and G.M. Hayden, *American Law: An Introduction* (2017), at 263-4.

20. T. Tyler, *Why People Obey the Law* (1990); T. Tyler, 'Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities', 25 *Law & Social Inquiry* 983, at 984 (2000).

21. R.H. Mnookin and L. Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce', 88 *Yale Law Journal* 950, at 968 (1979). It should not be assumed, however, that disputes are always transformed into the language of the law; in many disputes, people may choose between several different types of norms. See H. Jacob, 'The Elusive Shadow of the Law', 26 *Law & Society Review* 565 (1992).

22. Barkan, above n. 3, at 160.

23. R. Pound, 'The Limits of Effective Legal Action', 3 *American Bar Association Journal* 55, at 69 (1917); see also Cotterrell, above n. 1, at 51 ff.; M. Berger, *Equality by Statute: The Revolution in Civil Rights* (1968), at 219.

24. Pound, *ibid.*, at 70.

25. *Ibid.*, at 66.

chological, cultural and economic factors. Social factors include vested interests:

The acceptance of almost any change through law will adversely affect the status of some individuals or groups in society, and to the degree that those whose status is threatened consciously recognize the danger, they will oppose the change.²⁶

Habit is a psychological factor that may act as a barrier to change: 'Once a particular form of behavior becomes routinized and habitual, it will resist change.'²⁷ Cultural factors include ethnocentrism: '[F]eelings of superiority by whites have hindered integration efforts in housing, employment and education among many areas in the context of race relations.'²⁸ Last but not least, economic factors may form a barrier to changes that might otherwise be readily adopted. Vago gives as an example that the administrative costs associated with affirmative action programmes in the United States were resisted in many academic circles and contributed to demands for modification of a variety of laws affecting higher education.²⁹

Law's ability to create social change also depends on the type of change sought. Yehezkel Dror distinguished between 'emotionally neutral' and 'expressive and evaluative' areas of activity, arguing that the latter are far more resistant to changes imposed by law. Dror referred to studies of the reception of western European law in Turkey, which showed that

aspects of social action of a mainly instrumental character, such as commercial activities, were significantly influenced by new law, while those aspects of social action involving expressive activities and basic beliefs and institutions, such as family life and marriage habits, were very little changed despite explicit laws trying to shape them.³⁰

Other authors likewise argued that law is 'generally more likely to bring about changes in what may be called external behavior'.³¹ According to some, the use of law to change deep-rooted attitudes and beliefs by imposing legal duties that require such changes is fraught with problems. Legal sanctions are useless and may even have perverse effects.³² Allott refers to the notion of 'superficial conformism'. People who feel that their opinions are contradictory to the 'official and general line of thought' will keep these opinions to themselves and conform in their outward response to what they think is the permitted line.³³

A few authors are more optimistic about law's ability to change basic attitudes and beliefs.³⁴ According to Vago, 'changes in external behavior are, after a while, usually followed by changes in values, morals, and attitudes'.³⁵ Friedman refers to experimental studies that showed that people tend to change their minds about moral propositions when they find out what 'the law' has to say.³⁶ Thus, it would seem that the law's 'legitimate authority' can wield influence over attitudes as well as behaviour. Of course, this presupposes that people are aware of what the law says – which in practice is often not the case.³⁷

Even optimistic authors assume that law can influence attitudes and beliefs only indirectly. According to Friedman, the impact of legal change is 'mediated and influenced by some sort of learning process – a complicated process – that takes place within society'.³⁸ William M. Evan assumed that legal change may produce changes in attitudes and beliefs through two interrelated processes: a process of institutionalisation (the establishment of a norm with provisions for its enforcement) and a process of internalisation (the incorporation of the value(s) implicit in the law). 'Law ... can affect behavior directly only through the process of institutionalization; if, however, the institutionalization process is successful, it, in turn, facilitates the internalization of attitudes or beliefs.'³⁹

2.2 Attempts at Specifying Conditions That Maximise the Impact of New Laws

Various scholars have tried to specify the conditions under which a new law is likely to effectively influence behaviour and, perhaps, attitudes. Evan, writing with the US experience with law and racial desegregation in mind, hypothesised that seven conditions are necessary for law 'to perform an educational function' – conditions that, he stressed, are not always possible to achieve:

1. The source of the new law should be perceived as authoritative.
2. The rationale for the new law should clarify its continuity and compatibility with existing institutionalised values.
3. Publicity surrounding the new law should emphasise that similar laws have proven helpful in other countries or settings.
4. The enforcement of the law must be aimed at making the change in a relatively short time, so as to minimise the chances of the growth of organised or unorganised resistance.

26. Vago, above n. 4, at 331.

27. *Ibid.*, at 333.

28. *Ibid.*, at 335.

29. *Ibid.*, at 336.

30. Dror, above n. 13, at 800.

31. Vago, above n. 4, at 329.

32. See, e.g., Cotterrell, above n. 1, at 54; M. Wood, 'EC 1992: Free Market Framework or Grand Design', in S. Livingstone and J. Morison (eds.), *Law, Society and Change* (1990) 185.

33. A.N. Allott, *The Limits of Law* (1980), at 231.

34. For a more extensive overview, see A. Kok, 'Is Law Able to Transform Society', 127 *South African Law Journal* 59, at 71 ff. (2010).

35. Vago, above n. 4, at 329.

36. Friedman (1975), above n. 16, at 115.

37. Friedman (2016), above n. 3, at 14.

38. *Ibid.*, at 72.

39. W.M. Evan, 'Law as an Instrument of Social Change', in A.W. Gouldner and S.M. Miller (eds.), *Applied Sociology: Opportunities and Problems* (1965) 285, at 286.

Instrumentalist approaches	Social working approach
Atomistic individualism: Society is seen as made up of individuals who behave like rational actors, bound together by the state organisation and not by anything else.	People are fundamentally social beings: Legal rules are addressed to social beings acting in a specific social context, not to asocial rational actors seeking to maximise their preferences.
Perfect legal knowledge: The social space between the state and the individual is conceived of as a normative vacuum through which the commands of the legislature pass unmediated and untransformed by intervening social rules and structures on their way to the individual.	Legal knowledge is socially contingent: The message about the law that ultimately comes to an actor's attention is seldom the same as what the legislature intended. The transmission process is a transformation process in which the message gets simplified and otherwise distorted and enriched with all sorts of additional information.
Legal monism: The state is assumed to have an effective monopoly over the regulation of interaction that (except in some extremely deviant situations such as the mafia) excludes other sources of regulation as important influences on behaviour.	Legal pluralism: The state is but one of many sources of regulation, and for individuals engaged in social interaction, the behavioural expectations of the state are frequently less well known, less clear and less pressing than those of other sources of regulation that are closer to the scene.
Legislative autonomy: The legislature is treated as external to and independent of the social context in which legal rules are effective.	Inseparability of legislation from social life: Legislation is an integral part of processes of ordering, conservation and change in society; it is not a distinct and autonomous force acting on those processes.

5. The enforcement agents must themselves be committed to the behaviour required by the law, even if not to the values implicit in it.
6. Positive as well as negative sanctions should be used to help ensure compliance.
7. Effective protection and resources should be provided for people who would suffer from evasion or violation of the law by other people.⁴⁰

Similar listings, mostly based on common sense and inductive reasoning on the basis of a few specific cases, were drawn up by other scholars.⁴¹ Although a wealth of empirical studies on law's impact on behaviour have been undertaken in the half-century since Evan wrote his still often-cited essay, a recent review concludes that it is hardly possible to draw general conclusions about the conditions under which new laws are most likely to have an impact: 'Much more research is needed. More replications. More attempts at pulling the strands together. Otherwise, everything depends. On time. On place. On situation.'⁴² Friedman's synthesis study nevertheless shows that the potential for legal impact is greater when four factors coincide: ample publicity, a proper mix of rewards and punishments, peer pressure supporting obedience to the new law, the new law appealing to the sense of conscience and prevailing moral views of the public at which it is aimed.

40. *Ibid.*, at 285.

41. See J.A. Kok, *A Socio-Legal Analysis of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2008); Kok (2010), above n. 34. Kok made a detailed analysis of four of these requirements of effective laws in his study of the potential effectiveness of a South African non-discrimination law.

42. Friedman (2016), above n. 3, at 249.

2.3 Griffiths' Theory of the Social Working of Law

An attempt to develop a systematic sociological theory of the social impact of law was made by John Griffiths. Griffiths was motivated by puzzlement:

It is hard to understand how anyone could ever expect a legislated rule to have any effect on behavior. After all, as it leaves the legislative body a law seems to be nothing more than so many ink marks on paper.⁴³

Griffiths called his theory 'the social working approach' and set it against traditional 'instrumentalist' approaches to legislation. According to Griffiths, lawmakers and authors of impact studies tend to make four untenable assumptions about society and social life and the place therein of legal rules.⁴⁴ Griffiths' theory of the social working of legal rules consists of four propositions that are simply the opposite of the basic assumptions of the instrumentalist paradigm:

Griffiths' depiction of the instrumentalist paradigm in legal impact studies is slightly caricatural. Moreover, there are many examples of sociolegal studies that do take a sociological approach. However, there have not been many attempts at developing a systematic theory of the relationship between legal and social change, and an important merit of Griffiths' social working approach is that it forces researchers to look 'bottom-up', not 'top-down'. It is not the intention of the lawmaker, but the

43. J. Griffiths, 'The Social Working of Legal Rules', 48 *Journal of Legal Pluralism* 1, at 4 (2003).

44. *Ibid.*, at 16.

'shop floor of social life', where law is only one factor amidst other factors, that should be at centre stage.

This 'shop floor of social life' can be described and analysed as a 'semi-autonomous social field' (SASF). Sally Falk Moore developed this concept in a classic article on the relationship between law and social change.⁴⁵ Every society, Moore argued, consists of overlapping SASFs; every individual belongs to various SASFs at any given time. An SASF can generate rules and has the means to induce or coerce compliance internally, but it is also vulnerable to rules and decisions emanating from the state and other SASFs. Examples of SASFs are families, workplaces, churches or branches of industry. According to Moore, 'the various processes that make internally generated rules effective are often also the immediate forces that dictate the mode of compliance or non-compliance to state-made legal rules'.⁴⁶ Studying the operation of SASFs in which new legal rules have to unfold their effects would thus enable researchers to gain a better understanding of how legal change is really effected. Griffiths' approach was applied in several studies of the social working of non-discrimination law, which will be discussed next.⁴⁷

3 Empirical Studies on the Social Impact of Non-discrimination Law

This section turns to the findings of empirical research on the social impact of non-discrimination law. What conclusions can be drawn from this literature about the effects (or lack thereof) of non-discrimination law and the factors that explain these effects?

Non-discrimination law comes in many forms and can be used to promote equality and combat discrimination in different (direct or indirect) ways. Legislation and legal rules can be used to prohibit discrimination and provide remedies for (individual) victims; to oblige or encourage employers or other actors to take affirmative action; or to open up institutions (e.g. marriage) for groups that used to be barred from these institutions. Moreover, non-discrimination law consists not only of legislation but also of case law. In the United States, in particular, social movements have used litigation to pursue social change, and court decisions have played an important role in bringing about policies and legislation aimed at reducing racial and other discrimination.

This section discusses findings from studies on each of these types of non-discrimination law. Section 3.1 focuses on legislation based on an 'individual rights model'. Section 3.2 focuses on affirmative action law. Both types of non-discrimination law have been the subject of evaluation studies. However, rather than effectiveness or compliance evaluations, I selected studies that shed light on the social working of non-discrimination law, i.e. its effects on the shop floor of social life, where it is just one factor of many that influence behaviour. The next three subsections contain examples of other types of non-discrimination law. Section 3.3 examines the role of civil society groups in making non-discrimination law a reality on the ground. Section 3.4 examines how rules and processes within social fields may resist or support state-made non-discrimination rules. Section 3.5 discusses the findings of studies that focused specifically on law's ability to eliminate or reduce prejudice.

3.1 Legislation Based on an 'Individual Rights Strategy'

Many non-discrimination laws are based on what has been called an 'individual rights strategy'⁴⁸ or an 'individual justice model'.⁴⁹ This type of legislation gives individuals who belong to disadvantaged groups the right to equal treatment. To uphold this right, an individual has to take action. He or she can ask the offending party to comply with the law, and, should this claim be unsuccessful, file a complaint with a specialised agency or bring the case to court. The enforcement thus depends primarily on the action of individual victims of discrimination.

Various empirical studies have shown the limitations of this type of legislation. A first limitation is that claims and complaints tend to be limited to overt and direct forms of discrimination. For example, in the Netherlands, in the early years of the gender equality legislation, many complaints concerned job advertisements stating a preference for, or excluding, male or female applicants. One will hardly find such advertisements any more today. Legislation prohibiting discrimination may thus be effective against overt forms of discrimination. However, other (more covert, indirect or systemic) forms of discrimination, if unlawful at all, are practically impossible to recognise for individual victims.

Other limitations arise because victims who do recognise that they have been or are being discriminated, often prefer the options of 'lumping it', 'avoidance' or 'exit', rather than confront the offending party and invoke the protective measures of law. In a classic study, based on in-depth interviews with women (black, Hispanic and white) and men (black and American Indian) in the

45. S. Falk Moore, 'Law and Social Change. The Semi-Autonomous Social Field as an Appropriate Subject of Study', 7 *Law and Society Review* 719 (1973).

46. *Ibid.*, at 721.

47. J. Griffiths, 'The Social Working of Anti-Discrimination Law', in T. Loeenen and P. Rodriguez (eds.), *Non-Discrimination Law: Comparative Perspectives* (1999) 313; T. Havinga, 'The Effects and Limits of Anti-Discrimination Law in The Netherlands', 30 *International Journal of the Sociology of Law* 75 (2002).

48. S. Macaulay, 'Lawyers and Consumer Protection Laws', 14 *Law and Society Review* 115 (1979); Griffiths (1999), *ibid.*; Havinga, *Ibid.*

49. C. McCrudden, 'International and European Norms Regarding National Legal Remedies for Racial Inequality', in S. Fredman (ed.), *Discrimination and Human Rights: The Case of Racism* (2001) 251. Other models distinguished by McCrudden are the 'group justice model' and 'equality as participation'.

United States who had experienced discrimination, Kristin Bumiller highlighted three factors that make victims of discrimination refrain from taking action and mobilising the law:

- The power disparity between the parties involved (for example, between an employee and her employer).
- The refusal to consider oneself a victim. Discrimination is seen as inevitable in the lives of disadvantaged groups; they develop an ‘ethic of survival’.
- Victims’ perception of the law: law is on their side (forbidding discrimination), but is it able to really help them, or will legal intervention worsen the situation?⁵⁰

The same or similar barriers have been found in other studies.⁵¹

Bumiller’s study built on a large survey, in which thousands of randomly selected respondents were asked what grievances they had experienced in the past three years and how they had dealt with these grievances.⁵² The researchers distinguished five stages in the development of a dispute from grievance to court filing: 1) grievance; 2) claim (the aggrieved party confronts the offending party and asks for redress); 3) dispute (the offending party rejects the claim); 4) the aggrieved party contacts a lawyer; 5) court filing. Only a small fraction of all grievances in their study reached the last stage. However, the pattern for discrimination grievances (one in seven respondents reported grievances involving racial, sexual, age, or other discrimination in employment, education or housing) clearly differed from the general pattern: grievances were less likely to lead to claims; claims were more likely to be rejected; and disputes were less likely to lead to contacts with lawyers and court filings. ‘The impression is one of perceived rights which are rarely fully asserted. When they are, they are strongly resisted and pursued without much assistance from lawyers or courts.’⁵³ Findings such as these illustrate the limitations of an individual rights strategy in legislating against discrimination.

Griffiths’ social working theory was applied in a study of the effects and limits of the Dutch 1994 Equal Treatment Act, which prohibited discrimination on grounds of religion, belief, political opinion, race, sex, nationality, heterosexual or homosexual orientation and civil status in the areas of employment and goods and services

provision. Tetty Havinga examined five factors or conditions that might play a role in the social working of legislation based on an individual justice model:

- Whether a specialised agency has been set up to investigate complaints, what (other) competences it has and how it uses these competences. The study found that the Equal Treatment Commission at the time took a reactive rather than a proactive approach, investigating complaints and handing down rulings but not using its competences to initiate investigations or to enforce compliance with its rulings in court. This was due to resource limitations, but partly also to the commission’s preference for giving priority to its judicial tasks; at any rate it meant that the mobilisation of the law depended largely on members of the protected groups and civil society organisations.
- Whether knowledge about the legal rules is communicated to potential offenders and potential victims. The study showed that five years after its entry into force, most actors at ‘the shop floor of social life’ had only a vague idea about the contents of the Equal Treatment Act.
- Whether there are civil society organisations that inform, activate and support members of the protected groups in claiming their right to equal treatment. The study showed that especially in cases concerning racial discrimination, specialised (non-discrimination) NGOs played an important role.
- Whether expert legal assistance is available for victims of discrimination. The study found that in cases concerning racial discrimination, legal assistance was mostly provided by the aforementioned specialised NGOs. Possible explanations could be the lack of competent lawyers, the relatively low monetary stakes and the expectations of victims of racial discrimination.
- Whether the social fields in which the legal norms are supposed to work tend to support or oppose the legal norms. The study found that there was more support (at least ideologically) within public sector organisations as compared with private firms, and within larger as compared with smaller firms.⁵⁴

3.2 Affirmative Action Legislation

Griffiths hypothesised that ‘more is often to be expected from regulatory approaches that do not depend on the creation of individual rights that require mobilization and enforcement on the shop floor’.⁵⁵ Equal employment opportunity (or employment equity) laws are based on a ‘non-individual rights’ approach. This type of legislation obliges employers to engage in proactive employment practices to improve the employment opportunities of members of under-represented groups (e.g. women, racial minorities, persons with disabilities). Particularly in the United States, affirmative action laws

50. K. Bumiller, ‘Victims in the Shadow of the Law: A Critique of the Model of Legal Protection’, 12 *Signs* 421 (1987).

51. E.g., B. Quinn, ‘The Paradox of Complaining: Law, Humor, and Harassment in the Everyday Work World’, 25 *Law & Social Inquiry* 1151 (2000); J. Verstraete, D. Vermeir, D. De Decker & B. Hubeau, *Een Vlaams antidiscriminatiebeleid op de private huurmarkt. De mogelijke rol van zelfregulering* (2017); see also Kok (2008), above n. 41, at 12-13: ‘Many South Africans have internalised discrimination and do not perceive discriminatory incidents perpetrated against them as discrimination, but as “the way things are”.... The majority of South Africans lack confidence in the courts and the justice system and have inadequate access to courts.’

52. R.E. Miller and A. Sarat, ‘Grievances, Claims, and Disputes: Assessing the Adversary Culture’, 15 *Law & Society Review* 525 (1980).

53. *Ibid.*, at 545.

54. Havinga (2002), above n. 47.

55. Griffiths (1999), above n. 47, at 10.

have also been used to fight discrimination in the areas of education and housing.

An obvious strength of this strategy is that its effectiveness does not have to depend on actions of individual members of disadvantaged groups. It may thus be better suited to combating indirect and systemic forms of discrimination. However, a potential risk is that (some) members of majority groups perceive ‘affirmative’ or ‘positive action’ as a threat to their position. They may thus be provoked to resistance:

Few workplace policies are as controversial or divisive as affirmative action programs. They attempt to redress or reduce historical forms of discrimination based on demographic distinctions among employees, but they simultaneously mandate social categorizations on the basis of those same distinctions.⁵⁶

Critics claim that affirmative action laws and policies stigmatise minority students or employees as being less than fully qualified, when in fact they may be well qualified. Another, related potential weakness is that affirmative action relies and depends on the collection and processing of data regarding membership of the designated groups. Employment equity laws require employers to collect, maintain and report information about how racial minorities, women and/or persons with disabilities are represented across occupational categories and salary levels within their workforce. They are required to identify areas of under-representation and to set goals for improvement by comparing the information about their own workforce to data on the availability of racial minorities, women and/or people with disabilities in relevant labour markets. The effectiveness of affirmative action thus depends on the quality and accuracy of both types of data.

Various studies have evaluated the effects of employment equity laws in Canada and the Netherlands, among other countries. Studies of the impact of Canada’s federal employment equity legislation found that it did make a difference for the representation rates of the designated groups, though more so for those of women and visible minorities than for those of aboriginal people and persons with disabilities. Moreover, progress differed across sectors and occupations.⁵⁷ Carol Agocs examined two contrasting explanations for the limited results. The first was that the legislation itself was flawed. An essential weakness would be its reliance on data collected through self-identification. Increases in the representation of, in particular, aboriginal people and persons with disabilities might be partly attributable to changes in the rates of self-identification. However, Agocs found it more likely that the limited results stem-

med ‘from a failure of employers to implement the Act, and of government to enforce it and hold employers accountable for lack of compliance’.⁵⁸ This gap between policy and practice might in turn be explained by the lack of political will to provide adequate provisions for monitoring and enforcing compliance. For example, employers covered by the Employment Equity Act were subject to compliance audits by the Canadian Human Rights Commission, but the Act forbade the commission to impose quotas on employers even when they were not in compliance. Enforcement by the commission was also hampered by resource limitations. Employers with more than 100 employees were required to implement employment equity as a condition for bidding on contracts with the federal government, but the review process appeared to be extremely lenient. In addition, Agocs pointed to ongoing structural changes in the labour market and the nature of work:

Employment equity policy assumes long-term jobs with somewhat specialized job descriptions, not the ‘flexible’ and contingent jobs favored by many employers today, or the very small businesses or self-employment arrangements that are becoming common, particularly among women.⁵⁹

Trends such as these might worsen the position of the designated groups in the labour market, and the current employment equity legislation was not likely to address them effectively.

The Netherlands had employment equity legislation in place in the years 1994–2004. The objective of the Dutch Employment Equity Act (*Wet Bevordering Evenredige Arbeidsdeelname Allochtonen*) was to improve the position of ethnic minorities in the labour market. The Dutch law was modelled on the Canadian legislation. However, it did not rely on data based on self-identification but on ‘objective’ data, i.e. information on the country of birth of one’s parents. A study of the drafting stage and the first five years of the legislation found that there was a lot of resistance against the collection and registration of these data, most fiercely from employers (because of the administrative burden) but also from employees and others (who had principal objections to the registration of data on people’s race or ethnicity).⁶⁰ Moreover, the study found that the Dutch law’s approach was weakened by political compromises even more than was the case with its Canadian counterpart. The drafters of the law did not attach meaningful sanctions to non-compliance with the requirements imposed by the law. Publicity was expected to be an effective measure to achieve compliance. Employers were obliged to deposit annual reports with the Cham-

56. D.A. Harrison, D.A., Kravitz, D.M. Mayer, L.M. Leslie & D. Lev-Arey, ‘Understanding Attitudes Toward Affirmative Action Programs in Employment: Summary and Meta-Analysis of 35 Years of Research’, 91 *Journal of Applied Psychology* 1013, at 2013 (2006).

57. C. Agocs, ‘Canada’s Employment Equity Legislation and Policy, 1987–2000: The Gap between Policy and Practice’, 23 *International Journal of Manpower* 256 (2006); C. Agocs (ed.), *Employment Equity in Canada. The Legacy of the Abella Report* (2014).

58. Agocs (2006), *ibid.*, at 270.

59. *Ibid.*, at 274.

60. P. Jonkers, *Diskwalificatie van wetgeving. De totstandkoming en uitvoering van de Wet Bevordering Evenredige Arbeidsdeelname Allochtonen (Wbeaa)* (2003); A.P. Jonkers and P.E. Minderhoud, ‘The Dutch Employment Equity Act: An Analysis from the “Poldermodel” Perspective’, in F. van Loon and K. van Aeken (eds.), *60 maal recht en 1 maal wijn. Liber Amicorum prof. dr. Jean van Houtte* (1999) 530.

bers of Commerce, and third parties had a right of access to these reports. However, many employers did not comply and got away without any repercussions.⁶¹ The representation rates of the designated groups nevertheless improved during the years the legislation was in force. The favourable economic situation probably helped a lot in achieving these results.

Studies on the implementation of affirmative action legislation in the United States have likewise shown the importance of enforcement of requirements. Executive Order 11246 requires firms that do business with the federal government to take affirmative action to ensure that job applicants are employed and that employees are treated during employment without regard to their race, colour, religion, sex or national origin. A study of its effects concluded that during the initial years, when this affirmative action requirement was vigorously enforced, the representation rates of black men and women increased significantly faster in contractor than in non-contractor firms. However, this progress stopped in the 1980s, when enforcement budgets and staff were reduced.⁶² Another American study, on affirmative action programmes for minority students, found evidence that affirmative action programmes can stigmatise minority students. However, the researchers concluded that this finding 'tells us less about the inherent weakness of affirmative action than about the poor fashion in which programs are carried out'.⁶³ Referring to social psychological studies, they suggested that the power of negative stereotypes can be defused through programmes of 'wise intervention'. Such programmes should, among other elements, provide 'an emphasis on challenge rather than remediation in learning, conveying to students their potential for growth rather than their accumulated deficiencies', and 'affirmation of minority students' belonging on the campus and their routine acceptance as members of the scholarly community'.⁶⁴ The picture emerging from these and other studies on the impact of affirmative action laws and policies is mixed. However, a clear conclusion is that their effects and effectiveness depend to a large extent on how they are implemented and enforced and, moreover, on how the purposes behind the requirements are communicated to all actors involved.

3.3 Mobilisation of the Law (and the Protected Groups) by Civil Society Groups

The importance of the involvement of civil society in making non-discrimination law a reality on the ground has been underlined most clearly in studies of the American civil rights movement. Charles Epp argued that 'rights are not gifts'; they 'originate in pressure

from below in civil society, not leadership from above'.⁶⁵ Epp attributed the growth in civil rights cases decided by the US Supreme Court to the emergence of groups such as the National Association for the Advancement of Colored People and the American Civil Liberties Union:

Only certain kinds of pressure from below, particularly organized support for rights litigation, are likely to support sustained judicial attention to civil liberties and civil rights; and support from judicial elites is hardly irrelevant.⁶⁶

In a study of the impact of the US Supreme Court's decision in *Brown v. Board of Education*, which outlawed segregation in public schools, Gerald N. Rosenberg also emphasised the pivotal role of the civil rights movement. According to Rosenberg, even if the court had not acted as it did, 'the existence and strength of pro-civil-rights forces at least suggests that change would have occurred, albeit at a pace unknown'.⁶⁷

The same factor, i.e. the involvement of civil society groups, was found to be of crucial importance in making Swedish non-discrimination legislation work. Reza Banakar compared two Swedish non-discrimination laws: the Equality between Women and Men Act (EWMA) and the Act against Ethnic Discrimination (AED). They were comparable in many respects; in fact, the AED was modelled on the EWMA. However, the AED was much less mobilised and applied than the EWMA. Banakar found that this could not be explained by differences between the two laws or how they were enforced by *ombudsmen*. His explanation was that the two laws

constitute two different forms of legislation, the one emerging from below as a result of an ongoing rights discourse and acting bottom up, the other being imposed from above to introduce a rights discourse and acting top down.⁶⁸

The women's movement was actively involved in both the making of the EWMA and its enforcement once it had entered into force. The AED lacked such a support structure. It was enacted by the Swedish government in response to international pressure to satisfy the legal standards set by various UN and ILO conventions. The groups it aimed to protect were diffuse and barely organised; they were hardly involved in the making of the law and did not have the organisational capacities to mobilise it once it was in force.

61. Jonkers, *ibid.*

62. J.S. Leonard, 'The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment', 4 *Journal of Economic Perspectives* 47 (1990).

63. C.Z. Charles, M.J. Fischer, M.A. Mooney & D.S. Massey, 'Affirmative Action Programs for Minority Students: Right in Theory, Wrong in Practice', 55 *Chronicle of Higher Education* 29 (2009), <https://www.chronicle.com/article/Affirmative-Action-Programs/35122>.

64. Charles et al., *ibid.*

65. C.R. Epp, *The Rights Revolution. Lawyers, Activists, and Supreme Courts in Comparative Perspective* (1998), at 197.

66. Epp, *ibid.*, at 197.

67. G.N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991), at 157.

68. R. Banakar, 'When Do Rights Matter? A Case Study of the Right to Equal Treatment in Sweden', in S. Halliday and P. Schmitt (eds.), *Human Rights Brought Home. Socio-Legal Perspectives on Human Rights in the National Context* (2004) 165, at 184.

The aforementioned study of the Dutch Employment Equity Act came to a similar conclusion. Unlike its Canadian counterpart, the Dutch law was introduced through political pressure from above, not through pressure from below. The drafters of the law expected that organisations of the designated groups would actively mobilise the law once it was in place, but they did not. Trade unions and works councils were also very hesitant to help enforce the law, because they lacked resources and, moreover, did not want to harm their relations with employers.⁶⁹

The role of civil society organisations has also been examined in studies on the implementation and/or mobilisation of European equality law in EU member states. Anna van der Vleuten examined how European gender equality law was implemented in more and less willing member states. Her study shows that unwilling member states can be forced to comply when they are put under pressure ('squeezed' or 'sandwiched') by supranational and domestic actors simultaneously.⁷⁰

Constanza Hermanin sought to explain why, fifteen years after its entry into force, the European Racial Equality Directive was very rarely used to claim racial discrimination at the Court of Justice of the European Union (CJEU). Her analysis of jurisprudence of national courts in three member states showed that the absence of CJEU case law was related to scarce litigation for fighting racial and ethnic discrimination at the national level. This scarcity of domestic litigation was, in turn, related to the limited presence, organisational capacities and keenness and capacity to engage in legal strategies of specialised civil society organisations.⁷¹

These and other studies⁷² illustrate that civil society groups can play a crucial role in making non-discrimination law a reality on the ground. Non-discrimination laws may be enacted without their involvement, but the chances of 'law in the books' becoming 'law in action' are higher when they are involved in the lawmaking process and perceive the law as 'theirs' once it is in force. The mobilisation of non-discrimination rights often depends on whether there are NGOs that can inform, activate and support members of the protected groups. The enforcement of affirmative action requirements sometimes likewise depends on the actions of civil society organisations.

3.4 Support or Resistance within Relevant Social Fields

Non-discrimination law has to unfold its effects at the shop floor of social life, in what may be considered SASFs.⁷³ Social fields have their own, internally generated rules, norms and routines, and the means of inducing or coercing compliance. These internal rules and processes may hamper or promote compliance with rules emanating from the state. State-made non-discrimination rules may be supported and incorporated into the prevailing norms and structures, but they are more likely to be resisted, at least initially.

Studies on the civil rights movement in the United States have shown that the Supreme Court's 1954 decision in *Brown v. Board of Education* met with fierce resistance in the southern United States. Rosenberg's study of the impact of this federal court ruling led him to conclude that 'while there is little evidence that *Brown* helped produce positive change, there is some evidence that it hardened resistance to civil rights among both elites and the white public'.⁷⁴ Resistance to change grew not only in education, but also in other areas. Rosenberg posited that the courts offer only a 'hollow hope' for achieving social change. Victories in court may not prompt much change, as the opposing parties often fiercely resist these changes, and the courts lack effective enforcement powers. According to Rosenberg, '*Brown*'s major positive impact was limited to reinforcing the belief in a legal strategy for change of those already committed to it'.⁷⁵ However, other authors emphasised the importance of this indirect benefit of legal mobilisation. Although *Brown* did not quickly end school segregation, it did give African Americans in the southern United States new hope and helped spur the massive civil rights protests that captured the nation's attention in the following decade.⁷⁶ A study on women's struggles for pay equity yielded a similar conclusion. Michael McCann found that the actual gains fell short of the high hopes created by the movement's legal victories; employers' resistance effectively limited pay equity achievements. But women gained a new sense of their rights as workers and their discrimination as women workers; this encouraged them to become more active in labour unions and to press for reforms in areas beyond pay equity.⁷⁷ Another study showed that although it did not end discrimination, the Americans with Disabilities Act helped to improve the self-image and to enhance the career aspirations of people with disabilities.⁷⁸

Resistance to change may also take a passive or covert form. Studies of the social impact of the Dutch 1994 Equal Treatment Act found that, in general, the norm of equal treatment enjoyed a high degree of support in

69. Jonkers, above n.60, at 123 ff.

70. A. van der Vleuten, 'Pincers and Prestige: Explaining the Implementation of EU Gender Equality Legislation', 3 *Comparative European Politics* 464 (2005).

71. C. Hermanin, 'Whither Judicial Europeanization? The Case of the Race Equality Directive', in B. Witte, J. Mayoral, U. Jaremba, M. Wind & K. Podstawa (eds.), *National Courts and European Law: New Issues, Theories and Methods* (2016) 239.

72. E.g., A. Böcker, 'Racial Discrimination in The Netherlands', 17 *New Community* 603 (1991); N. O'Brien, 'Social Rights and Civil Society: "Giving Force" without "Enforcement"', 34 *Journal of Social Welfare and Family Law* 459 (2012).

73. See Section 2.3 above.

74. Rosenberg, above n. 67, at 155; see also Barkan, above n. 3, at 158.

75. Rosenberg, above n. 67, at 156.

76. Berger, above n. 23; Barkan, above n. 3, at 157 ff.

77. M. McCann, *Rights at Work. Pay Equity Reform and the Politics of Legal Mobilization* (1994); Barkan, above n. 3, at 160.

78. D.M. Engel and F.W. Munger, *Rights of Inclusion: Law and Identity in the Life Stories of Americans with Disabilities* (2003).

the social fields targeted by the law. However, members of these social fields tended to assume that their work practices and routines were in accordance with the law, without really knowing (or asking) what the law required in specific situations. They simply believed that discrimination did not occur in their organisation or industry. The researchers noted, however, that some of the selection criteria and procedures used by, for example, banks or insurance companies, might very well constitute indirect discrimination under the law.⁷⁹ A recent study of discrimination in the rental housing market in the Netherlands showed that these findings were still valid. Landlords and rental brokers were not aware that some of their usual practices might be in breach of the non-discrimination legislation. In their everyday practice, discrimination was not really an issue; they were much more preoccupied with issues such as the risk of tenants growing drugs in their properties.⁸⁰

Various other factors and characteristics of social fields may influence compliance with non-discrimination law. One such factor is whether the 'definition of the situation' of the lawmakers is shared within the relevant social fields. In the case of the Dutch Employment Equity Law, employers did not believe that discrimination was an important factor in the disadvantaged position of ethnic minorities in the labour market. This certainly did not help to gain their support and compliance.⁸¹ Other factors are the anticipated costs of compliance and whether the areas of activity concerned are of a mainly instrumental character or of an expressive and evaluative character.⁸² These factors may explain why large employers were found to be more likely to adapt their employment policies and procedures to comply with the Dutch Equal Treatment Act than small employers.⁸³

However, such modifications may represent cosmetic rather than deep changes. In this regard, it is interesting that in the United States one effect of the 1964 Civil Rights Act was that large employers created internal procedures for resolving discrimination complaints, as an alternative to formal legal channels. A study in which complaints handlers were interviewed showed that, on the one hand, such internal procedures encouraged the resolution of many complaints that would find no remedy under law. In this sense, law could be said to cast a broad shadow over the internal dispute resolution pro-

cess. At the same time, however, the shadow of law was eclipsed by organisational concerns. Law was found to play a very peripheral role in the complaint handlers' orientations toward discrimination complaints. They were focused on resolving complaints to restore smooth employment relations and tended to recast discrimination claims as typical managerial problems. Lauren Edelman concluded that '[w]hile the assimilation of law into the management realm may extend the reach of law, it may also undermine legal rights by deemphasizing and depoliticizing workplace discrimination'.⁸⁴

In a later study, Edelman argued that an important reason for the limited success of equal employment opportunity law is that employers create policies and programmes such as non-discrimination policies, anti-harassment policies, diversity programs 'that promise equal opportunity yet often maintain practices that perpetuate the advantages of whites and males',⁸⁵ and that even courts defer to these symbolic structures:

The widespread acceptance of organizational policies that symbolize equal opportunity ... extends into the legal realm, where courts too often focus on the presence of organizational policies that signify nondiscrimination more than they attend to evidence that minorities and women face systematic disadvantages at work.⁸⁶

These research findings are in line with the basic assumptions of Griffiths' social working approach, in particular the assumption of the socially contingent character of legal knowledge (state-made rules are mediated and transformed by intervening social rules and structures on their way to members of SASFs) and the assumption of legal pluralism (state-made rules often have to compete with the internal rules of social fields, and the latter rules may be clearer and more binding for the members of these social fields).

3.5 Can Non-discrimination Law Change People's Hearts and Minds?

A few studies have focused specifically on the question of whether non-discrimination law can eliminate or reduce prejudice. They tend to assume that it can do so only indirectly.

American studies mostly refer to the example of desegregation (in the army, schools, housing projects) to argue that changes required by law have lessened prejudice by altering the situations in which attitudes are formed or reinforced. As Morroe Berger put it in his study on the role of law in the area of civil rights:

[L]aw does not change attitudes directly, but ... by altering the situations in which attitudes and opinions are formed, law can indirectly reach the more private

79. T. Havinga, 'Aanbieders van goederen en diensten en gelijke-behandelingswetgeving', in I.P. Asscher-Vonk and C.A. Groenendijk (eds.), *Gelijke behandeling: Regels en realiteit. Een juridische en rechtssociologische analyse van de gelijke-behandelingswetgeving* (1999) 371; T. Havinga and C.A. Groenendijk, 'De sociale werking van gelijke-behandelingswetgeving', in I.P. Asscher-Vonk and C.A. Groenendijk (eds.), *Gelijke behandeling: Regels en realiteit. Een juridische en rechtssociologische analyse van de gelijke-behandelingswetgeving* (1999) 495, at 508; Havinga (2002), above n. 47, at 86.

80. A. Böcker, A. Terlouw & E. Özdemir, *Discriminatie bij de verhuur van woningen? Een verkennend onderzoek naar verklaringen en de mogelijke aanpak* (2019).

81. Jonkers, above n. 60.

82. See Section 2.1 above.

83. Havinga (2002), above n. 47.

84. L.B. Edelman, H.S. Erlanger & J. Lande, 'Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace', 27 *Law & Society Review* 497, at 497 (1993).

85. L.B. Edelman, *Working Law: Courts, Corporations, and Symbolic Civil Rights* (2016), at 14.

86. *Ibid.*, at 15.

areas of life it cannot touch directly in a democratic society.⁸⁷

Berger cited Gordon Allport's contact hypothesis, which holds that interpersonal contact can reduce prejudice. It is important to note, however, that Allport himself emphasised that only under certain conditions would interpersonal contact reduce prejudice:

Prejudice ... may be reduced by equal status contact between majority and minority groups in the pursuit of common goals. The effect is greatly enhanced if this contact is sanctioned by institutional supports ..., and provided it is of a sort that leads to the perception of common interests and common humanity between members of the two groups.⁸⁸

These facilitating conditions (equal status, common goals, intergroup cooperation and institutional support) may well be managed in experiments. Experimental research has indeed yielded evidence that externally imposed desegregation can reduce prejudice over time. The authors of a recent study presented their findings as a refutation of Sumner's contention that legislation cannot change mores.⁸⁹ Unfortunately, however, the conditions outlined by Allport are much more difficult to meet in real social life. Prospects are most favourable in the area of education.

Another psychological mechanism is the cognitive dissonance mechanism. Robert L. Kidder referred to this mechanism to explain the decline in expressions of racial prejudice and hatred found in surveys in the southern United States after the Supreme Court's 1954 school desegregation decision:

[P]eople cannot persist in behaving in ways that are incompatible with their beliefs and values.... If the law prevents people from acting consistently with old beliefs and values, then they abandon the old beliefs and adopt new ones which fit the actions they find themselves doing.⁹⁰

However, he questioned the reliability and validity of the surveys' results.

A recent American study has found that legalising same-sex marriage has accelerated the acceptance of homosexuality.⁹¹ The researchers examined each US state's level of bias against gay people before and after the legalisation of same-sex marriage in that state. They found that, although bias against gay people was already on the

decline, it began to drop more quickly after the legalisation of same-sex marriage. This finding suggests that legal change, the symbolic message of law, can sway public opinion, improving tolerance for members of stigmatised groups. However, there was some evidence of a backlash in states that only legalised same-sex marriage following federal legalisation. The researchers therefore added the caveat that '[f]or laws to change minds, it is possible that the laws must be perceived as intrinsically motivated by the people'.⁹² A similar study was conducted in Europe. Like its US counterpart, it found that the legal recognition of same-sex relationships was associated with an increase in favourable attitudes towards sexual minorities. The effects were widespread across demographic groups. The researchers concluded: 'Our results suggest that laws can exert a powerful influence on societal attitudes.'⁹³

Kidder would probably not share this optimism. As said, he questioned the reliability and validity of surveys that measured a decline in racist attitudes in the years after the US Supreme Court's decision in *Brown v. Board of Education*. Kidder argued that there were other changes, for example in the composition of the southern population, which might explain the measured change in attitudes. Moreover, people might just have learnt to conceal racist attitudes when answering survey questions.⁹⁴ Last but not least, Kidder pointed out that even a genuine shift in people's attitudes towards racial minorities may not put an end to institutionalised racism. Referring to the example of school desegregation in the United States, he argued that regardless of

[w]hether whites care or not for minority groups and racial equality ... their pursuit of economic security and the best housing they can afford produces patterns of residential segregation which are reflected in school populations.⁹⁵

This also raises the question of what is more important, changes in (patterns of) behaviour or changes in attitudes and beliefs? It can be argued that, overall, disadvantaged groups will benefit first of all from changes in 'external' behaviour; they will benefit most when they are no longer confronted with *practices* of discrimination in major areas of life.

4 Concluding Remarks

There is no unequivocal answer to the question of whether law can change 'hearts and minds'. The overall picture emerging from the sociolegal literature is that

87. Berger, above n. 23, at 217, 229.

88. G.W. Allport, *The Nature of Prejudice* (1954), at 281.

89. A. Eller, D. Abrams & M. Koschate, 'Can Stateways Change Folkways? Longitudinal Tests of the Interactive Effects of Intergroup Contact and Categorization on Prejudice', 72 *Journal of Experimental Social Psychology* 21 (2017).

90. R.L. Kidder, *Connecting Law and Society. An Introduction to Research and Theory* (1983), at 119.

91. E.K. Ofosu, M.K. Chambers & E. Hehman, 'Same-Sex Marriage Legalization Associated with Reduced Implicit and Explicit Antigay Bias', 116 *Proceedings of the National Academy of Sciences* 8846 (2019).

92. J.M. Chen, 'When Laws Change Minds', *Psychology Today*, 23 April 2019, <https://www.psychologytoday.com/ie/blog/race-in-new-world/201904/when-laws-change-minds> (last visited 28 February 2020).

93. C.G. Aksoy, C.S. Carpenter, R. De Haas & K. Tran, 'Do Laws Shape Attitudes? Evidence from Same-Sex Relationship Recognition Policies in Europe', *EBRD Working Paper* 2018:219.

94. Kidder, above n. 90, at 125.

95. *Ibid.*, at 125-6.

law can do so only indirectly, by changing the situations in which attitudes and beliefs are formed.

The research literature on the social impact of non-discrimination law shows that its effects and effectiveness depend largely on how it is implemented and enforced, whether there are civil society groups that help to enforce it and whether the social fields in which it has to unfold its effects support it. Conditions for achieving compliance are not always favourable. Enforcement by governmental agencies is often hampered by resource limitations, and civil society organisations may not be keen on and capable of mobilising the law against more powerful parties. The norm of equal treatment is widely supported in principle, but in everyday social practice it has to compete with other, more established rules, routines and practices within social fields.

On a more positive note, the research literature also confirms the notion of reciprocity between legal change and social change. This implies that if the timing is right, legal interventions may reinforce and accelerate changes in social norms. As Griffiths put it,

[As] long as the legislator does not march too far in advance of developments in social norms, legislation can help to articulate them, thus making the applicable norms clear and indisputable, at which point informal control can assume the task of enforcement.⁹⁶

To put it in one sentence, law alone cannot deal effectively with social problems such as discrimination, but it can be an important ally or instrument for social change.

96. Griffiths (1999), above n. 47, at 323.

How Far Should the State Go to Counter Prejudice?

A Positive State Obligation to Counter Dehumanisation

Ioanna Tourkochoriti*

Abstract

This article argues that it is legitimate for the state to practice soft paternalism towards changing hearts and minds in order to prevent behaviour that is discriminatory. Liberals accept that it is not legitimate for the state to intervene in order to change how people think because ideas and beliefs are wrong in themselves. It is legitimate for the state to intervene with the actions of a person only when there is a risk of harm to others and when there is a threat to social coexistence. Preventive action of the state is legitimate if we consider the immaterial and material harm that discrimination causes. It causes harm to the social standing of the person, psychological harm, economic and existential harm. All these harms threaten peaceful social coexistence. This article traces a theory of permissible government action. Research in the areas of behavioural psychology, neuroscience and social psychology indicates that it is possible to bring about a change in hearts and minds. Encouraging a person to adopt the perspective of the person who has experienced discrimination can lead to empathetic understanding. This, can lead a person to critically evaluate her prejudice. The paper argues that soft paternalism towards changing hearts and minds is legitimate in order to prevent harm to others. It attempts to legitimise state coercion in order to eliminate prejudice and broader social patterns of inequality and marginalisation. And it distinguishes between appropriate and non-appropriate avenues the state could pursue in order to eliminate prejudice. Policies towards eliminating prejudice should address the rational and the emotional faculties of a person. They should aim at using methods and techniques that focus on persuasion and reduce coercion. They should raise awareness of what prejudice is and how it works in order to facilitate well-informed voluntary decisions. The version of soft paternalism towards changing minds and attitudes defended in this article makes it consistent with liberalism.

Keywords: prejudice, soft paternalism, empathy, liberalism, employment discrimination, access to goods and services

1 Introduction

Is it legitimate for the state to change hearts and minds? Liberals accept that it is not legitimate for the state to intervene in in this area because ideas and beliefs are wrong in themselves. Changing how human beings think requires an additional justification to the extent that state paternalism is demeaning as it means treating citizens as immature human beings. There is always a danger of sliding into illiberalism. Only when there is a risk of harm to others and when there is a threat to social coexistence is it legitimate for the state to do so. For instance, anti-discrimination law aims to tackle stereotypes and prejudice, ways of thinking that materialise in acts that have discriminatory effects upon some persons who are classified as members of some groups.¹ Stereotypical and prejudicial thinking is wrong and causes harm because it projects characteristics upon a person and dictates attitudes towards a person that deprive him/her of advantages.² Harm is in these cases both material and immaterial. The evaluation of a stereotype or a prejudice relates to the social meaning of acts.³ It focuses on the wider social, cultural and historical contexts that discriminatory acts accentuate.⁴ Anti-discrimination law aims to tackle a social environment that is demeaning.

This article traces a theory of permissible government action. It argues that soft paternalism towards changing hearts and minds is legitimate in order to prevent harm to others. It attempts to legitimise state coercion in order to eliminate prejudice and broader social patterns

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1. The tension for liberalism inherent in enforcing anti-discrimination law is analysed with great accuracy by John Gardner in 'Liberals and Unlawful Discrimination', 9 *Oxford Journal of Legal Studies* 11 (1989).
2. On prejudice as projection of qualities that deprive a person of the opportunity to define her personality and show it to others, see I. Tourkochoriti, "Should Hate Speech be Protected?" Group Defamation, Party Bans, Holocaust Denial and the Divide Between (France) Europe-U.S.A.', 45(2) *Columbia Human Rights Law Review* 552-622 (2014).
3. On focusing on the social meaning of an act as expressing moral inferiority in order to define when discrimination is wrong, see A. Sangiovanni, *Humanity without Dignity* (2017), at 122.
4. See D. Hellman, *When is Discrimination Wrong?* (2008), at 35.

of inequality and marginalisation in narrowly limited circumstances. And it distinguishes between appropriate and non-appropriate avenues the state could pursue in order to eliminate prejudice. Policies towards eliminating prejudice should address the rational and the emotional faculties of a person. They should aim at using methods and techniques that focus on persuasion and reduce coercion. They should raise awareness of what prejudice is and how it works in order to facilitate well-informed voluntary decisions. The version of soft paternalism towards changing minds and attitudes defended in this article makes it consistent with liberalism. Changing ‘hearts and minds’ means, for the purposes of this article, changing ways of feeling, of thinking and of evaluating knowledge. The perspective adopted presupposes that cognition is affected both by emotion and reason. Research in the area of behavioural psychology, neuroscience and social psychology indicates that both reason and emotion are at play in human cognition. It also indicates that it is possible to bring about a change in hearts and minds. Encouraging a person to adopt the perspective of the person who experiences discrimination can lead to sympathetic understanding of her situation. Activating sympathetic understanding can lead a person to critically evaluate her prejudice. This evaluation can help her better apply the criterion of universalisability in her reflection on what rights persons should have.

This article aims to make a contribution to the literature on anti-discrimination law by providing an interdisciplinary approach and a multilevel analysis of discriminatory prejudice. It aims to make normative proposals by using conclusions of research in empirical science on what prejudice is and how it leads to discrimination. In this respect it uses data existing in recent research in the areas of behavioural psychology, neuroscience and social psychology. This study is divided into four parts. Part one offers an analysis of the types of harm that discrimination causes. In this respect, it analyses what prejudice is and how it works. Part two deals with whether it is possible to change hearts and minds. It presents research from the areas of behavioural psychology, social psychology and neuroscience to make the case that it is possible. Part three discusses whether it is legitimate for the state to change hearts and minds. In this respect it engages with Kant, Mill, Locke and Rawls. Part four discusses legal tools that exist and others that have been proposed. These legal tools can create a consciousness that discrimination is wrong and can, in the long term, lead to changing hearts and minds.

2 What is the Harm Caused by Discrimination?

For liberals to be able to defend government intervention in changing hearts and minds, it is compelling to

increase consciousness about the harm that a person experiences. This harm can be defined in multiple ways. First, there is a harm to the social standing of the person. Discrimination perpetuates and accentuates a social context of oppression and marginalisation. Further, the harm to social standing leads to experiencing psychological harm. A person is made to feel inferior. Thirdly, there is material harm. Discrimination affects the distribution of rights and goods that a person gets. She may be denied access to professional opportunity or a good that she needs. Finally, there is an existential harm to the extent that discrimination affects the opportunities that a person has to improve her situation. In what follows I analyse each of these types of harm.

In order to be able to evaluate the harm that discrimination causes, it is important to analyse how prejudice works. Prejudice, *praejudicium*, can be a preliminary rational judgment, as Gadamer has noted.⁵ It can also be due to a hasty emotional response. The Latin etymology of the term *prae-judicium* points towards the idea of a preliminary judgment. This preliminary judgment can be formed on the basis of various conscious and unconscious factors. Gordon Allport provided in his study on Prejudice, which is the work of reference in social psychology, a definition of prejudice as “thinking ill of others without sufficient warrant”.⁶ Research has shown that discriminatory behaviour is not only motivational but also cognitive.⁷ Prejudice has a cognitive component, an emotional component and a behavioural component, which form parts of an integrated whole.⁸ Prejudice is associated with stereotyping, the creation of categories of projected expectations. These concern the human qualities and the behaviour of a person. Prejudice and stereotyping lead to discriminatory behaviour. This is relevant to both cases of direct or indirect discrimination. Human beings apply stereotypes related to ability or other characteristics unconsciously. Unconscious biases affect what decision-makers see and interpret and how they evaluate persons.

Gordon Allport noted that forming in-group and out-group mentality is part of human existence.⁹ Familiarity provides a basis for our existence which is defined by our membership in various social groups. These are defined in reference to an out-group, or in other words a “common enemy”.¹⁰ Research in the area of neuroscience shows that our brains form in-group and out-group dichotomies with stunning speed.¹¹ This leads to

5. In his ‘Truth and Method’, (J. Weinschmeyer & D.G. Marshall trans., 2nd ed.), at 272 seq.

6. Gordon Allport, *The Nature of Prejudice* [1954] (1979) 6.

7. See L.H. Krieger, ‘The Content of our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity’, 47 *Stanford Law Review* 1161, at 1164 (1994-1995).

8. *Ibid.*, at 1174.

9. Gordon Allport, *above n. 6*, at 29.

10. As Allport notes, citing the French Biologist Felix le Dantec, *ibid.*, 41. Freud in his *Civilization and its Discontents*, argued that group formation is possible when a group redirects its natural aggressivity towards an outgroup.

11. R. Sapolsky, *Behave, The Biology of Humans at Our Best and Worst* (2017), at 388.

rapid automatic biases. These biases are due to hormones in the brain that prompt trust, generosity and cooperation towards in-groups and worse behaviour towards out-groups. Numerous experiments, again in the area of neuroscience, have shown that the brain processes within milliseconds differential images based on cues about race or gender.¹² These lead to numerous in-group biases, such as higher levels of cooperation. People feel positive associations with others who share the most meaningless traits with them. By age three to four, children have already grouped people by race and gender, have negative views of others and perceive other-race faces as being angrier than same-race faces.¹³ This is because children naturalize those social dimensions that the ambient culture marks as especially salient.¹⁴ Thinking in terms of “race” is unthinkable in the absence of culture and polity which create systems of cultural beliefs and channel sets of expectations.¹⁵ Furthermore, social cognition theory has shown that human thinking involves categorising. Human cognition is based on forming categories.¹⁶ Categories help the human mind impose some order upon the disorder of the world. They also help make it predictable. Categorising means turning ‘fuzzy’ differences into clear-cut distinctions.¹⁷ Stereotyping is an extension of the functioning of human cognition. Human beings learn to create categories at a young age. This forms part of the evolution of one’s cognitive capacities. Categorising is associated with creating an exemplary member onto whom are projected a number of qualities. Categorisation leads to social stereotyping. Problems emerge because there is some arbitrariness inherent in stereotyping that dictates behaviour that deprives some persons of opportunities. Stereotyping associates persons with characteristics that belong to a group she is arbitrarily classified in. Children and adults develop stereotypes and prejudices concerning groups that are uncorrelated with any observable traits or behaviours.¹⁸ Stereotyping leads to essentialist thinking, viewing out-groups as homogeneous and interchangeable.¹⁹ The individuals stereotyped are seen as monolithic and undifferentiated. These cognitions are

post hoc justifications for feelings and intuitions.²⁰ Developmental Psychologists argue that our cognitive architecture makes some cultural representations possible and precludes others.²¹ And this architecture resonates with regimes of power and authority.²²

Stereotyping means associating a person with qualities that are not necessarily chosen by her. This deprives her of the opportunity to form her own persona and show it to others. It is a violation of the autonomy of a person. It is an attempt to her ability to define her personality for herself and to show it to others. Discriminatory behaviour deprives a person of job opportunities and access to goods and services for imagined qualities and characteristics, which do not necessarily correspond with what that person is. If prejudice operates in this way, then it is legitimate for the government to engage in efforts that modify these patterns of thinking. Unconscious prejudice manifests itself in cases of both direct discrimination and indirect discrimination.

In discriminatory employment decisions, characteristics are used as proxies for job-related traits. Stereotyping involves concrete expectations projected upon others on the basis of characteristics that they have. If prejudice has a cognitive component, an emotional component and a behavioural component that form parts of an integrated whole,²³ it involves systematic biases in inter-group judgment that can flow directly from stereotypes that are unconscious. This is the case because group mentality leads to a biased evaluation of in-group and out-group members. Stereotyping serves as a heuristic in our mental representations. It affects the evaluation of the behaviour of a person and its projected behaviour. It leads to all sorts of causal attributions that preclude searching for other relevant information. It even leads to projecting behaviours consistent with the stereotype that did not actually occur.²⁴ Social cognition theory has shown that decision-making comprises perception, interpretation, attribution, memory and judgment. These operations take place in a way that is internalised and becomes automatic. Intent to discriminate does not necessarily play a role.

Having analysed how prejudice operates, it is now important to explore the types of harm that discrimination causes. Discrimination expresses and consolidates social power. Foucault has made us conscious that power is omnipresent within societies.²⁵ A constructive reading of Foucault points towards raising awareness about the complicated ways in which we exercise and receive power. In this respect, his thought is very valuable for anti-discrimination law towards conceptualising

12. *Ibid.*, at 389.

13. I.A. Hirschfield, ‘Natural Assumptions: Race, Essence and Taxonomies of Human Kinds’, 65 *Social Research* 331-349 (1998), R.S. Bigler et al., ‘Developmental Intergroup Theory: Explaining and Reducing Children’s Social Stereotyping and Prejudice’, 16 *Current Directions in Psychological Science* 162-166 (2007), A.S. Baron and M.R. Banaji, ‘The Development of Implicit Attitudes: Evidence of Race Evaluations from Ages 6, 10, and Adulthood’, 17 *Psychological Science* 53 (2006). See also F.E. Aboud, *Children and Prejudice* (1988), R.S. Bigler et al., ‘Social Categorization and the Formation of Intergroup Attitudes in Children’, 68 *Child Development* 530 (1997), cited by Sapolsky, above n. 11, at 391.

14. I.A. Hirschfield, ‘Natural Assumptions: Race, Essence and Taxonomies of Human Kinds’, above n. 13, at 335.

15. *Ibid.*

16. Allport, above n. 6, at 20.

17. See Krieger, above n. 7, at 1189.

18. R.S. Bigler et al., ‘Developmental Intergroup Theory: Explaining and Reducing Children’s Social Stereotyping and Prejudice’, above n. 13, at 165.

19. Sapolsky, above n. 11, at 399.

20. J. Haidt, ‘The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment’, 108 *Psychological Review* 814 (2001), J. Haidt, *The Righteous Mind: Why Good People are Divided by Politics and Religion* (2012).

21. I.A. Hirschfield, ‘Natural Assumptions: Race, Essence and Taxonomies of Human Kinds’, at 349.

22. *Ibid.*

23. Krieger, above n. 7, at 1174.

24. *Ibid.*, at 1208.

25. See for instance, M. Foucault, *The History of Sexuality*, Engl. transl. by Robert Hurley (1990), at 92-95.

the immaterial harm that discrimination causes. If discrimination is caused by social power dynamics that it in return perpetuates, then it is legitimate to use the law in order to eliminate social power dynamics. Social power is expressed by conscious and unconscious acts of discrimination. It leads to the formation of stereotypes, and it accentuates them. The harm that a person experiences when she is facing discrimination relates to experiencing negative consequences owing to a characteristic that is arbitrarily projected to her and does not allow her to show who she is to others.

Social power thus contributes to affecting the social standing of some persons owing to stereotyping. As analysed earlier, this perception in relation to the social standing is conscious and unconscious. Discrimination is demeaning in that a person is depicted as not being of equal moral worth to others.²⁶ As Deborah Hellman has noted, discriminatory behaviour is an expressive act.²⁷ A person is made to feel inferior. Discriminatory acts demean or debase others. To demean someone has a social and a power dimension.²⁸ The omission takes place in a context of unequal social power. If we accept an understanding of human dignity according to which human beings are entitled to unconditional respect, discriminating means not showing this unconditional respect. An example of this behaviour is placing an additional burden upon women to prove their fitness for a job opportunity. Context is very important for the evaluation of the acts of respect and for the acts of absence of respect.

Discrimination causes psychological harm as it leads to the internationalisation of the projected stereotypes of a person. A person is made to feel inferior to others. Discrimination undermines what Andrea Sangiovanni calls 'the structural conditions for a flourishing life'.²⁹ By that he means the social-relational dimensions of disadvantaging someone through discrimination. The social relational element is not merely an aggravating circumstance, Sangiovanni notes, but fundamentally affects the wrongfulness of the act of discrimination. If, as Hegel noted, the sense of self of a person is formed by recognition,³⁰ then treating another person as inferior in this context undermines her ability to develop a sense of herself as a moral agent. The person internalises the feeling of disrespect and is prevented from forming her self-respect. In other words, the person is negated what Rawls calls the social basis of self-respect.³¹ Our self-respect is formed in the web of relationships we have with others and by the recognition of others. This can have detrimental effects on the very sense of self of the person. Having a conception of the self for each person is an important condition of living a flourishing life. Sangiovanni offers an interesting conception of the self:

one that associates it with a person's values and normative commitments that are central to one's life.³²

This harm is accentuated by the material harm that a person expresses when she is being discriminated against. A person refused a good or a service that she needs also has to make a greater effort in order to obtain that good or service. A person who is refused a cake to celebrate his or her same-sex marriage with another person needs to spend more time and energy in identifying a baker that is able to produce the cake that she needs. This material harm intensifies the psychological harm that the person experiences.

Discrimination causes another type of harm that can be described as existential. The existential harm that a person experiences relates to her facing additional obstacles in front of her when she is trying to transcend her circumstances and define her identity. Humanity is involved in an effort to transcend her circumstances in any attempt to make sense of the world. The search for meaning in life is a characteristic of every human being. This existential possibility in human life has been associated by some scholars with the idea of human dignity.³³ In this effort to transcend their circumstances, some persons are facing more obstacles than others, which are the result of social constructs, prejudice and stereotypes. Discrimination on the basis of age, race, gender, sexual orientation, religion and disability creates additional obstacles to the persons that experience it, which should not be there. The persons who are experiencing discrimination on the basis of all these criteria are therefore entitled to additional protection. It is legitimate for the state to engage in action eliminating discrimination out of respect for human dignity. Respecting human dignity means treating human beings as having unconditional value. It means, to use Kant's famous phrase, treating human beings as ends and not as means.³⁴ Persons who experience discrimination are denied the unconditional respect that should be recognised to them simply because they are human beings. This constitutes a deontological foundation for the right not to be discriminated against.

Harm is in these cases both material and immaterial. The evaluation of a stereotype or a prejudice relates to attributing social meaning and consequences to the acts of social actors.³⁵ It focuses on the wider social, cultural and historical contexts in which their acts operate and possibly accentuate.³⁶ Anti-discrimination law aims to tackle a social environment that is demeaning. To demean someone has a social and a power dimension. This operation of trying to bring about social change by changing collective states of mind implies challenges for liberalism to the extent that it implies evaluating social

26. See Hellman, above n. 4.

27. *Ibid.*

28. *Ibid.*

29. Sangiovanni, above n. 3, at 133.

30. G.F. Hegel, *Phenomenology of Spirit*, Engl. transl. by A.V. Miller (1977), at 111.

31. J. Rawls, *Theory of Justice* (1971), at 139.

32. Sangiovanni, above n. 3, at 79.

33. See G. Kateb, *Human Dignity*, (2011) at 10.

34. I. Kant, *Groundwork to the Metaphysics of Morals*, Engl. transl. by James W. Ellington (1993), at 45.

35. On focusing on the social meaning of an act as expressing moral inferiority in order to define when discrimination is wrong, see Sangiovanni, above n. 3, at 122.

36. See Hellman, above n. 4.

harm. Changing how human beings think requires an additional justification to the extent that state paternalism is itself demeaning as it means treating citizens as immature human beings. The danger of sliding into illiberalism is present in all these cases. The analysis in part 3 engages with these difficulties.

In all these cases of immaterial and material harm, discrimination perpetuates a social context of oppression and marginalisation that threatens peaceful coexistence. This necessitates taking action towards eliminating discrimination. If this is the harm that a person experiences when she is facing discrimination, it is legitimate for the state to try to eliminate prejudice. It is also legitimate for it to try to change the behaviour of those whose acts have an impact on others. Legislation against discrimination in the access to employment and goods and services aims to address these cases of injustice towards persons. It aims to eliminate a broader context of oppression and marginalisation that some persons have experienced. This broader context is actualised in every denial to them of a job opportunity or of basic goods and services that they need in order to survive. In these cases, there is concrete material harm to the persons who have experienced discrimination. There is also a form of immaterial harm that exists when within a society ideas circulate that are demeaning. Both these types of harm threaten social interaction and peaceful coexistence. Courts in many parts of the world may be reluctant to expand their understanding of harm in a way that includes all the types of harm just analysed. This means that it is preferable for the state to engage in soft paternalism that prevents them from occurring in the first place. Scholars have made suggestions, discussed in part 4, as to how courts should elaborate techniques that take prejudice into consideration in their application of anti-discrimination law. These suggestions concern the evaluation of the motivation in the application of anti-discrimination law and legal tools to confront systemic discrimination. The difficulties that courts have in taking them into consideration mean that it is preferable for the state to engage in preventive action. It is legitimate to attempt to modify at least how others manifest these beliefs through concrete acts. The hope always exists that, in the long term, by modifying their behaviour, persons carrying prejudices might be led to doubt also their beliefs and filter their prejudices.

3 Is It Possible to Change Hearts and Minds?

Before discussing whether, as a matter of principle, it is possible to make a case in favour of soft paternalism, it is worth reflecting whether it is possible to change hearts and minds. Research in the areas of behavioural psychology, neuroscience and social psychology indicates that it is possible to bring about a change in hearts and minds. Encouraging a person to adopt the perspective of

the person of a minority group can lead to empathetic understanding of her situation. Activating empathetic understanding can lead a person to critically evaluate her prejudice. The use of arguments that address both the reason and the emotions of the person can help her realise some of the prejudices she is carrying. It can also help her eliminate them. This indicates that soft paternalism is justified on a consequentialist basis.

Gordon Allport noted that interpersonal contact between majority and minority groups can reduce prejudice.³⁷ Allport noted the importance of institutional support and the importance of creating a perception of common interests and common humanity. Developmental psychologists note that prejudice is under environmental control and might be shaped via educational, social and legal policies.³⁸ Research in the area of behavioural psychology has also shown that intergroup prejudice can be reduced.³⁹ Moral judgment is not a single act that occurs in a person's mind, but an ongoing process affected by reasons and arguments.⁴⁰ Prejudice, intuition, reasoning and social influences interact to produce moral judgment. This means that creating a culture that fosters a more balanced, reflective and fair-minded style of judgment can help people evaluate their intuitions and prejudices.⁴¹ Attitudes can change when individuals engage in active processing of brief messages. Interventions encouraging active consideration of counter-prejudicial thoughts can produce changes in attitudes towards out-groups. A thought process encouraging perspective taking, that is 'imagining the world from another's vantage point' has been shown to reduce prejudice. As analysed earlier, prejudice consists in categorising and in engaging in 'in-group' and 'out-group' thinking. It was proved that encouraging individuals to actively take an out-group's perspective can durably reduce prejudice. During an experiment conducted in Florida, participants were encouraged to adopt 'analogic perspective-taking'.⁴² This involved encouraging participants to see how their own experience offered a perspective into minority groups' experiences, in this case transgender people. The experiment included short interaction with persons identifying as members of this group. It ended by asking voters to describe if and how the exercise had changed their minds. The intervention was described as being successful in increasing acceptance of transgender people. The experiment found that the change in attitudes was both lasting and politically relevant. The findings are highly

37. Gordon Allport, *The Nature of Prejudice*, 261. See also Anita Böcker, "Can Non-discrimination Law Change Hearts and Minds?", in this issue, 3.5.

38. R.S. Bigler et al., 'Developmental Intergroup Theory: Explaining and Reducing Children's Social Stereotyping and Prejudice', 162.

39. D. Broockman and J. Kalla, 'Durably Reducing Transphobia: A Field Experiment on Door-to-Door Canvassing', 352 *Science*, Issue 6282 220 (2016).

40. J. Haidt, 'The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment', above n. 20, at 828-9.

41. Ibid, at 829.

42. D. Broockman and J. Kalla, 'Durably Reducing Transphobia: A Field Experiment on Door-to-Door Canvassing', above n. 39 at 221.

significant as they seem incompatible with theories that depict prejudiced attitudes as durable and resistant to change.

As analysed earlier, research in the area of neuroscience shows that our brains form in-group and out-group dichotomies with stunning speed.⁴³ But research in the same area has also shown that the roots of human morality are older than cultural institutions and constructs.⁴⁴ Narratives related to protected values provoke a strong emotional reaction.⁴⁵ Commitment to normative principles is associated with certain feelings caused by social emotions such as outrage and disgust. Emotional brain systems are involved in moral cognition. In general, interpreting stories in terms of protected principle-based values is associated with increased signal in the same brain regions activated by these kinds of moral judgments and social emotions.⁴⁶ Furthermore, research has shown that the brain's systems for emotion appear to be engaged when protecting the aspects of our mental lives with which we strongly identify.⁴⁷ These include our closely held beliefs, both political and religious.⁴⁸ The same research shows that it is possible to change both religious and political beliefs. If emotions play such an important role in human thinking, then any attempt by the state to coerce in this area does not necessarily guarantee that change will follow. Only persuasive mechanisms are likely to be successful.

Other studies in the area of social psychology have shown that it is possible to eliminate group blame for acts committed by persons associated with them and thus to eliminate prejudice. A study conducted in the US related to anti-Muslim hostility following attacks by Muslims showed that by pointing out inconsistencies and hypocrisy, it is possible to change hearts and minds.⁴⁹ Academics conducted an experiment by showing videos that exposed the unfairness of collective blame and challenged the perception of homogeneity about persons seen as members of social groups that have experienced discrimination. The experiment concerned Muslims in an attempt to eliminate prejudice in favour of extremist behaviour. When participants were shown films highlighting hypocrisy in blaming one religious group, e.g. Muslims for extremism, and no other

religious groups, e.g. Christians for extremism, attitudes did change. Challenging the perception of Muslim homogeneity by providing counter-stereotypical examples can erode collective blame too.⁵⁰ Watching a film where Muslims are allowed to speak for themselves allowed perspective taking, which is held to improve intergroup attitudes and foster prosocial behaviour. Another film provided social proof depicting examples of Americans espousing pro-Muslim behaviours; e.g. an interview with a man participating in demonstrations against Islam recounting the transformation he experienced after accepting an invitation from the imam of a mosque to observe a service. And two more films challenged common beliefs about Muslims, for instance that they hate America and that Muslim immigrants strain the economy by citing data countering these views. Some more films challenged the perception that Muslims are intrinsically supportive of violence. This would reduce the tendency to blame all Muslims for the violent actions of individual group members. Watching the films did change attitudes towards Muslims in all these cases. Longitudinal studies in the same area allowed testing temporal relationships with more confidence.⁵¹ These studies revealed that prejudice and social exclusion can be reduced with schooling interventions that affect intergroup structures.

These experiments seem to affirm Adam Smith's insightful description of the operation of sympathy in his *Theory of Moral Sentiments*.⁵² For Smith sympathy is a faculty of the mind that allows a human being to project herself through the use of her imagination into the situation of another human being. For Smith, it is the faculty of sympathy that allows morality. The experiments just described seem to provide empirical validation to Smith's moral theory. The faculty to sympathise seems to have been activated by them. This means that opinions and even prejudice can change through the proper activation of sympathetic understanding. Contemporary psychologists and neuroscientists use the term 'empathy' with the meaning that Smith attributed to sympathy.⁵³ Empathy has a cognitive element. It means understanding the cause of someone's pain. It also means taking his perspective, 'walking in his shoes'. Research in neuroscience has shown that human beings are affected by emotional contagion.⁵⁴ It has also shown that it can feel good to do good.⁵⁵ But for a human being to actually engage in action he or she needs appropriate education towards helping others. This does not necessarily occur automatically.⁵⁶ Behaviours do not become

43. Sapolsky, above n. 11.

44. *Ibid.*, at 487, discussing the roots of justice in children and other primate animals.

45. J.T. Kaplan, S.I. Gimbel, M. Dehghani, M.H. Immordino-Yang, K. Sagae, J.D. Wong, C.M. Tipper, H. Damasio, A.S. Gordon & A. Damasio, 'Processing Narratives Concerning Protected Values: A Cross-Cultural Investigation of Neural Correlates', 27 *Cerebral Cortex* 1428-1438 (February 2017).

46. *Ibid.*, at 1434.

47. J.T. Kaplan, S.I. Gimbel & S. Harris, 'Neural Correlates of Maintaining One's Political Beliefs in the Face of Counterevidence', *Scientific Reports*, 23 December 2016, www.nature.com/articles/srep39589.

48. S. Harris, J.T. Kaplan, A. Curiel, S.Y. Bookheimer, M. Iacoboni, M.S. Cohen, 'The Neural Correlates of Religious and Nonreligious Belief', 4(10) *PLoS ONE* (2009).

49. E. Bruneau, N. Kteily & E. Falk, 'Interventions Highlighting Hypocrisy Reduce Collective Blame of Muslims for Individual Acts of Violence and Assuage Anti-Muslim Hostility', *Personality and Social Psychology Bulletin*, http://pcnlab.asc.upenn.edu/wp-content/uploads/2017/10/CB_R1_accepted_10-10-17.pdf (last visited 10 October 2017).

50. *Ibid.*, at 12.

51. Anja Eller, Dominic Abrams and Miriam Koschate, 'Can stateways change folkways? Longitudinal tests of the interactive effects of intergroup contact and categorization on prejudice', 72 *Journal of Experimental Social Psychology*, 21 (2017).

52. London [1853].

53. For psychologists, see P. Bloom, *Against Empathy, The Case for Rational Compassion* (2018). For neuroscientists, see Sapolsky, above n. 11, at 522.

54. Sapolsky, above n. 11, at 524.

55. *Ibid.*, at 546.

56. *Ibid.*, at 552.

automatic unless a person is trained in them. The three experiments cited earlier in this part confirm this analysis. A person needs to be exposed to the situation of another who is carrying the characteristic associated with negative qualities. Exposure can lead to understanding someone else's situation.

If this is the case, then it is legitimate for the state to engage in action that activates sympathetic understanding in human beings. This can be done through seminars raising awareness about minority social groups. This is not the case of mobilisation of emotions that can lead to partiality feared by Kant. Scholars keep articulating the same concerns, warning against over-reliance on emotions in the formation of moral judgment.⁵⁷ It is the kind of emotion mobilisation that can help a person reflect better on the application of Kant's universalisability rule. Understanding the situation of a person who experiences discrimination through emotional projection, i.e. a transgender person who wants to get married, can help a person improve her ability to perceive the conditions of the universalisability test. It can help her understand that a right to marriage should be recognised for everyone. Interpersonal communication that leads to emotional projection in someone else's situation can help a person better understand the conditions that can lead her reflection on what rights people should have. If in-group and out-group mentality leads to prejudice and discrimination,⁵⁸ experiments like the ones analysed previously show that it is possible to expose a person to circumstances that can lead her to fair reasoning towards out-groups. Empathy can be stimulated in a way that, in coordination with reason, can lead to better judgments about correct moral reasoning about rights.

If it is legitimate for the state to eliminate social power dynamics that lead to discrimination, it is important to distinguish between appropriate and non-appropriate avenues the state could pursue in order to eliminate prejudice. Policies towards eliminating prejudice should address the rational and the emotional faculties of a person. They should aim at using methods and techniques that focus on persuasion and reduce coercion. They should aim at encouraging citizens to use their critical abilities. If discrimination occurs owing to unconscious patterns of thinking, it is very important to elaborate sophisticated tools to address them as well.

Scholarship on 'nudging' has highlighted the choice architecture that affects the decisions persons make.⁵⁹ The term is crafted to mean the possibilities available to individuals in their decision-making in various areas that concern their life and their health. The factors that define this architecture are omnipresent even if people cannot see them. Numerous structures define our decisions. Nature, customs and traditions and spontaneous

and non-spontaneous orders.⁶⁰ Adopting Foucault's perspective, we can say that all sorts of social power that are exercised upon us, consciously and unconsciously, provide a choice architecture. This includes private and public power. These visible and invisible structures that affect decision-making can be properly tuned by the state in order to eliminate prejudice that is conscious and unconscious. Creating this kind of architecture can be dictated on the basis of a soft paternalism towards eliminating prejudice before it materialises in action. In the area of discrimination where there is harm to others that is subtle and often immaterial, it is legitimate for the state to engage in preventive action towards changing hearts and minds. If prejudice is unconscious and often the result of social power that is invisible, then it is legitimate for the state to eliminate these social power dynamics. In other words, the state should opt towards the social structures that minimise the impact of prejudice that leads to discrimination. Governments, by highlighting some topics and downplaying others, can have a significant impact on the operation of prejudice. They can have an important role in mobilising sympathetic understanding that can help to eliminate prejudice. A society that wants to become well ordered cannot remain indifferent to social oppression. On the contrary, it should always be alert to discovering new ways according to which social power operates. Nudging should aim to raise awareness about how discrimination works in order to encourage persons to critically evaluate their prejudices.

The most compelling objection to nudging is the risk of manipulation. Manipulation consists in an attempt to reduce the use of the rational faculties of a person in order to lead them to a decision that benefits the manipulator to the detriment of the interests of the person who is manipulated. An effort to make every citizen realise that every person is worthy of equal unconditional respect can hardly be considered manipulating. An effort to persuade citizens that they should give a chance to every other fellow citizen to show to them who they are beyond any kind of prejudice can be seen as an effort to ensure informed choice in various areas of human action. Nudging with the aim of eliminating discrimination aims to encourage more discussion and participation in the political system.⁶¹ As Cass Sunstein notes, nudging exists de facto in all social contexts. Choice architecture exists by default. Governments always nudge. As Polanyi has famously written, 'the free market was planned, planning was not.' To paraphrase Polanyi, nudging always existed. It is important that the government practices nudging in a way that respects the dignity of all social members. In the case of discrimination where there is material and immaterial harm to

57. For a re-articulation of these concerns by a psychologist, see Bloom, above n. 53.

58. Bloom, above n. 53, at 90, reaffirms this point.

59. C. Sunstein, *Why Nudge? The Politics of Libertarian Paternalism* (2014), at 14-15, A. Kemmerer, C. Möllers, M. Steinbeis & G. Wagner (eds.), *Choice Architecture in Democracies, Exploring the Legitimacy of Nudging* (2016).

60. C.R. Sunstein, 'The Ethics of Choice Architecture', in A. Kemmerer, C. Möllers, M. Steinbeis & G. Wagner (eds.), *Choice Architecture in Democracies, Exploring the Legitimacy of Nudging* (2016) 21.

61. Cf. C. McCrudden and J. King, 'The Dark Side of Nudging: The Ethics, Political Economy, and Law of Libertarian Paternalism', in A. Kemmerer, C. Möllers, M. Steinbeis & G. Wagner (eds.), *Choice Architecture in Democracies, Exploring the Legitimacy of Nudging* (2016) 113.

others, nudging can only prevent awkward situations within civil society that threaten peaceful coexistence. It is thus compelling for the state to discover appropriate ways of ‘nudging’ towards reducing the risk of discriminatory behaviour. Nudges that point towards integrating harmoniously social members are democratic. They can be seen as ensuring equal respect that facilitates democratic participation for all members. And they can also be justified in reference to the concept of autonomy and dignity. They aim to ensure those principles for all. It is acceptable for the state to engage in action towards making citizens conscious of how discrimination operates. Increasing consciousness about what discrimination is and how it works can help citizens become more perceptive. It can encourage them to filter their prejudices in order to reduce the role of unconscious factors within decision-making. There are a number of measures that states can take. Civic education lessons offered during primary and secondary education are excellent methods towards changing hearts and minds early on. Classes teaching tolerance and equality for all are exercising a legitimate soft paternalism. Civic education can foster deliberative democracy and deliberative autonomy.⁶² In this respect, civic education can play a significant role in making students alert about how social power works, according to Foucault’s perspective. Civic education should aim to encourage citizens that social power is omnipresent. We should be alert to the likelihood that we may be oppressing fellow citizens on the basis of the characteristic that they have. Civic education should encourage individual and social alertness towards raising awareness about potential sources of social power upon minority groups. They are the ideal laboratories of stimulating sympathetic understanding provided that they can allow free and uninhibited discussion of pressing social issues. Equal respect of all participants in every discussion is very important to eliminate prejudice through the use of argument. Civic education should teach tolerance and respect for difference, by allowing the respectful discussion of all opinions. Allowing students to express themselves in schools so that they feel that they are influencing ‘the climate and policies of their school’ helps them develop into ‘more effective, skilled, and knowledgeable citizens’. These lessons can also be combined with in-class and out-of-class experience, where students may engage in community service as well as ‘academic study of the issues addressed by the students’ service where students might discuss underlying causes of social problems’.⁶³ These lessons should be obligatory despite objections raised in some context in reference to religious beliefs.⁶⁴

When families neglect or do not provide civic education to their children, schools should step into this role.⁶⁵ In fact, the bringing together of young people with different backgrounds itself ensures first-hand experience and interaction with various cultures that can operate towards eliminating prejudice.

Prefigurative politics can also be deployed in this direction. The state can provide the means to NGOs that are active in defending the rights of persons who have experienced discrimination to create short films and radio spots that can eliminate stereotypes. It can also mobilise public media to diffuse them. For instance, NGOs active in the area of protecting persons with disabilities would have valuable expertise to create short films indicating the special abilities these persons have. The state should subsidise them so that they engage in publicity efforts to raise awareness on these abilities. A short video clip describing the different abilities of a person considered ‘disabled’ can lead to an understanding of her situation and to changing stereotypes associated with ‘disability’. This clip can be projected during advertising time by public broadcasting media. It can also be projected onto screens while queuing to receive public services, in public hospitals’ waiting rooms, etc. A clip like this one can serve the role of well-intentioned ‘nudging’ of persons towards adopting the perspective of those considered ‘disabled’.

Broad solutions that encourage collaborations across social groups can operate towards eliminating prejudice. The state needs to engage in wide policies of acculturation using various media to achieve its goals. It needs to encourage the citizens to transcend their perspective and to challenge their point of view. It needs to encourage them to adopt the perspective of those who have experienced discrimination and sympathise with them. As Martha Minow has noted, recognising that we are all different is what is needed to break the cycle of discrimination.⁶⁶ Reflecting critically on the stereotypes and categories that our own thought needs is very important in this respect. Seminars informing about how prejudice works in the workplace and elsewhere are a type of measure that can help. It is legitimate for the state to require private employers to provide similar training to all employees related to how prejudice works in interpersonal decision-making processes.

The enforcement of antidiscrimination law can thus appear legitimate. Gordon Allport noted in one of the editions of his major work on Prejudice that most citizens would accept “a firmly enforced executive order” ... “as a fait accompli, with little protest or disorder. In part they do so because integrationist policies are usually in line with their own consciences (even though countering their prejudices)”.⁶⁷ There are some concerns in the enforcement of anti-discrimination law that relate to social cohesion. Enforcing anti-discrimination law can

62. See J.E. Fleming and L.C. McClain, *Ordered Liberty: Rights, Responsibilities and Virtues* (2013), at 118.

63. Peter Levine and Kei Kawashima-Ginsberg, 4.

64. In the city of Birmingham, in the UK, objections were raised to civics education teaching tolerance towards homosexuality by parents on the basis of their religious beliefs. The relevant protests led to court ruling in favour of exclusion zones; see ‘LGBT Teaching Row: Birmingham Primary School Protests Permanently Banned’, *The Guardian*, 26 November, www.bbc.co.uk/news/uk-england-birmingham-50557227.

65. Fleming and McClain, above n. 48, at 120-121.

66. M. Minow, ‘Making All the Difference: Three Lessons in Equality, Neutrality, and Tolerance’, 39 *DePaul Law Review* 1-13 (1989-1990).

67. Gordon Allport, Foreword to the 1958 edition of *The Nature of Prejudice*, above n. 6.

lead to animosity between social groups that threatens peaceful coexistence. Scholars in the US have expressed this concern as the risk of ‘balkanisation’.⁶⁸ On the basis of this approach, anti-discrimination law should be enforced with caution in order not to lead to the break-up of social bonds. According to what are held to be neo-conservative arguments, anti-discrimination law should not be enforced because it perpetuates animosity between social groups. Justice Scalia, in his concurring opinion in *Ricci v. DeStefano*, articulated the idea that anti-discrimination law places ‘a racial thumb on the scales... requiring employers to evaluate the racial outcomes of their policies and to make decisions based on those racial outcomes’, a type of decision-making that is discriminatory.⁶⁹ It is definitely preferable for the state to engage in nudging in order to prevent discrimination. Nevertheless, there are cases where besides nudging, anti-discrimination law should be enforced too when discrimination actually occurs. As empirical evidence has shown, the most effective means of changing behaviour in a population is to use a range of policy tools, regulatory and not.⁷⁰

4 Is It Legitimate for the State to Intervene in Changing Hearts and Minds?

42 As analysed earlier, when discrimination results in concrete material harm, it is easier to make a case in favour of government intervention. In the area of thoughts and beliefs it is harder. Changing how human beings think requires an additional justification to the extent that state paternalism is itself demeaning as it means treating citizens as immature human beings. The risk of sliding into illiberalism is present. A good justification towards accepting government intervention is the risk of prejudice materialising in harm towards the individual. If prejudice is cognitive and thus unconscious, it is very important for the state to raise awareness in order to eliminate its negative unintended consequences. It is legitimate for the state to engage in action towards eliminating both aspects of prejudice, the rational and the emotional. If prejudice has both a rational and an irrational component, it is impossible to eliminate it by state coercion. Force cannot remove prejudice, ‘make way for Truth, remove one Truth for another’, Locke notes.⁷¹ Only methods that address both the rational and the emotional faculties, and possibly even ‘nudging’ (done

properly and in a way that respects liberty) can contribute towards changing attitudes. Educational methods broadly conceived can contribute towards preventing behaviours and legal enforcement should intervene when it is necessary to restore harm.

Liberals agree that when harm to others is at stake, then it is legitimate for the state to intervene. Mill has articulated the harm principle that liberals hold as the canon for government intervention within civil society.⁷² According to this principle, the government may limit someone’s liberty against his will only to prevent harm to others.⁷³ A person’s own good ‘is not a sufficient warrant’, Mill thinks, ‘for which power can be exercised over him’.⁷⁴ People are amenable to society, he considers, only for conduct that concerns others.⁷⁵ Mill makes a distinction between self-regarding and other-regarding acts. If we consider that our consciousness is social and defined in social interaction we realise that this distinction is artificial. Nevertheless, Mill still provides important insights into the meaning and purpose of the force that it is legitimate for the state to use. Only when concrete, material harm to others is caused, is it legitimate for the government to intervene. In the area of prejudice that leads to discriminatory behaviour, it is not legitimate for the state to intervene in order to change how citizens think because this is wrong in itself. It is only legitimate for the government to intervene in order to make sure that these thoughts do not materialise in actions that harm others.

Liberals underline the importance of the autonomy of the person. The state behaves paternalistically when it attempts to change the way a person thinks out of a concern for the well-being of that person. Kant has also noted that paternalism is ‘the greatest conceivable despotism’ because it treats human beings as immature beings and as unable to define happiness for themselves.⁷⁶ It is possible to distinguish between ‘hard’ and ‘soft’ paternalism.⁷⁷ According to Feinberg’s definitions of the distinction, hard paternalists accept that it is necessary to protect competent adults against their will from the harmful consequences of their fully voluntary choices and undertakings. Soft paternalists accept that the state has the right to prevent self-regarding harmful conduct only when it is substantially involuntary or when temporary intervention is necessary to establish whether it is voluntary or not.⁷⁸ The state’s concern in this area is to help implement a person’s ‘real’ choice. Soft paternalists generally argue that intervention is legitimate for generally competent people when factors that reduce voluntariness affect the decisions of a per-

68. R. Siegel, ‘From Colorblindness to Anti-Balkanization: An Emerging Ground of Decision in Race Equality Cases’, 120 *The Yale Law Journal* 1278 (2011).

69. *Ricci v. DeStefano*, at 557 U.S. 557, at 594.

70. See House of Lords, *Science and Technology Select Committee behaviour Change Report* (2011) HR Paper 179, 5.13, cited in McCrudden and King, above n. 61, at 92.

71. “Excerpts from a Third Letter for Toleration”, in M. Goldie (ed.), *A Letter concerning Toleration and Other Writings* (2010) 78.

72. Above n. 1.

73. J. Stuart Mill, ‘On Liberty’, in J. Gray (ed.), *On Liberty and Other Essays*, (1998) at 14.

74. *Ibid.*, at 14.

75. *Ibid.*

76. I. Kant, ‘On the Common Saying: This May be True in Theory, But It Does Not Apply in Practice’, in H. Reiss (ed.), *Political Writings*, Engl. transl. by H.B. Nisbet (1970), at 74.

77. J. Feinberg, *The Moral Limits of the Criminal Law*, vol. 3, *Harm to Self* (1989), at 12.

78. *Ibid.*

son.⁷⁹ This is the case, for instance, for people who are prone to the influence of distorting emotions. More generally, it is legitimate for the state to correct lack of information for those who chose not to gather it. An intervention may be autonomy-respecting when the target would consent to it if she were informed. Voluntariness can be a matter of degree.⁸⁰ Given this account, questions arise as to whether soft paternalism is an independent liberty-limiting principle at all.⁸¹ Soft paternalism aims to protect a person from his/her nonvoluntary choices. For Feinberg, soft paternalism is not paternalism at all.⁸² Rather, it should be seen as consistent with liberalism. If it increases awareness, it increases freedom. Feinberg thinks that the definition of liberalism should be enlarged so that soft paternalism becomes a morally valid liberty-limiting principle.

Arguably, this is relevant to prejudice. What is at stake in prejudice is unconscious behaviour. If prejudice is likely to materialise in behaviour that causes serious harm, then it is possible to make a case in favour of state action in order to raise consciousness in the citizens about its existence. Once a person becomes aware of her prejudices and that those are unjustified, it is very likely that she will voluntarily modify her behaviour. Government intervention is respecting autonomy when it has the form of raising awareness. It is plausible that government is protecting the person from decisions and harm that is 'other' from himself or herself. There should be a threshold of harm that justifies a liberal government's interest in changing citizens' opinions for self-regarding acts, even when the suspicion exists that non-voluntary behaviour is at stake. This threshold should be defined in reference to the social harm that is caused, which means that the act is no longer self-regarding. The costs of retrieving or repairing harm weigh heavily upon society. The line between self-regarding and other regarding acts should be traced by defining what is remotely or trivially other-regarding.⁸³ Triviality in this case is also defined in reference to the extent of the population that shares discriminatory prejudice. If it is shared by a good number of them, then it can certainly approach the threshold of serious harm. If more than fifty percent carry the prejudice, then social coexistence is seriously threatened.⁸⁴

In the area of discriminatory prejudice, the distinction between self-regarding and other-regarding is fluid. Furthermore, the risk of direct harm to others also exists. Prejudice can materialise in discrimination in many areas of social life. Widespread prejudice can be destructive to the existence of society. As discussed earlier, soft paternalism can be justified in order to

ensure that behaviour prima facie self-regarding does not end up in behaviour that threatens social coexistence. The line between self-regarding and other regarding acts should be traced by defining what is trivially other-regarding.⁸⁵ Triviality should be defined with reference to the extent of the population that shares the discriminatory prejudice. Widespread prejudice can affect social interaction and cooperation. Prejudice can encourage a feeling of malaise and stir animosity between social groups. It can lead to long judicial processes before courts. It can burden taxpayers with unnecessary costs to support this system. The social costs of repairing harm can become important. This means that preventive action can be encouraged in this case. If prejudice operates in unconscious ways, it is legitimate for the government to raise consciousness about what prejudice is and how it works. If, as analysed earlier, discriminatory behaviour is cognitive, it is legitimate for the state to engage in action that helps human beings realise how they form and modify their cognitive categories.

When concrete harm to the rights of others is at stake, then paternalism is not relevant. What is at stake is protecting others from harm. Soft paternalism makes sense only in order to change opinions towards preventing harm to others' rights. There is a wide spectrum of tools that are available to the state in order to handle cases of discrimination. Anti-discrimination law has emerged as an area of law because consciousness emerged that there are some behavioural patterns that introduce obstacles to social cohesion and social interaction. Human beings make decisions on the basis of some criteria like age, race, gender, sexual orientation, religion and disability, which affect others. They exclude them from having access to employment or to goods and services. Employment decisions on the basis of some of these criteria limit employment opportunities for part of the population. These decisions cause harm to the extent that they mean that these persons face additional obstacles in their lives in having what they need in order to survive. Providers of goods and services exclude persons from having access to them on the basis of the same criteria.

Any government intervention in this respect should be done with great caution and in a way that enhances the freedom of the citizens. Freedom of thought is a fundamental freedom. Government intervention in how citizens think and feel cannot be justified. It is also doubtful whether it can be effective. Eccentric and provocative beliefs should be tolerated out of respect for individual freedom. Locke's writings on toleration can be instructive in this area.⁸⁶ He noted that government attempts to affect beliefs are vain. Human beings cannot conform their beliefs to the dictates of another. Beliefs are a mat-

79. J. Feinberg, 'Legal Paternalism', 16 *Canadian Journal of Philosophy* 105-124 (1971), J. Hanna, 'Hard and Soft Paternalism', in K. Grill and J. Hanna (eds.), *The Routledge Handbook of the Philosophy of Paternalism* (2018) 28-29.

80. Feinberg (1971), above n. 79, at 111.

81. Feinberg (1989), above n. 77, at 12.

82. *Ibid.*, at 14-16.

83. Feinberg (1989), above n. 77, at 22.

84. This thought is inspired by Joel Feinberg's discussion of similar issues in *Harm to Self*, 23.

85. Feinberg (1989), above n. 77, at 22.

86. See his 'Letter Concerning Toleration', in M. Goldie (ed.), *A Letter Concerning Toleration and Other Writings* (2010) and his 'Excerpts from a Third Letter for Toleration', in M. Goldie (ed.), *A Letter Concerning Toleration and Other Writings* (2010).

ter of the 'inward and full persuasion of the mind'.⁸⁷ The care of each person's heart and mind belongs only to himself or herself. The power of civil authorities consists only in outward force. The nature of human understanding is such that it cannot be compelled to the belief of anything by outward force. Penalties are not effective in changing hearts and minds. Only persuasion can do so. 'Only Light and Evidence can work a change in Mens Opinions,' he notes (sic).⁸⁸ Locke thinks that it should be everyone's moral duty to make use of arguments in order to persuade others to be virtuous.⁸⁹ Government intervention should be accepted also in these terms, but only to the extent that it enhances the freedom of the citizens by raising awareness that allows them to make free, well-informed decisions. Locke also accepts that the magistrates, just like every other man in the state, may make use of arguments in order to 'teach, instruct and redress the Erroneous by Reason'.⁹⁰ This is so because this respects the freedom of a person by maximising information that allows voluntary decision-making. Raising awareness about how prejudice operates should be done in a way that involves as little as possible the punitive mechanism of the state. Only persuasion is the legitimate means to change hearts and minds. Locke also agrees that it may be legitimate for the state to enforce virtuous behaviour not because it is virtuous but because it ensures the preservation of society.⁹¹ And he notes that the good of the commonwealth is the standard of all human laws. Locke offers an interesting rationale for government intervention. It is legitimate for the state to enforce good behaviour, not because it is good in itself, but because not doing so might threaten the preservation of society. It is thus legitimate for the government to intervene because harmful behaviour threatens social interaction. If discriminatory prejudice causes substantial social harm, then it is legitimate for the state to intervene in order to eliminate it. If this harm is the result of social power dynamics, then it is legitimate for the state to engage in action towards affecting these dynamics. The state should engage in action that eliminates social power imbalances. From a liberal perspective, this does not mean that the state promotes a perfectionistic goal aiming to make citizens virtuous. Ideally, it should strive to create a situation where persons are not denied opportunities for characteristics that are projected upon them arbitrarily. Soft paternalism is legitimate to the extent that it addresses a person's reason and emotions towards eliminating prejudice. If prejudice is a preliminary judgment that invades consciousness and prevents a person from seeing things otherwise, it is legitimate for the state to do its best in order to raise awareness about its existence.

There are some values that are fundamental to a well-ordered society. The principle of equal respect for everyone is one of these values. Others include equal liberty, fair equality of opportunity and the social basis of mutual respect among citizens. Eliminating discriminatory prejudice serves as the social basis of mutual respect. Rawls's thought is very enlightening in this respect. He thinks that there are some ideas that can concentrate an overlapping consensus between comprehensive doctrines.⁹² Rawls has offered an interesting analysis of a test that a rule should pass in order to be accepted as a rule of a well-ordered society.⁹³ He discusses the idea of a well-ordered society as a society whose citizens all accept the same principles of justice, whose political and social institutions satisfy these principles, and whose citizens comply with these institutions considering them as just.⁹⁴ This publicly recognised conception of justice establishes a shared point of view from which citizens' claims on society can be adjudicated.⁹⁵

In order to persuade for the validity of these rules Rawls engages in the thought experiment of the original position. He constructs the original position as a device offering an abstraction of the contingencies of each person in the social world.⁹⁶ The social members under the veil of ignorance have a rational capacity, that is, they can have a conception first of their own good, and, second, a reasonable capacity, that is, they can have a capacity for a sense of justice, which means that they accept the validity of rules that regulate interaction. This thought experiment aims to enlighten norms of fair social cooperation. It is relevant in order to evaluate prejudice. It is a helpful thought experiment that can help us hypothesise what types of rules are just in the absence of factors that lead us towards making partial decisions. If we did not know the circumstances that define our existence, that is whether we have a characteristic that might lead others to discriminate against ourselves, then we would want society to establish the rules of fair social cooperation. We would want our society to be organised in a way that meets the needs of all participants. Under a veil of ignorance everyone would want not to experience discrimination. This provides legitimacy for the enforcement of anti-discrimination law.

For Rawls, these principles are political principles, not metaphysical – that is, they are principles that can be agreed upon independently of the comprehensive religious, philosophical and moral conceptions of each person. A society based on fair cooperation is thus based on the idea that there are some terms that each participant may reasonably accept in a reciprocal way with everybody else and that serve everybody's good. Rawls con-

87. 'Letter Concerning Toleration', in M. Goldie (ed.), *A Letter Concerning Toleration and Other Writings* (2010) 39.

88. *Ibid.*, at 40.

89. *Ibid.*

90. *Ibid.*

91. 'Excerpts from a Third Letter for Toleration', in M. Goldie (ed.), *A Letter Concerning Toleration and Other Writings* (2010) 95.

92. J. Rawls, *Political Liberalism* (2005), at 39.

93. For an extended analysis, see I. Tourkochoriti, 'Revisiting Hosanna-Tabor: The Road Not Taken', 49 *Tulsa Law Review* 45-96, at 88 (2013).

94. Rawls, above n. 92, at 35.

95. *Ibid.*

96. *Ibid.*, at 16.

tinues with the idea that questions about constitutional essentials and matters of public justice are to be settled by appeal to political values alone, with respect to which political values have the weight to override all other values that may come into conflict with them. These political values cannot be overridden as they govern ‘the basic framework of social life’, which constitutes ‘the very groundwork of our existence’, and ‘specify the fundamental terms of political and social cooperation’. Rawls argues that about these values there can be an overlapping consensus among reasonable comprehensive doctrines, even if these doctrines are in conflict. Or better, they can win the support of every citizen by addressing their reason, even if they adhere to conflicting comprehensive doctrines. Agreement is possible in circumstances of reasonable pluralism. Provided that all citizens are willing to use their public reason, they will agree on the fundamental role of some political values expressing the terms of fair social cooperation consistent with mutual respect of free and equal citizens. As Rawls notes, ‘[A]ny realistic idea of a well-ordered society may seem to imply that some such compromise is involved.’ Some of the ideas that people would agree upon in the original position are ideas that can concentrate an overlapping consensus even in our contemporary pluralistic societies. A well-ordered society is one that is governed by a political conception of justice that is the result of an overlapping consensus between opposing comprehensive doctrines and where unreasonable comprehensive doctrines do not gain enough currency to undermine society’s essential justice.⁹⁷ We can add to this reflection the unreasonable elements within comprehensive doctrines, such as elements that some human beings, e.g. homosexuals or persons with disabilities, should have unequal rights to live a meaningful life. To extend Rawls’ thought further, it seems that there can be an overlapping consensus on the fact that everyone must have access to the goods and services that they need. A religious belief that expresses intolerance towards some social members should not be tolerated. If we did not know whether we are part of a social group that runs the risk of experiencing discrimination in the access to goods and services, we would want everyone to be spared from having to experience it.

These Rawls-inspired reflections can promote our thinking about the legitimacy of the state’s efforts to raise awareness of discriminatory prejudice. It is legitimate to engage in soft paternalism towards changing hearts and minds in order to enable citizens to make decisions that respect the equal dignity of all social members. Under a veil of ignorance we would all want not to experience discrimination. In the same hypothetical situation, were we to exercise our public reason we would want vulnerable citizens to be protected by the state against civil society actors that discriminate against them. And it would be legitimate for the state to engage in preventive action in this respect. The previous analysis indicates that a version of soft paternalism in order to

eliminate prejudice is permissible on a deontological and consequentialist basis. On a deontological basis it is legitimate for the government to attempt to change hearts and minds in order to protect human beings as ends in themselves. It is also justified on a consequentialist basis as in the long term it can have the best possible effects for individuals and societies.

5 Legal Tools

The previous section of this paper showed that there is a philosophical justification behind recognizing positive obligations for the state to engage in action that aims to eliminate prejudice. Many international conventions which establish these positive obligations reflect this philosophical justification.⁹⁸ Nudging and soft paternalism need to go together with the enforcement of legal rules forbidding discrimination in some instances. In cases where a discriminatory decision cannot be prevented, it is very important to use the law in order to reverse its effects when harm to others exists. Law has an expressive function too.⁹⁹ Legislation against discrimination in the access to employment and to goods and services sends a message. Discrimination on the forbidden grounds is wrongful. The analysis of types of harm previously in this article shows that it can be both material and immaterial. When it is immaterial it is difficult to justify government intervention for liberals. Civil responsibility is, in any case, highly preferable to criminal responsibility.

In the enforcement of anti-discrimination law Durkheim’s insights are very relevant. Durkheim noted that the predominance of criminal sanctions is characteristic of societies of mechanical solidarity.¹⁰⁰ Those societies are not characterised by an advanced division of labour, and thus a sense of complementarity among social members that transforms the moral consciousness of each individual has not emerged yet. Societies characterised by mechanical solidarity need to ensure the allegiance of their members by enforcing the respect of some deeply held values. Hence, the predominance of criminal sanctions in their midst. For Durkheim, societies with sophisticated division of labour have succeeded in creating a moral consciousness of complementarity. This sense of complementarity holds their members together. This means that social members do not need a strong punitive mechanism to guarantee allegiance to the community. When a member violates a rule, society needs to restore the situation to the status quo ante. It needs to turn back the clock to the situation that existed

97. *Ibid.*, at 39.

98. For an analysis of these international legal tools see Stephanie E. Berry, “A Positive State Obligation to Counter Dehumanisation under International Human Rights Law”, in this issue.

99. See C.R. Sunstein, ‘On the Expressive Function of Law’, 144 *University of Pennsylvania Law Review* 2021 (1996); R. Mullender, ‘Racial Harassment, Sexual Harassment and the Expressive Function of Law’, 61 *Modern Law Review* 236 (1998).

100. D. Émile, *The Division of Labor in Society*, transl by L.A. Coser. (1984 [1893]).

before the violation of the rule. Therefore, in the area of enforcing anti-discrimination law it is important to focus on legal sanctions that strengthen this sense of complementarity and allegiance to the community. Civil sanctions can achieve this goal better than criminal sanctions. Criminal sanctions are a sign of harshness. They are a sign of insecurity of a community. A community punishes harshly because it feels threatened. Civil sanctions are a sign that the community is merely restoring the situation to the status quo ante and is willing to move on.

In the area of employment discrimination, mechanisms and solutions that reflect a conciliatory attitude are also legitimate. Finding solutions that involve reasonable accommodation is also necessary. The concept of reasonable accommodation does not imply that the rights of one party win over those of the other. On the contrary, it points towards a spirit of finding a workable solution that respects the rights of both employers and employees. Finding a reasonable accommodation is very relevant in the area of religious freedom and dress codes and in the area of disability and age discrimination. Enforcing anti-discrimination legislation in the access to employment is fundamental towards eliminating discrimination and changing attitudes and hearts and minds. If human beings have a natural tendency to prefer their same and to project negative stereotypes onto those that are different from them, then it is important to attempt to eliminate this attitude. Offering employment opportunities to persons beyond stereotypes can allow them to show who they truly are.

Another legal tool that can help in this direction is enforcing anti-discrimination legislation in the access to goods and services. A debate has emerged related to the possibility of some citizens to put forward religious objections in the application of legislation that outlaws discrimination in the access to goods and services. The debates relate to whether anti-discrimination law in the access to goods should be enforced, for instance, upon providers of cakes for the celebration of same sex marriages.¹⁰¹ Locke's objections emerge in this case anew. Should persons be forced to fulfil a legal obligation if their religious convictions dictate otherwise? If the point of having anti-discrimination law is to bring about a change in attitudes then it should be enforced even upon objections of this kind. Civil Rights legislation in the US eliminated race discrimination in the access to goods and services because it obliged providers not to discriminate on the basis of race.¹⁰² As our societies evolve, we become more aware of different ways of exercising social power and thus of discriminating. We real-

ised relatively recently that we need to eliminate discrimination on the basis of sexual orientation. The rights of homosexual persons are gaining recognition, while the rights of transgender persons are not recognised to the same extent yet. It is very important for legislation to take into consideration the need to protect the rights of these new groups. Just like the government in the US in the past had to enforce legislation against racial discrimination in the access to goods and services, it should now enforce it in order to protect other social groups. Being part of a society means accepting the enforcement of rules that operate in a way that eliminates prejudice. In this case harm is more tangible. As analysed earlier, it is both material and immaterial. The social risk that the person with the protected characteristic might not be able to obtain the goods and services that she needs from another provider is too heavy to take. There may be an undue burden upon the person asking for the good in this case. A well-ordered society needs to ensure that human beings have the goods that they need in order to survive.

Depending on context, the enforcement of anti-discrimination law upon claims for religious exemptions can take many forms. In South Africa, the High Court has held that a church that refuses to 'solemnise' same-sex marriage 'inherently diminishes the dignity' of persons in same-sex relationships.¹⁰³ A similar ruling would be unthinkable in the US, where the doctrine of ministerial exception under the First Amendment precludes government intervention in religious matters. The principle of equality in the South African Constitution entirely redefines the hierarchy of constitutional values. It leads jurists to interpret the constitution as attributing secondary importance to freedom of religion. In legal systems that give priority to freedom of religion, such as that of the US, a similar ruling would be unthinkable. In these cases the appropriate criterion for tracing the line between freedom of religion and anti-discrimination law can be found in the degree of involvement in the same-sex marriage ceremony. A church cannot be obliged to 'solemnise' a same-sex marriage. This would imply deep involvement in the internal workings of the church. A bakery that provides a cake should be asked to do so. A conscientious objection should not be recognised here. Such an objection should only be recognised to providers of services that are deeply involved in the ceremony, such as oath writers.

Furthermore, scholars have made a number of suggestions to address discriminatory behaviour based on stereotype. If prejudice operates unconsciously, scholars have argued that the non-discrimination principle must evolve to encompass a prescriptive duty of care to identify and control for category-based judgment errors and other forms of cognitive bias in intergroup settings.¹⁰⁴ In the US, the Supreme Court has held that a plaintiff can shift the burden of proof to the defendant by showing simply that her group status 'played a role' in the

101. The debate relates to the recent rulings *Masterpiece Cakeshop Ltd v. Colorado Civil Rights Commission* in the US and 138 S. Ct. 1719, 584 US ___, 201 L. Ed. 2d 35 and *Lee v. Ashers Baking Company Ltd* [2018 UK SC 49] in the UK. The case in the UK did not concern a wedding per se but the preparation of a cake expressing a message in favour of same-sex marriage to be brought to a political event in favour of recognising same-sex marriage.

102. For a relevant discussion see also Anita Böcker, *Can Non-discrimination Law Change Hearts and Minds?*, in this issue, 3.2.

103. *Gaum v. Van Rensburg*, NO 2019 2All SA 722 (GP).

104. Krieger, above n. 7.

decision or action taken against her.¹⁰⁵ The plaintiff would not have to prove that it was the sole reason, nor would she have to establish that the reasons proffered by the defendant were ‘cover-ups’ for a real discriminatory reason.¹⁰⁶ Commentators note that, unfortunately, courts have not been very successful in their efforts to define the respective spheres of application of the pretext and mixed-motives theories of liability.¹⁰⁷ Courts determine whether pretext or mixed-motives theory will apply to a given case based on the type of evidence a plaintiff proffers. Courts also disagree on the meaning of ‘direct evidence’ or ‘evidence directly tied to discrimination’. For these reasons Linda Hamilton Krieger suggests that the pretext model of individual disparate treatment proof should be replaced with a unitary motivating factor analysis.¹⁰⁸

Other scholars are in favour of a ‘negligence’ approach to employment discrimination.¹⁰⁹ Negligence is a theory according to which there is breach of duty recognised by law for the protection of others. This duty exists either in the common law, in legislation or administrative regulation. Anti-discrimination law creates an obligation for employers to treat employees without regard to race, colour, religion, sexual orientation, disability, age or national origin. According to this view, employers who violate this obligation even without intending harm, since prejudice is unconscious, should incur responsibility. When there is a duty to provide a reasonable accommodation, negligent discrimination exists when the employer does not discharge this duty properly.

A doctrine of strict liability has led to the emergence of the theory of disparate impact. According to this theory, there is discrimination even in the absence of intent to discriminate when a neutral policy has a disproportionate effect upon a social group.¹¹⁰ The concept evolved to include cases of ‘systemic discrimination’, where courts are looking into whether broader social patterns have discriminatory effects upon social groups. It migrated in Europe with the term ‘indirect discrimination’.¹¹¹ Courts should be encouraged to think in these terms in order to make wider policy suggestions towards eliminating discrimination. Courts in the US and in Europe have already elaborated a doctrine of indirect discrimination. There is more that they can and should do in this area in the future.

All these legal tools can attack prejudice directly or indirectly. They exercise a pedagogical function and encourage employers to become conscious of how prejudice works. Increasing consciousness can lead to modifying behaviours. In the cases of unconscious discrimination the legal sanctions should not be compensatory

or punitive damages. Since cognitive biases are to a great extent unintentional, heavy sanctions do not appear just. Neither do they guarantee a change in attitudes. On the contrary, they may heighten intergroup animosity. The state has a more important role to play in eliminating prejudice through pedagogical methods.

6 Conclusion

As I argued in this article, it is legitimate for the state to practice soft paternalism towards changing hearts and minds in order to prevent behaviour that is discriminatory. Liberals accept that it is not legitimate for the state to intervene in order to change how people think because ideas and beliefs are wrong in themselves. It is legitimate for the state to intervene with the actions of a person only when there is a risk of harm to others and when there is a threat to social coexistence. Furthermore, it is legitimate for the government to try to persuade citizens to eliminate their prejudice because it can lead them to discriminatory behaviour that can threaten social coexistence. In the area of preventing discrimination a more sophisticated reasoning is required as harm to others is material but also immaterial. Preventive action of the state is legitimate if we consider the serious harm that discrimination causes. Discrimination causes material and immaterial harm. It reinforces a broader context of social power. It harms the social standing of the person. It causes both psychological and existential harm. All these harms threaten peaceful social coexistence. Thus, it is legitimate for the state to raise awareness of what prejudice is and how it works. As Locke insightfully notes, although sanctions cannot change beliefs, persuasion can. In fact, Locke discusses a moral duty to try to change beliefs that threaten social coexistence. As Rawls encourages us to think, under a veil of ignorance of whether we have a characteristic that might lead to discrimination against us, we would all opt for rules of justice that eliminate discrimination. Changing hearts and minds can be justified as a matter of principle. It can also be justified for consequentialist considerations. Research in the areas of behavioural psychology, neuroscience and social psychology indicates that it is possible to bring about a change in hearts and minds. Encouraging a person to adopt the perspective of the person who has experienced discrimination can lead to understanding her situation. This can lead a person to critically evaluate her prejudice.

When discrimination materialises in action, it is legitimate to enforce anti-discrimination law. Enforcing anti-discrimination law should be done with caution as it can also threaten social bonds. The state has a broad array of tools that it can use in this area. It can first ‘nudge’ the citizens towards behaviour that is not discriminatory. Nudging is not objectionable in this area to the extent that it aims to incite towards behaviour that is not discriminatory. Through civic education the state can encourage empathetic understanding towards persons

105. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) 244.

106. *Ibid.*, at 246.

107. Krieger, above n. 7, at 1220.

108. *Ibid.*, at 1241.

109. D.B. Oppenheimer, ‘Negligent Discrimination’, 141 *University of Pennsylvania Law Review* 899, at 915-17 (1993).

110. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

111. See I. Tourkochoriti, ‘Jenkins v. Kingsgate and the Migration of the U.S. Disparate Impact Doctrine in EU Law’, in F. Nicola and B. Davies (eds.), *EU Law Stories* (2017).

that are members of minority groups. If the wrongs of discrimination are many and the harms particularly acute upon the social members it concerns, then it is legitimate for the state to deploy a vast array of mediums towards eliminating it. It can assist NGOs with valuable expertise towards engaging in campaigns that raise awareness against prejudice. And it can enforce anti-discrimination law in the access to employment and to goods and services. The state should also be conscious to encourage solidarity among social groups. Its pedagogical and ideological mechanisms should be oriented towards enhancing feelings of complementarity.

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Proposals for Legislative Reform to Promote Equality through Schools and the Education System

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Abstract

In this article, we focus on how the education system can be used to promote equality in the context of changing people's hearts and minds – values, morals and mindsets. The duties contained in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('Equality Act') bind private and public schools, educators, learners, governing bodies and the state. The Equality Act calls on the state and all persons to promote substantive equality, but the relevant sections in the Equality Act have not been given effect yet, and are therefore currently not enforceable. We set out how the duty to promote equality should be concretised in the Equality Act to inter alia use the education system to promote equality in schools; in other words, how should an enforceable duty to promote equality in schools be fashioned in terms of the Equality Act. Should the relevant sections relating to the promotion of equality come into effect in their current form, enforcement of the promotion of equality will take the form of obliging schools to draft action plans and submit these to the South African Human Rights Commission. We deem this approach inadequate and therefore propose certain amendments to the Equality Act to allow for a more sensible monitoring of schools' duty to promote equality. We explain how the duty to promote equality should then play out practically in the classroom to facilitate a change in learners' hearts and minds.

Keywords: Transformative pedagogy, equality legislation, promotion of equality, law reform, using law to change hearts and minds

1 Introduction

The Promotion of Equality and Prevention of Unfair Discrimination Act¹ is an omnibus law concretising Section 9(4) of the South African Constitution.² The Equality Act binds the state and all persons,³ and prohibits hate speech,⁴ harassment⁵ and unfair discrimination.⁶ The Equality Act prohibits these causes of action in all spheres of South African life, and (at least in theory) reaches into the most intimate and private spaces as well.⁷ The Equality Act also clearly aims at facilitating attitudinal change (transformation of hearts and minds);⁸ to some extent via the equality courts, but mainly through the parts of the Act that deals with the promotion of equality. However, the sections in the Act pertaining to the promotion of equality have not come into force yet. Draft regulations on the promotion of equality have been published more than 15 years ago but have not been operationalised.⁹

Several racial incidents in South African schools have recently been exposed by outspoken learners. In 2016, Pretoria Girls High School faced a backlash after its learners revealed how the school's code of conduct unfairly discriminated against black students.¹⁰ In 2017,

1. Act 4 of 2000; hereafter 'the Act' or 'the Equality Act'.
2. The Constitution of the Republic of South Africa, 1996 (hereafter 'the Constitution'). Section 9(4) of the Constitution provides: 'No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of Subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination'. The national legislation referred to here is the Equality Act.
3. Section 5 of the Equality Act.
4. Section 10 of the Equality Act.
5. Section 11 of the Equality Act.
6. Section 6 of the Equality Act.
7. J.A. Kok, *A Socio-Legal Analysis of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000*. LLD Thesis University of Pretoria (2008), 145-6. Also see Section 7(d) and 7(i) that clearly strike at intimate, private spaces.
8. Kok (2008), above n. 7, at 9-11.
9. GN No 563, *Government Gazette* No 26316, 2004-04-30.
10. K. Ngoepe, Black Girls in Tears at Pretoria School Hair Protest, *News24*, 29 August 2016 www.news24.com/SouthAfrica/News/black-girls-in-tears-at-pretoria-school-hair-protest-20160829 (last visited 10 January 2018). The High Court has also ruled that the exclusion of a learner

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St Johns College in Johannesburg eventually dismissed a teacher who had initially been allowed to continue teaching at the school despite being found to have victimised pupils based on their race.¹¹ An inclusive education is an education that does not unfairly discriminate, welcomes learners from diverse backgrounds and caters to their diverse needs.

The prohibition of unfair discrimination, as in the above scenarios, is a negative right, as it only requires an abstinence from conduct that amounts to unfair discrimination, versus actively putting in place measures to ensure a more equal society. Henrard writes about the European Court of Human Rights (ECtHR)'s engagement with cases brought on the basis of its prohibition of discrimination rules.¹² In an analysis of ECtHR cases relating to discrimination, it was found that the court moved towards analysing discrimination on the basis of protection provided (by the relevant institution) against discrimination – the 'degree of suspectness of the ground of differentiation' determines the level of scrutiny employed by the court upon investigating if the protection against such discrimination was/is sufficient.¹³ We argue that the promotion of equality as a positive act goes beyond the abstaining of discrimination (a negative right) and should lead to a reduction in occurrences of (discrete, insular cases of) discrimination.

In this article, we argue that the Equality Act forms part of South Africa's education law. The Equality Act provides an overarching value system which gives effect to the Constitution of the Republic of South Africa, 1996 (hereafter 'the Constitution') that should govern all decisions, conduct, policies and laws. It should also, at its most ambitious and idealistic, in line with the proactive nature of the Constitution, champion lasting changes in educators' and learners' attitudes and belief systems towards equality and, ultimately, the celebration of diversity.¹⁴ The Equality Act is a law of general application, applying to all spheres of life and all sectors of society, not just in the educational sphere. It is an overarching piece of legislation, second in importance to only the Constitution, and trumps all other South African legislation.¹⁵ The Equality Act is therefore drafted in general terms, to be applied in all sectors by considering the specific particularities and context of each

issue.¹⁶ The proposed amendments to the Equality Act set out in more detail later in the article are therefore general amendments, not amendments specific to the educational sector. We do, however, point out the practical implications of these proposed amendments for the educational sector, specifically in the context of amendments being proposed to facilitate changes in the hearts and minds of the South African population.

In earlier research, Kok pointed out that sociolegal scholars differ on the law's ability to steer attitudes and beliefs.¹⁷ Of the few authors who are of the view that law can influence attitudes, most offer stringent caveats.¹⁸ Pound and Cotterrell, amongst many others, hold the view that the lawmaker can aim to steer observable behaviour but not attitudes and beliefs.¹⁹ We argue that South Africa offers a distinct case study as its Constitution implicitly mandates the legislature to proactively and positively put measures in place to facilitate the influencing of the hearts and minds of South African inhabitants – values, morals and mindsets.

The South African National Development Plan Vision 2030 relates social change via law to the Constitution which creates a values framework of 'collective convictions, joint and minimum ideological and normative choices of what a good society should be' and notes of the Constitution that it 'is a national compact that defines South Africa's common values and identifies our

from class by the Leseding Technical School in Welkom, because of dreadlocks, worn for religious reasons, were inconsistent with the learner's basic right to education and right to not be discriminated against based on religion, see *Radebe and Others v. Principal of Leseding Technical School and Others* (1821/2013) [2013] ZAFSHC 111 (30 May 2013).

11. Timeslive, *St John's College Fired for Racist Comments*, 28 July 2017, www.timeslive.co.za/news/south-africa/2017-07-28-st-johns-college-teacher-fired-over-racism/ (last visited 10 January 2018).
12. K. Henrard, 'The European Court of Human Rights, Ethnic and Religious Minorities and the Two Dimensions of the Right to Equal Treatment: Jurisprudence at Different Speeds?', 34 *Nordic Journal of Human Rights* 157 (2016).
13. *Ibid.*, at 160.
14. Compare *MEC for Education: Kwazulu-Natal and Others v. Pillay* 2008 (1) SA 474 (CC) paras. 65, 76, 92.
15. Section 5 of the Equality Act.

16. E.g. cf. Section 14(2)(a) of the Equality Act.
17. J.A. Kok, 'Is Law Able to Transform Society?', 127 *South African Law Journal* 59-83 (2010).
18. M. Berger, *Equality by Statute: Legal Controls over Group Discrimination*. Columbia University Press: New York (1952) 172; R.L. Kidder, *Connecting Law and Society: An Introduction to Research and Theory*. Prentice-Hall: Englewood Cliffs (1983), 118-19 and 124; E. Chemerinsky, 'Can Courts Make a Difference?', in N. Devins and D.M. Douglas (eds.), *Redefining Equality*, Oxford University Press, Oxford (1998), 191-204, at 195; A. Sen, 'Normative Evaluation and Legal Analogues', in J.N. Drobak (ed.), *Norms and the Law*, Cambridge University Press, Cambridge (2006), 247-66, at 254; Kollapen in *Sunday Times* (2005-4-3) 18.
19. R. Pound, 'The Limits of Effective Legal Action', 3 *The American Bar Association Journal* 55-70, at 55 (1917); R. Cotterrell, *The Sociology of Law: An Introduction*. Butterworths: London (1992), 51-2; Wilson as discussed by Handler (1978), at 39; A. Allott, *The Limits of the Law*. Butterworths: London (1980), 231-2, at 40; L.M. Friedman, *The Legal System: A Social Science Perspective*. Russel Sage Foundation: New York (1975), 111-24; J.F. Handler, *Social Movements and the Legal System: A Theory of Law Reform and Social Change*. Academic Press Inc: New York (1978), 218; G.N. Rosenberg, 'The Irrelevant Court: The Supreme Court's Inability to Influence Popular Beliefs about Equality (or Anything Else)', in N. Devins and D.M. Douglas (eds.), (1998), 172-90, at 173. To these authors may be added those who argue that any new law should not run too far ahead of society's current mores: A. Macfarlane, 'What Makes Effective Laws?', in H. Swain (ed.), *Big Questions in History*, Vintage London (2006), 101-7, at 105; J. Morison, 'How to Change Things with Rules', in S. Livingstone and J. Morison (eds.), *Law, Society and Change*, Dartmouth Aldershot (1990), 5-32, at 9; W.M. Evan, 'Law as an Instrument of Social Change', in W.M. Evan (ed.), *The Sociology of Law: A Social-structural Perspective*, Macmillan New York (1980), 554-62, at 557-60; W. Jeffrey Jr. 'Sociologists' Conceptualisations of Law: A Modest Proposal for Paradigm Revision', in P.J. Brantingham and J.M. Kress (eds.), *Structure, Law, and Power: Essays in the Sociology of Law*, Sage Beverly Hills (1979), 27-40, 38; Lundstedt as translated and interpreted by V. Aubert, in *Search of Law: Sociological Approaches to Law*. Martin Robinson: Oxford (1983), 13. Also see the contribution by Bocker in this special edition.

rights and responsibilities as people living together'.²⁰ The Constitution is also the vision for South Africa and offers a blueprint for the establishment of a prosperous, non-sexist, non-racial and democratic society.²¹

The founding provisions of the Constitution state that South Africa is founded on the values of human dignity and equality as well as human rights and freedoms,²² non-racialism and non-sexism.²³

The protection and advancement of these rights and values, in principle, have the power to change society because it protects freedom, dignity, equality, life and a whole host of other human rights and should ensure that no law or practice in society goes against these values. This transformative capacity of the Constitution is the essence of transformative constitutionalism.

Transformative constitutionalism has been defined as 'a long term project of constitutional enactment, interpretation and enforcement committed to transforming a country's political and social institutions and power relationships in a democratic participatory and egalitarian direction'.²⁴ Former deputy chief justice Dikgang Moseneke noted that South Africa's constitutionalism is 'value-drenched'.²⁵ If this is so, because of its status as the supreme law, all social institutions, power relationships, law and conduct then logically have to fit into the normative scheme created by the Constitution.

If it is true that various Constitutional Court judgments have been handed down where the values of compassion and tolerance have been emphasised,²⁶ why is it that these values have not found their way into the hearts of South Africans and what is to be done? Socio-legal scholars offer a few ways in which attitudes may be steered: dramatic events such as a war or a depression, extraordinary leadership or the repeated circulation of ideas in the media;²⁷ intricate and detailed knowledge of values-enforcing court decisions;²⁸ and utilising the primary and secondary school system as a 'nationally inclu-

sive socialising agent'.²⁹ In this article, we consider the last-mentioned proposal – the extent to which the school system can assist in concretising one of the Equality Act's aims to bring about changes in the hearts and minds of South Africans.³⁰ We argue below for the amendment of the Equality Act to achieve this goal (see the Annexure to the article for the detailed proposal).

We deal with the proposal in five parts. In the first part, we investigate the South African government's legislative mandate to not only enforce but also to promote a certain moral stance – that of substantive equality – in its citizens' lives. We then consider why schools should be utilised as one of the main instruments in facilitating changes in hearts and minds. Thirdly, we describe the current structure of the chapter in the Equality Act that deals with the promotion of equality, and how it may apply to schools. In the fourth part, we offer some lessons from the United Kingdom's approach in promoting equality, also as it may apply to the school system. In the last part, we propose an alternative, more workable method of promoting equality, in particular how these amendments may be applied to the basic education system, which considers current South African realities, in terms of which the value of substantive equality can be promoted and diversity celebrated using the Equality Act.

2 The Legislature's Mandate to Influence Hearts and Minds

Before the legislature can be urged, or the argument made that the legislature is responsible for implementing laws that will promote a specific moral stance, in this instance, substantive equality, one must consider why the legislature (should) have the power to interfere in private spheres of life.

For the sake of this South African-centred argument we argue that, core to the nature of the recent history of apartheid, legal development in South Africa has established a precedent that the legislature can, and ought to, interfere with moral affairs if the effect of not interfering would bring about unjustified inequality in the treatment of specific groups. We argue that South Africa's history and a transformative Constitution demand that the state positively interfere in inhabitants' lives based on constitutional values.

In a democracy, as originally intended, the power arguably vests in the people and they should determine the government's agenda and scope, not the other way around. If the legislature then enacts law seemingly in contradiction to the people's will, say law to promote moral change, such law would be undemocratic and,

20. National Development Plan Vision 2030, 458.

21. *Ibid.*

22. Section 1 (a) of the Constitution of the Republic of South Africa Act 108 of 1996.

23. Section 1 (b).

24. K. Klare, 'Legal Culture and Transformative Constitutionalism', 14 *South African Journal of Human Rights* 150 (1998).

25. D. Moseneke, 'A Journey from the Heart of Apartheid Darkness towards a Just Society: Salient Features of the Budding Constitutionalism and Jurisprudence of South Africa', *Thirty-Second Annual Philip A. Hart Memorial Lecture*. Georgetown University Law Center (2012), 22.

26. *Prince v. President of the Law Society of the Cape of Good Hope* 2002 (1) SACR 431 (CC) paras. 57, 79, 147; *S v. Lawrence*; *S v. Negal*; *S v. Solberg* 1997 (2) SACR 540 (CC) para. 147; *S v. Makwanyane* 1995 (2) SACR 1 (CC) paras. 249, 308, 369, 391; *Hoffmann v. South African Airways* 2001 (1) SA 1 (CC) para. 38; *Pretoria City Council v. Walker* 1998 (2) SA 363 (CC) para. 102.

27. Wilson, as discussed by Handler (1978), at 39. Handler (1978), at 220, puts it somewhat differently: 'Wilson... argue[s] that social change only really comes about by dramatic events, political entrepreneurs, or the gradual change of public opinion'. From this perspective, one could, e.g. argue that it was not the enactment of the interim Constitution that led to greater tolerance between the polarised racial groups in South Africa, but symbolic reconciliatory moments such as President Mandela's appearance in a Springbok jersey at the 1995 Rugby World Cup.

28. Rosenberg, above n. 19, at 174.

29. A. Bestbier, 'Legal Literacy – the Key to a South African *Supra*-Culture', 15 *Obiter* 105-26, at 107-8 (1994).

30. See Kok (2008), above n. 7, at 7-9.

accordingly, it should not be of force. How to answer this argument? In the South African context, with a value-based Bill of Rights, transformation should be seen as the will of the people, in line with the said values, which provides the mandate for the South African democracy.

Late Chief Justice Langa (of the South African Constitutional Court) argues that the transformative nature of the Constitution is a continuous one, using the metaphor of a bridge, as described in the Epilogue of the interim Constitution:

[The Constitution is] a historic bridge between the past of a deeply divided society ... and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for *all South Africans, irrespective of colour, race, class, belief or sex*.³¹

Langa chooses to interpret the bridge, representing transformation, not as a temporary phenomenon, where one crosses the bridge and the goal is reached, but rather as a continuous effort where 'the idea of change is constant'.³²

This bridge represents the traditional idea of a mandate. A mandate, in this instance, is given with a specific set of boundaries and instructions; the mandator being the people in a democratic society and the mandatee the state. It would seem that, using this idea of a mandate, people cannot provide a mandate for the state to change their morals; for changing the hearts and minds of the people, would not be a request that would come from the people. Rather, such a 'legitimate' mandate would be in line with the hearts and minds (the morals) of the people.

However, Langa's continuous bridge metaphor provides insight into the mandate provided by South Africans. Because of the 'permanent ideal'³³ of transformation set in the values of the Constitution, the mandate dictates that change is the continuous goal, not a specific outcome. South Africans, through the Constitution, provides the mandate to the state, especially the legislature and the judiciary, of transformation – the continuous nature of such a mandate necessitates broadness, including the guidance of morality, even if that goes beyond the current moral stance. The purpose of such a broad mandate is transformation, with the only constant being the breaking from the apartheid past.

The Constitution, being the supreme law of South Africa, guides all legal matters in the country.³⁴ The first test of the extent of the Constitution's reach was *S v.*

Makwanyane,³⁵ which ruled that the death penalty was inconsistent with the human rights contemplated in the interim Constitution. Capital punishment as sentence for crime is, in essence, a moral question, one often asked to be considered by the public.³⁶

In *Makwanyane*, Justice Chaskalson dealt with public opinion being in conflict with judicial rulings, stating that:

The question before us ... is not what the majority of South Africans believe a proper sentence ... should be. It is whether the Constitution allows the sentence.³⁷

This ruling makes it clear that, if the Constitution necessitates change, the state is bound to guide the hearts and minds of South Africans through legal intervention. The continuous transformation mandate given by the people (as discussed above) is guided by constitutional values, rather than by public opinion.

In South Africa, same-sex marriage was legalised following the Constitutional Court ruling in *Minister of Home Affairs v. Fourie*³⁸ on 1 December 2005. The *Fourie* ruling was based on the value of substantive equality, as contemplated in Section 9 of the Constitution. As mandated by the Constitutional Court, Parliament passed the Civil Union Act³⁹ in 2006 to legalise same-sex unions, being only the fifth country in the world to do so at the time.

De Vos and Barnard point out that public support for the recognition of same-sex marriage leading up to the mentioned legislation to be in opposition to the *Fourie* ruling.⁴⁰ Public hearings facilitated by Parliament related to the Civil Union Bill often led to 'homophobic rants',⁴¹ illustrating the public's reluctance to accept this moral determination made by the state. The contradiction in the public's opinion and the mandate, as found in the Constitution, is summarised by De Vos and Barnard, quite meaningfully, as follows:

It [the ruling party] had to comply with the court's judgment while aware that the vast majority of its voters were strongly opposed to it. ... It is one of the

31. Constitution of the Republic of South Africa, Act 200 of 1993 (own emphasis to highlight equality as Constitutional mandate). See P. Langa, 'Transformative Constitutionalism', 17 *Stellenbosch Law Review* 351 (2006).

32. Langa makes this argument in line with A. Van der Walt 'Dancing with Codes – Protecting, Developing and Deconstructing Property Rights in a Constitutional State', 118 *South African Law Journal* 258-96, at 296 (2001).

33. Langa, above n. 31, at 354.

34. Section 2 of the Constitution.

35. 1995 (6) BCLR 665 (CC) (hereafter *Makwanyane*).

36. The question of allowing death penalty was considered by public vote in several United States of America states since 1916 (Arizona) until as recent as 2016 (California, Nebraska, Oklahoma), see: (https://ballotpedia.org/Death_penalty_on_the_ballot). Citizens of the Republic of Ireland voted to van death penalty in 2001 (www.irishstatutebook.ie/eli/2001/ca/21/enacted/en/html).

37. *Makwanyane*, above n. 35, para. 87.

38. 2006 (1) SA 524 (CC) (hereafter *Fourie*).

39. 17 of 2006.

40. P. de Vos and J. Barnard, *Same-Sex Marriage, Civil Unions and Domestic Partnerships in South Africa: Critical Reflections on an Ongoing Saga*. 2015. <https://constitutionallyspeaking.co.za/wp-content/uploads/2015/11/Same-sex-marriage1.pdf>.

41. *Ibid.*, at 814, detailed in media reports: W.J. da Costa, 'Hearings "A Platform for Hate Speech"', *Cape Times* 11 October 2006, at 4; W.J. Costa, 'Gays Protest Tone of Civil Union Bill Debate', *Cape Times* 16 October 2006, at 4; W.J. da Costa, 'Activists Slam Hearings on Same-Sex Unions', *Pretoria News* 11 October 2006, at 4.

implications of favouring the rule of law that it will not always accord with public opinion.⁴²

De Vos further emphasised, discussing the Civil Union Act in 2007, that the *Fourie* victory was the result of ‘... luck, wise strategic leadership and fortitude’, with a legal strategy relying on Section 9’s sexual orientation inclusion and not societal approval of same-sex marriages.⁴³

The action taken by the judiciary in *Fourie* and the subsequent compliance by Parliament indicate that the South African state interprets the constitutional values as its guiding principles when it is faced with a moral issue. The South African state has a clear mandate to guide the hearts and minds of South Africans through law.

3 Why Focus on Schools in Promoting Equality?

According to the theories of Yezekiel Dror, a lag in social change will exist if people understand the law but the norms introduced by the law differs from their existing norms,⁴⁴ and ‘when social behaviour and the sense of obligation generally felt towards legal norms significantly differs from the behaviour required by law’.⁴⁵ This implies that the gap between constitutional literacy and internalisation will potentially cause a lag in social change.

Values and norms are acquired through processes of learning and socialisation.⁴⁶ Socialisation is a process of internalising the norms and ideologies of society.⁴⁷ Learning happens via agents of socialisation or influencers, which can be seen as individuals, groups and institutions that alter individual attitudes, behaviours and beliefs to conform.⁴⁸

The three main traditional agents of socialisation are the family, the community⁴⁹ and the school.⁵⁰ As society changes, religious, communal and family values, and hence the education they provide, do not stay constant either. This makes family and community unstable socialising agents, and hence are not the ideal platforms. Schools, on the other hand, use one uniform national framework or curriculum to determine their values,

which makes it easy to see why Bestbier refers to schools as ‘nationally inclusive socialising agents’;⁵¹ and Saldana considers them the most stable and formal agent of socialisation.⁵²

The reason why schools are arguably the best option for socialisation lies in Greenfield’s theory of ‘transitional community’. Patricia Greenfield theorises that the learning and development pathway for children becomes complicated because of the family’s and community’s role as socialising agents, delivering different normative messages of individualism versus collectivism.⁵³

Under these conditions, the theory of social change and human development predicts that children will be subject to cross-cutting currents, in that they will receive both socialisation messages at home that continue to be adapted to the more *gemeinschaft* environment that their parents grew up in and conflicting socialisation messages from representatives of the more *gesellschaft* host society, such as teachers.

Schools are hence an essential way to address the gap between the two prototypes and cause an intervention between *gemeinschaft* and *gesellschaft* and different normative frameworks because they essentially create what we could call ‘transitional communities’.

So this means that if we want to socialise the transformative values (as contained in the normative structure of the Constitution) into society and bridge the gap between our differing normative structures to achieve real social change, we should focus on education as a socialising agent, specifically schools that create transitional communities.

If we hence want the constitutional values to actually change people’s thinking, these constitutional values must be internalised. Mere knowledge or understanding or ‘constitutional literacy’ is not enough. How to achieve this internalisation?

Paulo Freire calls this step critical consciousness/*conscientização*, which involves dialogue, reflection and praxis/action.⁵⁴ Freire considers that the main problem with education lies in ‘narration sickness’.⁵⁵ The relationship between a teacher and student is one of an active narrator and a passive listener: ‘The contents, whether values or empirical dimensions of reality, tend in the process of being narrated to become lifeless and petrified’.⁵⁶ This leads to what he calls the ‘banking concept’ of education through which students are simply keeping deposits as passive recipients in the classroom and are ‘receptacles

42. de Vos and Barnard, above n. 40, at 820.

43. P. de Vos, ‘The ‘inevitability’ of Same-Sex Marriage in South Africa’s Post-Apartheid State’, 23 *South African Journal on Human Rights* 432-65 (2007).

44. Y. Dror, ‘Law and Social Change’, 33 *Tulane Law Review* 787, at 790 (1959).

45. *Ibid.*, at 794.

46. J. Saldana, ‘Power and Conformity in Today’s Schools’, 3 *International Journal of Humanities and Social Science* 228, at 228 (2013).

47. M. Hirsch, *Invitation to the Sociology of International Law*. Oxford University Press: Oxford (2015), at 7-8.

48. Saldana, above n. 46, at 228.

49. S. Amon, S. Shamani & Z. Ilatov, ‘Socialization Agents and Activities of Young Adolescents’, 43 *Adolescence* 373 (2008).

50. Saldana, above n. 46, at 228.

51. Bestbier, above n. 29, at 108.

52. Saldana, above n. 46, at 228.

53. P.M. Greenfield, ‘Linking Social Change and Developmental Change: Shifting Pathways of Human Development’, 45 *Developmental Psychology* 401, at 411-2 (2009).

54. P. Freire, *Education and Critical Consciousness*. Bloomsbury Academic (2005), 43.

55. P. Freire, *Pedagogy of the Oppressed*. Continuum: New York (2005), 72.

56. *Ibid.*, at 72.

to be filled by the teacher'.⁵⁷ The problem with this approach to education is that:⁵⁸

The more students work at storing the deposits entrusted to them, the less they develop the critical consciousness which would result from their intervention in the world as transformers of that world. The more completely they accept the passive role imposed on them, the more they tend simply to adapt to the world as it is and to the fragmented view of reality deposited in them.

This approach arguably leads to students having a disconnect with their social realities because they are passive in those realities and do not feel an inclination towards having a responsibility to change those realities. On the other hand, using a more active educational method of critical enquiry through problem-posing education instead of banking education creates a space for dialogue where 'multiple voices are honored but not unquestioned; stories and perspectives are entered into the educational arena to serve as entries for critical social interrogation'.⁵⁹ When problems are posed and dialogue is had about those problems, students do not simply receive knowledge or achieve literacy, they are forced to think critically about situations. According to Nagda *et al.*, 'in this democratic and emancipatory process, students and teachers engaged in dialogic pedagogy can become active citizens, challenging injustices both within and among themselves, and in the social world around them'.⁶⁰

Dialogue and reflection about problems can potentially help create a critical consciousness.⁶¹

Critical consciousness, which encompasses being aware of power relations, analyzing habits of thinking, challenging discursive and ideological formations, and taking initiative, is developed in student-centered dialogue that problematizes generative themes from everyday life, topical issues from society, and academic subject matter from specific disciplines.

In a dialogue and subsequent critical consciousness, students as well as teachers can contextualise their experiences socially, culturally and historically and subsequently also recognise the potential to change oppressive structures.⁶² According to Freire, dialogue and reflection are not sufficient. He argues for praxis as well, which entails that

it is not enough for people to come together in dialogue in order to gain knowledge of their social reality. They must act together upon their environment in order critically to reflect upon their reality and so transform it through further action and critical reflection.⁶³

Through a critical consciousness about issues, dialogue and reflection, students can then take informed action (praxis) which is based on values.⁶⁴ Hence for Freire, the essential elements of education have to be dialogue and reflection that create a critical consciousness from which action can be taken. In the context of this discussion, we can hence consider that following a literacy or an understanding of laws or values, learners thus have to subsequently actually become conscious of those values by reflecting on them via dialogue to be introspective about how it affects their social reality and then only will they be inspired to act on the basis of those values in society; otherwise, they are unconnected to their own society (similar to Bestbier's notion of legal impotence).⁶⁵ How such a dialogue can be facilitated in (or even forced upon) schools using the Equality Act is addressed in the next sections.

4 The Equality Act's Commandment to Promote Equality

The Equality Act prohibits unfair discrimination, hate speech and harassment – conduct; or outward manifestations of implicit or explicit bias.⁶⁶ The state and 'all persons' are prohibited from these actions. The definitions of 'State' and 'person' in the Act are broad enough to include educators, learners, governing bodies and all role players in the schooling system. Complaints which fall under the equality court's jurisdiction probably occur on a daily basis in classrooms and school grounds across South Africa. These instances may all be adjudicated on in equality courts.

However, in this article, we focus on the part of the Equality Act that deals with the promotion of equality – the part that addresses changes in hearts and minds – and not the adjudication of complaints by the equality courts. As stated earlier, the part of the Equality Act that deals with the promotion of equality is not in force yet.

Chapter 5 of the Equality Act, in its current form, presupposes that the model to be followed when concretising the duty to promote equality is that of prescribing

57. *Ibid.*, at 73.

58. *Ibid.*, at 73.

59. B.A. Nagda, P. Gurin & GE. Lopez, 'Transformative Pedagogy for Democracy and Social Justice', 6 *Race Ethnicity and Education* 165, at 168 (2003).

60. *Ibid.*

61. J. Kaufmann, 'The Practice of Dialogue in Critical Pedagogy', 60 *Adult Education Quarterly* 455, at 458 (2010).

62. *Ibid.*, at 458.

63. <https://freire.org/paulo-freire/concepts-used-by-paulo-freire> (last visited 29 July 2019).

64. <http://infed.org/mobi/paulo-freire-dialogue-praxis-and-education/> (last visited 29 July 2019).

65. Bestbier, above n. 29, at 113 quoting Fitzgerald 'Law at school – a Canadian viewpoint' 1978 *New Law Journal* 300.

66. See Subsection 6 to 11 of the Act.

equality plans and action plans and having these plans submitted to a monitoring body. To operationalise this chapter in the Equality Act, regulations would have to be effected to make provision for equality plans, action plans, the monitoring of these plans and some enforcement mechanism if plans are neither drafted nor implemented.

Draft regulations dealing with the promotion of equality in the general sense have been published for comment,⁶⁷ but have not yet been given legal effect. The regulations distinguish between the promotion of equality by the state, and the promotion of equality by 'all persons'. As to the state's obligations, the regulations envisage the drafting of equality plans by state departments.⁶⁸ These plans must be drafted for a five-year period. These plans must then be submitted to the South African Human Rights Commission (SAHRC), which in turn must submit the plan to the Commission for Gender Equality (CGE) for purposes of consultation. The SAHRC is a national institution created by Chapter of the Constitution. Section 184 of the Constitution sets out the mandate of the SAHRC which states that the SAHRC must promote respect for human rights and a culture of human rights; promote the protection, development and attainment of human rights; and monitor and assess the observance of human rights in the Republic. Therefore, the role assigned to the SAHRC by the draft regulations falls squarely within the mandate of the SAHRC. In terms of the draft regulations, the SAHRC must consider and assess each of these equality plans, make appropriate recommendations to the relevant state department and report to the National Assembly in terms of Section 181(5) of the Constitution. (Section 181(5) states that Chapter 9 institutions are accountable to the National Assembly.) In terms of the draft regulations, each state department must also submit annual progress reports to the SAHRC, which must then assess each of these progress reports and if, necessary, must advise the relevant departments on measures to be put in place to expedite the implementation of the equality plan.⁶⁹

As to the promotion of equality by 'all persons', Section 28 of the draft regulations distinguishes between 'entities' that employ more than 150 employees, more than 50 but less than 150 employees and less than 50 employees. Entities that employ more than 150 employees must submit equality plans to the Director-General of the Department of Justice and Constitutional Development. These plans are valid for five years. Annual progress reports must also be submitted to the Department. The Director-General then forwards the plans to the appropriate national state department and that department then analyses the plans. The progress reports are dealt with on a similar basis. Entities that employ between 50 and 150 employees must adopt written measures to promote equality and must report in writing thereon upon

the written request of a national state department. It must also, on request of a member of the public, cause its plan to be made available for inspection at its offices. Entities with less than 50 employees must adopt written measures to promote equality and must report in writing thereon upon the written request of a national state department.

The most obvious question relating to these draft regulations is whether the SAHRC and the various state departments will have the capacity to rigorously assess and monitor compliance with the equality plans and progress reports.⁷⁰

The draft regulations pertaining to the promotion of equality cannot be successfully implemented without the heavy involvement of the SAHRC. The SAHRC will have to do the heavy lifting with the management of the equality plans envisioned by the Equality Act in its current form. The draft regulations task the SAHRC with a number of duties in respect of the equality plans such as assessing whether the measures to be implemented will achieve the stated goals and objectives and assessing whether the measures adopted to monitor the implementation of the equality plans are appropriate amongst others.⁷¹ This is bound to be a mammoth task for the SAHRC as it will have to draft guidelines and codes to guide the entities that have to submit equality plans on how to actually compile these plans. Then it will have to assess and monitor the compliance of these entities with the Equality Act and its regulations amongst other tasks.

In its Trends Analysis⁷² Report, the SAHRC states that alleged infringements of the right to equality comprised an overwhelming majority of the complaints received by the SAHRC. In the 2015/2016 financial year, the Commission received a total of 749 equality-related complaints. It received 428 complaints regarding alleged violations of socio-economic rights. This work load excludes the litigious work it does in the High Courts, Supreme Court and Constitutional Court and it excludes complaints in respect of the other rights violations falling outside of socio-economic rights. It also excludes the monitoring the SAHRC is mandated to do in terms of the Promotion of Access to Information. Suffice to say that the SAHRC already has a huge mandate which may affect its ability to take on the added monitoring responsibility in terms of the Act.

In this article, we proceed from the assumption that the SAHRC will not in the foreseeable future be empow-

67. GN 563, above n. 9, at 26316.

68. See Chapter VI, Section 24 of the draft regulations.

69. Section 26 of the draft regulations.

70. Compare S. Jagwanth, 'Affirmative Action in a Transformative Context: The South African Experience', 36 *Connecticut Law Review* 725-46, at 744 (2003). More recently, the Auditor-General has lamented the high rate of non-compliance by national and provincial government with key legislation. See audit outcomes of national and provincial government departments available on https://www.gov.za/sites/default/files/speech_docs/Audit%20Outcomes%202015-16%20PFMA%20Presentation.pdf. (last visited 5 October 2020).

71. See Section 25 of the draft regulations.

72. See the South African Human Rights Commission Annual Trends Analysis Report 2015/2016 Financial Year, available at www.sahrc.org.za/home/21/files/Annual_Trends_Analysis_%20Report_2015_16.pdf (last visited 17 October 2018).

ered to be able to deal with millions of submitted equality plans. We therefore argue for an alternative approach to promote equality in terms of the Equality Act – including how schools should be asked to promote equality.

5 Lessons from the UK Experience in Promoting Equality in the School System

The UK model for the advancement of equality requires public and private bodies to submit equality plans and concomitant action plans. The United Kingdom also provides a guideline which outlines how the UK Equality Act 2010 is to be promoted in schools in relation to the provision of education and access to benefits, facilities or services, both educational and non-educational. It provides an authoritative, comprehensive and technical guide on how schools can implement the requirements of the United Kingdom's Equality Act.

The guideline is also a useful guide on how to approach issues such as students undergoing gender reassignment and bullying (based on prohibited grounds) in schools and to incorporate these issues into the curriculum.⁷³

The guideline provides an example of how the promotion of equality can be pursued through the schooling system. For example, the guideline provides that schools must not

- discriminate against a pupil or prospective pupil because of their disability, race, sex, gender reassignment, religion or belief or sexual orientation;
- harass or victimise a pupil or prospective pupil.

Further, it provides that schools must not discriminate against a person in relation to the following activities

- admission to school;
- the provision of education to pupils;
- access to any benefit, facility or service;
- exclusion from school by subjecting a pupil to any other detriment.

A school must not

- discriminate in the way it provides education for a pupil;
- discriminate in the way it gives a pupil access to any benefit, facility or service;
- refuse to provide education for a pupil for discriminatory reasons;
- refuse to give a pupil access to a benefit, facility or service;
- harass a pupil;

73. E.g. www.equalityhumanrights.com/en/publication-download/technical-guidance-schools-england and www.equalityhumanrights.com/en/publication-download/tips-tackling-discriminatory-bullying (last visited 24 December 2017).

- victimise a pupil.

Schools must have in place either

- a three-year race equality policy and action plan; accessibility plan; disability equality scheme and action plan; gender equality scheme and action plan; equal opportunities policy that covers sexual orientation, age and religion and belief; and a strategy for promoting community cohesion; or
- a three-year single equality scheme and action plan that incorporates all the above policies, schemes and plans.

Schools need to be careful that blanket uniform policies do not discriminate because of race, religion or belief, gender, disability, gender reassignment or sexual orientation. Consequently, it will be up to the individual school to consider the implications their uniform requirements have on their pupils.⁷⁴

Schools need to make sure that pupils of all races are not singled out for different and less favourable treatment from that given to other pupils. Schools should check that there are no practices which could result in unfair, less favourable treatment of such pupils. For example, it would be unlawful for a selective school to impose a higher standard for admission to applicants from an ethnic minority background.

Similar to the South African draft regulations, the United Kingdom's model requires private bodies to submit their equality plans and concomitant action plans to the designated monitoring body and it is clear to these bodies that these plans will be scrutinised. As to who monitors compliance, the answer is twofold.

- i. Public and private bodies will internally have to set up monitoring schemes which have to be approved by the monitoring body. Examples of internal monitoring include recording and producing data, surveys and spot check exercises. The methods should be clearly described and appropriate to what is being monitored. Public and private bodies should designate internal teams or an internal equality officer whose duty it will be to drive the process. Service users can also play a role in the monitoring process and could offer feedback.
- ii. The other layer of monitoring will come from the external monitoring body. The United Kingdom's Equality Commission has issued a Compliance and Enforcement Policy setting out its powers and objectives in that regard. In that policy, the Commission states that it sees its role as regulatory – helping organisations achieve what they should, not trying to catch them out if they fall short. Legal action is the Commission's last resort.

Another issue that should be considered is how civil society can play a role in this monitoring process. Civil

74. The Equality Act and Schools: Departmental Advice for School Leaders, School Staff, Governing Bodies and Local Authorities, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/315587/Equality_Act_Advice_Final.pdf (last visited 17 October 2018).

society could be empowered to ask for information from a particular public or private body or to ask for a copy of the equality plan or action plan, and for information on progress in achieving the targets set in the action plan. Perhaps the single most important lesson from the United Kingdom is that public authorities have to weave policies of equality into the fabric of its decisions and public policies. That is what the promotion of equality comes down to – a political commitment to make equality central in every aspect of the state’s work. Equality plans are a written commitment, assessable and enforceable. This process will require resources – a committed work force and sufficient funds – for it to be a success. Otherwise, the fear expressed by an academic from the United Kingdom – that this whole process could result in the ‘mumbo-jumbo of clichéd policy statements and bureaucratic procedures’ without bringing about significant social change is a real danger – the only way that it can be prevented is by ensuring that the compliance and enforcement mechanisms are utilised.⁷⁵ Taking into consideration the UK model, we argue that the duty to promote equality may be concretised in schools as follows:

- Incorporating equality principles (and equality law) into primary and high school curricula;
- Promoting a holistic school ethos and values that challenge prejudice-based discriminatory language, attitudes and behaviour;
- Using materials and resources in schools that reflect the diversity of the school, population and local community in terms of race, gender, sexual identity and disability, avoiding stereotyping;
- Preparing learners for life in a diverse society and ensuring that there are activities across the curriculum that promote the spiritual, moral, social and cultural development of pupils;
- Providing opportunities for pupils to appreciate their own culture and celebrate the diversity of other cultures.⁷⁶

We return to these five proposals below. In the two sections that follow and in the Annexure, we show how the Equality Act may be amended to make these proposals compulsory for all South African schools.

75. B. Hepple, *Equality: The New Legal Framework*. Hart Publishing: Portland (2011), 179.

76. More generally, the Department of Justice should also develop an ‘equality journal’ – a publication consisting of judgements of the magistrates and High Courts; personal reflections by presiding officers of the equality court; guidance for the benefit of mainly presiding officers on how to interpret the Equality Act. It should also develop an equality court website with summaries of cases in plain language that the media should be referred to regularly for reporting purposes, discussions on radio and incorporation into the story lines of television series. Plain language versions of the Equality Act should be prepared in all eleven official languages (see the proposed amendment to the regulations in the last part of the article – ‘Availability of Act in official languages’. In this article, we treat as self-evident the benefits of a plain language approach. A full argument on why the Equality Act should be drafted in plain language is beyond the scope of this article).

6 An Alternative Approach to the Promotion of Equality

In this part of the article, we argue for amendments to the Equality Act and the existing draft regulations in relation to the promotion of equality. The assumption we make here is that the designated enforcement body in terms of the draft regulations – the SAHRC – is simply not in a position to monitor compliance with the Act. The approach set out in the Annexure asks much from individual schools and civil society instead.

To reiterate, the Equality Act is a national law that applies to the entire South Africa, across all sectors and public and private spheres of life. The Act is drafted in general language, to be applied context specifically for each individual case that may appear before the equality courts. The draft regulations on the promotion of equality are likewise drafted in general language, to be adapted by the particular organisations asked to develop equality plans. The amendments proposed in the Annexure are also proposed in general terms, not only for the education sector. The general gist of this article is, however, directed at schools as a particularly apt sector of society for addressing the transformation of hearts and minds. In the sections that follow, general amendments to the Act and the draft regulations are suggested, whereafter these suggested amendments are applied in particular to the education sector.

The following sections in the Equality Act’s current form require the promulgation of regulations relating to the promotion of equality:

Section 25(3)(c): ‘... [T]he constitutional institutions ... are also competent to request from the Department [of Justice], in the prescribed manner, regular reports regarding the number of cases and the nature and outcome thereof’.

Section 25(4)(b): ‘All Ministers must within their available resources prepare and implement equality plans, in the prescribed manner, which must include a time frame for implementation and which must be formulated in consultation with the Minister of Finance’.

Section 25(5)(a): ‘These equality plans must be submitted to the SAHRC to be dealt with in the prescribed manner’.

Section 26: ‘Any person directly or indirectly contracting with the State or exercising public power must promote equality by making regular reports to the relevant monitoring authorities or institutions as may be provided in regulations’.

Section 27(2): ‘The Minister of Justice must develop regulations to require companies, closed corporations, partnerships, clubs, sports organisations, corporate entities and associations, in a manner proportionate to their size, resources and influence, to

prepare equality plans or abide by prescribed codes of practice or report to a body or institution to promote equality’.

The proposed amendments to the Equality Act and draft regulations set out in the Annexure to this article proceed from the assumption that the SAHRC and other possible monitoring agencies are not sufficiently staffed or resourced to undertake a comprehensive monitoring of submitted equality plans from every company, closed corporation, partnership, club, sport organisation, corporate entity and association, nor from every person directly or indirectly contracting with the state or exercising public power.

The changes we suggest to the Equality Act and draft regulations accompanying the Act would rather require these bodies to develop and then make their equality plans publicly available and accessible to the public. This may, e.g. be done by publishing the plans online and to have it available at the premises of the body to supply the plan when requested. Where a particular body fails to develop, or fails to make publicly available, or publishes an inadequate equality plan, it is proposed that the draft regulations should include a provision empowering the equality courts, on application by an appropriate interested entity, to order the preparation and publication of such an equality plan. It is well-established that the equality courts are not overburdened, and creating this additional role for the equality courts will unlikely lead to clogged court rolls. Empowering equality courts to oversee the development and implementation of equality plans would allow these courts to play a more significant role in combating systemic discrimination as well – which is one of the explicit aims of the Equality Act.

We also propose that Section 14 of the Equality Act in its current form should be amended to allow equality courts to take cognisance of the existence or non-existence of a respondent’s equality plan, and whether the published equality plan is appropriate, in the determination of the fairness or unfairness of the alleged discrimination. Such an amendment would supplement the provision that already appears in Section 14 that equality courts must consider

‘(i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to – (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or (ii) accommodate diversity’.

It would not be a stretch for equality courts to rule on the content of equality plans. They are already called upon to make value judgements in deciding on ‘fair’ or ‘unfair’ discrimination. In the context of disabled learners, in ruling on ‘reasonable accommodation’, the equality courts are already to some extent devising equality plans. In the case of *Oortman v. St Thomas Aquinas Pri-*

vate School & Bernard Langton,⁷⁷ e.g. the Mpumalanga equality court ruled that the respondent school had to readmit the learner and had to reasonably accommodate the learner. The court made specific orders to allow for access for the learner in her wheelchair to the classroom, washbasin and toilet.⁷⁸

An audit of all laws calling on entities to draft equality/equity plans should be considered and so should the coordination and harmonisation of similar duties created in related legislation, e.g. the Employment Equity Act⁷⁹ which requires employers to submit employment equity plans that must indicate how affirmative action measures will be implemented⁸⁰ and the Women Empowerment and Gender Equality Bill⁸¹ which requires designated bodies to submit annual compliance plans on gender education; women’s health care and reproductive health; public education on prohibited practices, including gender violence and equal representation and participation in decision-making.⁸² The reporting obligations in these laws must be coordinated and harmonised so that all the relevant laws require one plan with the same content and same reporting cycle. Alternatively, those sections of other Acts calling for the preparation of equality/equity plans should be deleted, so as to create one overarching reporting duty.

The proposal set out in the Annexure requires all public and private bodies to prepare equality plans, irrespective of their size or influence. The preparation of an equality plan calls for consultation with affected communities and allows for reflection on how best to achieve substantive equality in a given context. Depending on the size and complexity of a particular public or private body, the preparation and content of an equality plan will vary significantly. A hairdresser’s equality plan may amount to little more than a clearly visible sign posted at the entrance professing that all hair types are accommodated. On the other hand, as an example, a school’s equality plan will have to address many interlocking and complex matters such as admission requirements, boarding placement policies, calculation of school fees, school culture, student governance structures, etc. To require small private entities to draft equality plans will therefore usually not be an onerous burden. To avoid the reporting obligations of larger bodies from becoming unduly onerous, one reporting obligation for all equality-related legislation should be created, as set out above. This would require an audit of all laws calling for equality/equity plans, and ensuring that these laws are harmonised.

An alternative approach would be to draft and prescribe codes of practice for particular sectors, e.g. education, service industry, sporting bodies, etc. to replace equali-

77. Equality Court Case 1/2010 (December 2010).

78. I. Grobelaar-Du Plessis and C. Grobler, ‘South Africa’, 1 *African Disability Rights Yearbook* 307, at 320 (2013).

79. 55/1998.

80. Section 20 of the Employment Equity Act.

81. www.juta.co.za/media/filestore/2013/11/B50_2013.pdf (last visited 24 December 2017).

82. Section 4 of the Employment Equity Act.

ty/equity plans. All entities operating in that particular sector would then be obliged to adhere to the relevant code of practice. These codes would have to be generic in nature, allowing each particular entity to interpret the applicable code in the context of its own operational and other requirements and circumstances. An opportunity to consult with the affected communities and stakeholders, and calling for the assistance of non-governmental organisations (NGOs) and civil society in drafting a tailor-made equality plan for that specific entity, would then also be absent. The proposal set out in the Annexure does not follow this approach, but rather opts for individualised equality plans.

A number of proposed amendments to other sections in the Act flow from this suggested approach (i.e. the preparation and publication of equality plans by all private and public entities, and empowering the equality courts to adjudicate on the content and implementation of equality plans), as set out in the Annexure.

In similar fashion, we propose to require state departments to also prepare, publish and implement equality plans, but that these plans not be submitted to the SAHRC. (The SAHRC would still have its normal monitoring and other duties as prescribed in its founding legislation.)

7 Implications for South African Education Law

Should the government accept this proposed model and amend the Equality Act and regulations accordingly and bring into effect the promotional part of the Equality Act, schools and faculties of education at universities, governing bodies, educators and learners will be impacted on significantly.

The departments of basic and higher education, all universities, including faculties of education and all schools would have to develop equality plans; inter alia on how they would, over time, eliminate systemic discrimination, individual instances of unfair discrimination, hate speech and harassment related to the prohibited grounds in its area(s) of operation; illustrate how it will advance substantive equality in its area(s) of operation and illustrate how it will foster good relations in its area(s) of operation between persons who share a prohibited grounds and persons who do not. A consultative process would have to be followed to develop these plans. These plans must be developed in a bona fide, inclusive manner allowing for input from all interested parties. These plans would then have to address matters such as *curricula* and assessment (the examples used and the questions asked); placement policies, codes of conduct, etc. – all in service of transforming schools into safe and inclusive spaces and producing learners and young adults attuned to the imperatives of living up to and celebrating diversity, substantive equality and dignity.

An example of the current approach to human rights education in South African high schools can be found in the grade 12 South African Life Orientation textbook, where a meagre total of 5 pages out of 244 are dedicated to human rights and discrimination by listing rights and examples of discrimination followed by two activities asking students to reciprocally, list rights and write down what violations would look like without any actual activity necessitating dialogue, reflection or action instructed to be undertaken for the exploration of these rights.⁸³ For learners and citizens alike to develop a critical consciousness about human rights, it is important to remember that human rights are personal rights, they are not impersonal or relating to property and they affect the 'self'. For this reason, perspectives on critical consciousness which have a focus on self-awareness are useful to determine how we can achieve critical consciousness about human rights. Pitner and Sakamoto theorise that the first step to critical consciousness is a self-awareness of one's various social identities (gender, race, etc.) and the influence thereupon of factors like history, culture and politics.⁸⁴ This is especially important in a South African social context if one considers our diverse society. They further theorise that we have a position and status within each of these identities which influences our perception of ourselves and others, e.g.: A male might have a privileged status in his position as a male from a gender identity perspective, but if his race in a specific context has been oppressed, he is simultaneously privileged and oppressed.⁸⁵ Our social identity perspectives can give us different narratives about our realities.⁸⁶ Pitner and Sakamoto refer to this as 'stand-point theory' and suggest that oppressed groups are often more aware of these narratives than non-oppressed groups.⁸⁷ The complication with this self-awareness strategy is that, often, when the privileged become aware of their position and status within their privileged identity, this leads to them becoming defensive or feeling guilty instead of constructively considering how collaboration can happen between the privileged and oppressed towards human rights-relevant goals such as social justice.⁸⁸ The way to counter this potential demotivation is by changing the perspective from being privileged to being an 'agent' whose privilege gives them access to social power while the oppressed can be seen as 'target groups' whose group memberships limit their access to power.⁸⁹ This less threatening approach helps shift the thinking attitude on two important levels.⁹⁰

83. Pearson *Spot on Life Orientation Learner's Book* (2017), 98-102.

84. I. Sakamoto and R. Pitner, 'Use of Critical Consciousness in Anti-Oppressive Social Work Practice: Disentangling Power Dynamics at Personal and Structural Levels', 35 *British Journal of Social Work* 435, at 442 (2005).

85. *Ibid.*

86. *Ibid.*

87. *Ibid.*

88. *Ibid.*, at 444.

89. *Ibid.*

90. *Ibid.*

First, it helps agent group members to examine power differentials at a structural level and, thus, lowers their resistance to acknowledgement of their own privilege. Secondly, for target group members, this analysis identifies a common goal with the agent group (i.e. eradicating all forms of oppression at every level). It also makes the target group responsible in that they are able to see how their various social group identities may also place them in the agent group role (depending on the social context). Thus, target groups do not simply blame agent groups for owning social power; they join them in working toward social justice. Being able to critically examine how we are both targets and agents allows individuals to feel less threatened and more responsible for working toward social action.

If one considers that the beginning of developing critical consciousness also includes a critical self-consciousness, that helps frame the way human rights-related concepts can be taught to learners so that they do not simply consider some human rights relevant to them and others perhaps not because it does not directly relate to them, i.e. the learner who is 'privileged' enough to never have experienced problems with access to water and sanitation might not become critically conscious or internalise the values behind this human right because the learner feels it does not directly relate to his personal circumstances. Critical self-consciousness hence helps to start create a consciousness of our role in society as 'agents' who can assist with change and hence more open and invested to learning about those rights and how we can contribute towards achieving them to assist 'target groups' and collaborate in society. This realisation is the core of critical consciousness.

While this concept is useful, it is only the beginning of critical consciousness and the question still remains how we make this concept practical especially in a classroom. This is where dialogue comes in so that reflection can be achieved via conversation and subsequent action or praxis can eventually occur.

Most models of critical consciousness teaching note that critical consciousness, specifically dialogue and reflection, can be made practical via activities such as journaling (self-reflection on issues and experiences), but, more importantly, via class discussions⁹¹ which can even take the form of structured debate for which guidelines are have been created by Pitner and Sakamoto⁹², if relevant. Rugut and Osman note Freire's perspective on dialogue and that 'dialogic action challenges mediating social realities by posing them as problems that can be analysed critically by those who have direct experience of them'.⁹³ They hence propose the use of the Freirean

model of 'problem-posing education' to counteract the banking model of education:⁹⁴

In this model, the teacher and learner discuss and analyze their experiences, feelings and knowledge of the world together. Instead of the belief that learners' and teacher's situation in the world is fixed, as the banking model suggests, the problem-posing model explores problems or realities people find themselves in as something which can be transformed.

Rugut and Osman then suggest that the problem-posing model can be used to make learners aware of their social identities, of privilege or oppression, by making use of dialogue in the form of 'the culture circle' where learners and teachers engage in non-hierarchical conversation around learners' current social realities and identifying generative themes related to their social realities:⁹⁵

These themes, which are related to nature, culture, work, and relationships, are discovered through the cooperative research of educators and students. They express, in an open rather than propagandistic fashion, the principle contradictions that confront the students in their world ... This involves creating a democratic space where every one's voice has equal weight. The conditions needed for this have to be actively created as it does not often occur naturally. This can mean challenging cultural, gender and other status related power relationships and stratifications.

Once these themes come to light and learners are exposed to each other's realities, a process of codification and decodification takes place where learners can form a picture of a reality they might not have previously related to or considered themselves involved in:

Codification is a way of gathering information in order to build up a picture (codify) around real situations and real people. Decodification is a process whereby the people in a group begin to identify with aspects of the situation until they feel themselves to be in the situation and be able to reflect critically upon its various aspects, thus gathering understanding.

It is this awareness created by dialogue which cultivates a critical consciousness of learners' social realities and where education is used not to adapt them to their current reality but to understand and transform their reality because real problems and needs are discovered.⁹⁶ From this shared understanding, learners can start to interrogate their own social identity and potential power in these realities.

8 Conclusion

In this article, we argued for amendments to the Equality Act to craft an explicit duty to transform South Afri-

91. K.A. McDonough, *Performing Critical Consciousness in Teaching: Entanglements of Knowing, Feeling and Relating*. PhD Thesis, University of Massachusetts (2015), 82.

92. I. Sakamoto and R. Pitner, 'Cultural Competence and Critical Consciousness in Social Work Pedagogy', *Encyclopedia of Social Work* August 6 (2016).

93. E.J. Rugut and A.A. Osman, 'Reflection on Paulo Freire and Classroom Relevance', *2 American International Journal of Social Science* 23, at 26 (2013).

94. *Ibid.*, at 24.

95. *Ibid.*, at 25.

96. *Ibid.*, at 27.

can's hearts and minds – a duty that rests on all persons in all contexts. The specific context of this article relates to education and a proposed duty to be placed on all schools to take a much more proactive and intrusive approach to transforming its learners. There is support to be found for this proposal in South African and international law. We briefly conclude by summarising the most pertinent South African and international law principles.

*MEC for Education: KwaZulu-Natal v. Pillay*⁹⁷ involved a school who refused permission to a learner to wear a nose stud to school. The evidence showed that in terms of the learner's culture, wearing this nose stud was seen as celebrating the coming womanhood of the learner. The Constitutional Court held that the school's code of conduct unfairly discriminated against the learner for not allowing for exemptions to the code for *inter alia* bona fide cultural reasons. The case did not directly deal with learners' hearts and minds, but some of the paragraphs in the judgement may be read as endorsing the approach set out in this article – an approach that would enforce difficult conversations in classrooms, where learners' diverse backgrounds and cultures and viewpoints are celebrated in such a way that the core values of the Constitution are strengthened,⁹⁸ in service of changing learners' hearts and minds.

International law also speaks directly to a duty on (South African) schools to promote equality in a much more thorough-going manner than is currently the case in classrooms. In terms of Section 39(1)(b) of the Constitution, when interpreting the Bill of Rights, all South African courts must consider international law. The rights to substantive equality and education are explicit-

ly guaranteed in the South African Bill of Rights; therefore, relevant international law principles are directly on point in how these rights (substantive equality read with the right to education) should be concretised.

The Abidjan Principles on the human rights obligations of states to provide public education and to regulate private involvement in education concretise in some detail what international human rights law on education implies for South African education law.⁹⁹ These principles were adopted in February 2019 in Côte d'Ivoire after a process of consultation and drafting that lasted three years.¹⁰⁰ The consultations involved legal practitioners, specialists in education and relevant community members from diverse localities.¹⁰¹ One of the aims of the drafters of these principles was to explain what international human rights law implies for states in providing education.¹⁰² Over the years, many bodies of the United Nations and other human rights institutions had been publishing a variety of documents on the topic, and there was a need to bring all of these together in a single document to confirm the ruling legal principles.¹⁰³

Many of the Abidjan Principles speak directly to equality and discrimination and imply a duty on schools to ensure their learners inculcate appropriate values relating to inclusion and diversity. The first principle provides that 'States must respect, protect, and fulfil the right to education of everyone within their jurisdiction in accordance with the rights to equality and non-discrimination'. This principle is then spelt out in much detail in the explanatory document accompanying the principles. Speaking directly to the transformation of hearts and minds, the explanatory notes refer to four dimensions (our emphasis):

- a fair redistributive dimension to address socio-economic disadvantages;
- a recognition dimension to *combat stigma, stereotyping, prejudice*, and violence, and to *recognise the dignity of human beings* and the intersectionality of different grounds of discrimination;
- a participative dimension to *reaffirm the social nature of people* as members of social groups and the full recognition of humanity through inclusion in society; and
- a transformative dimension to *accommodate difference as a matter of human dignity* and institute systemic change.

The principles espoused in South African and international law require a pro-inclusion and pro-diversity

97. 2008 (1) SA 474 (CC).

98. For example, see para. 104: 'Teaching the constitutional values of equality and diversity forms an important part of education. This approach not only teaches and promotes the rights and values enshrined in the Constitution, it also treats the learners as sensitive and autonomous people who can understand the impact the ban has on [the learner who was refused permission to wear a nose stud]'; para. 172: 'A school is an ideal place to educate other learners about the difference between fashion and cultural practices and should an exemption for nose-studs be granted, a school would be obliged to furnish such education to its learners'; para. 173: 'Schools are excellent institutions for creating the dialogue about culture that will best foster cultural rights in the overall framework of our Constitution. Schools that have diverse learner populations need to create spaces within the curriculum for diversity to be discussed and understood, but also they need to build processes to deal with disputes regarding cultural and religious rights that arise'; para. 185: 'It is inevitable given the extraordinary transformation that the school in this case has undergone that conflict about the school and its rules should arise from time to time. It needs to be emphasised however, that the strength of our schools will be enhanced only if parents, learners and teachers accept that we all own our public schools and that we should all take responsibility for their continued growth and success. Where possible processes should be available in schools for the resolution of disputes, and all engaged in such conflict should do so with civility and courtesy. By and large school rules should be observed until an exemption has been granted. In this way, schools will model for learners the way in which disputes in our broader society should be resolved, and they will play an important role in realising the vision of the Preamble of our Constitution: a country that is united in its diversity in which all citizens are recognised as being worthy of equal respect'.

99. www.abidjanprinciples.org/en/principles/overview (last visited 23 June 2020).

100. www.abidjanprinciples.org/ (last visited 10 July 2020).

101. www.abidjanprinciples.org/en/background/overview (last visited 10 July 2020).

102. www.abidjanprinciples.org/ (last visited 10 July 2020).

103. www.abidjanprinciples.org/en/background/overview (last visited 10 July 2020).

approach as, e.g. set out in the bulleted proposals at the end of the fifth section of this article. In our view such a pro-inclusion and pro-diversity approach may be facilitated by the amendments proposed to the Equality Act in this article.

Annexure: Proposed Amendments to the Equality Act and Accompanying Regulations

The proposed amendments to the Equality Act and accompanying regulations follow below. Additions are indicated by underlining and deletions by strike-through.

Sec. 25(4)(b): “All Ministers must within their available resources prepare, publish and implement equality plans, in the prescribed manner, which must include a time frame for implementation, and which must be formulated in consultation with the Minister of Finance”.

~~Sec 25(5) (a) The equality plans must, within two years after the commencement of this Act, be submitted to the South African Human Rights Commission to be dealt with in the prescribed manner.~~

~~(b) The South African Human Rights Commission must consult with the Commission on Gender Equality when dealing with the plans contemplated in paragraph (a).~~

Section 27:¹⁰⁴

The Minister must develop regulations in relation to this Act ~~and other Ministers may develop regulations in relation to other Acts~~ which require any person directly or indirectly contracting with the State or exercising public power, non-governmental organisations, community-based organisations, traditional institutions, companies, closed corporations, partnerships, clubs, sports organisations, corporate entities and associations, where appropriate, in a manner proportional to their size, resources and influence, to prepare and publish equality plans or abide by prescribed codes of practice or report to a body or institution on measures to advancepromote equality.

Section 14(3):¹⁰⁵

(j) Whether the respondent has developed an equality plan or not;

(k) If the respondent has developed an equality plan – whether this plan sets out how systemic unfair discrimination, individual instances of unfair discrimination, hate speech and harassment will be eliminated over time; whether this plan sets out how good relations will be fostered between persons who share a prohibited ground and persons who do not share it; whether the plan’s goals and objectives are directed towards the

advancement of equality; whether the measures to be implemented will achieve the stated goals and objectives; whether the measures adopted to monitor the implementation of the equality plan are appropriate; whether the criteria to evaluate the implementation of the equality plan are appropriate; whether the equality plan will achieve reasonable progress towards the eradication of systemic discrimination and the advancement of equality; whether time frames have been set and/or met and if not whether cogent reasons have been provided for this omission and whether measures have been put in place to expedite the implementation of the equality plan.

Sec 20(2) Proceedings under section 21(1)(e), (f) and (g) may be instituted by any of the persons or associations listed in section 20(1) as well as the South African Human Rights Commission, the Commission for Gender Equality or the Director-General of the relevant State department.

Sec. 21:

(1) The equality court before which proceedings are instituted in terms of or under this Act must hold an inquiry in the prescribed manner and determine whether one or more of the following has taken place, as alleged:

- a. unfair discrimination
- b. hate speech
- c. harassment
- d. the publication of material that illustrates the intention to unfairly discriminate
- e. the omission to prepare an equality plan as required in terms of this Act and any regulations promulgated in terms of this Act
- f. the omission to publish an equality plan as required in terms of this Act and any regulations promulgated in terms of this Act
- g. the omission to adequately implement an equality plan

Sec. 21(2)

(b) a declaratory order, including a declaratory order whether sufficient progress has been made with the implementation of the respondent’s equality plan and/or the measures to expedite the implementation of the respondent’s equality plan

...

(q) an order to prepare an equality plan in terms regarded appropriate by the court and as required in terms of this Act and any regulations promulgated in terms of this Act

(r) an order to publish an equality plan in terms regarded appropriate by the court and as required in terms of this Act and any regulations promulgated in terms of this Act

(s) an order to take appropriate measures to expedite the implementation of the respondent’s equality plan

104. We propose that Section 26 and 27(1) be deleted and incorporated into an amended Section 27(2).

105. These additions will allow an equality court to consider the relevance and content of a respondent’s equality plan (or inadequate plan or absence of an equality plan) in determining if the alleged discrimination was fair or unfair.

The following regulations are proposed, for further refinement, to flesh out the content of progress reports (section 25(3)(c)) and equality plans (section 25(4)(b) and section 27).

Request for progress report (sec. 25(3)(c) of the Act)

1.
 1. A request from a constitutional institution for a progress report regarding the number of cases and the nature and outcome thereof contemplated in section 25(3)(c) of the Act, must correspond substantially with Annexure (XX)¹⁰⁶ and must–
 - a. be in writing;
 - b. be addressed to the Director-General of the Department;
 - c. be signed by the chief executive officer of the constitutional institution, or a person designated by him or her;
 - d. indicate the period for which the information is required;
 - e. indicate the date on which the report is due;
 - f. indicate which of the following particulars are required –
 - i. in regard to the number of cases –
 - (aa) the number of cases instituted in the equality court in terms of section 20(2) of the Act; and
 - (bb) the number of cases finalised by the equality court or an alternative forum;
 - ii. in regard to the nature of the cases –
 - (aa) the ground of discrimination;
 - (bb) the category of discrimination involved for example in respect of procurement, employment, access to places and facilities, accommodation (land/housing), education, sport, insurance, provisioning of goods and services, registered clubs, advertisements etc.;
 - (cc) the area from which the complaint originates (rural/metropolitan);
 - (dd) the age, gender, race, and where applicable, the disability of the complainant;
 - (ee) the gender and race of the person against whom the allegations are made;
 - iii. in regard to the outcome of the case –
 - (aa) the finding and order of the equality court; or
 - (bb) in the event of the case being dealt with by an alternative forum, the name of the forum, the outcome of the case and form of dispute resolution mechanism used to solve the case;
 - g. invite the Director-General of the Department to make any additional relevant comments,

either in general or in respect of a specific case, or in respect of any apparent tendencies in respect of the cases reported.

Preparation of equality plan by State (sec. 25(4)(b))

2.
 1. An equality plan contemplated in section 25(4)(b) of the Act must be prepared–
 - a. within two years after the commencement of this regulation;
 - b. with due consideration to the provisions of section 28(3) of the Act;
 - c. for a period of five years coinciding with the financial year contemplated in the Public Finance Management Act, 1999 (Act No. 1 of 1999); and
 - d. subsequently at intervals of not exceeding five years beginning with the date of last publication.
 2. In preparing an equality plan contemplated in this regulation, a Minister must consult –
 - a. the Minister of Finance;
 - b. the Commission on Gender Equality, the Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and the Public Protector; and
 - c. affected communities and affected business sectors through any appropriate means including public hearings.
 3. An equality plan contemplated in this regulation must–
 - a. be in writing;
 - b. be signed by the responsible Minister;
 - c. illustrate how it will over time eliminate systemic discrimination, individual instances of unfair discrimination, hate speech and harassment related to the prohibited grounds in its area(s) of operation;
 - d. illustrate how it will advance substantive equality in its area(s) of operation;
 - e. illustrate how it will foster good relations in its area(s) of operation between persons who share a prohibited grounds and persons who do not;
 - f. contain specific and measurable objective(s), timeframes for the implementation of each objective, the mechanisms to monitor the implementation of each objective and the criteria to evaluate the implementation of the equality plan.
 - g. within 30 days after the responsible Minister has signed it be –
 - i. published in the Gazette;
 - ii. made available on the website, if any, of the relevant department;
 - iii. circulated under the signature of the relevant head of the department to all its employees;
 - iv. tabled in Parliament; and
 - v. submitted to the Minister of Finance.

106. Annexure (XX) refers to the prescribed format for the progress report.

Availability of Act in official languages

- 3.
1. The Minister must, for purposes of section 31(2)(b) of the Act, make the Act available in plain language¹⁰⁷ in all official languages by –
 - a. publishing it in the Gazette;
 - b. putting it on the website of the Department;
 - c. submitting it to all the constitutional institutions; and
 - d. circulating it to all magistrates' offices.
2. The constitutional institutions and magistrates' offices must, during office hours, make the Act available to every person who wishes to inspect the Act in plain language and in the official language so requested.

Preparation of equality plan by entities other than the State (new proposed sec. 27)¹⁰⁸

- 4.
1. This regulation applies to all persons directly or indirectly contracting with the State or exercising public power, non-governmental organisations, community-based organisations, traditional institutions, companies, closed corporations, partnerships, clubs, sports organisations, corporate entities and associations.
2. All entities bound by this regulation must within two years after the commencement of this regulation prepare an equality plan as contemplated in section 27 of the Act.
3. An equality plan referred to in subregulation (2) must –
 - a. illustrate how it will over time eliminate systemic unfair discrimination, individual instances of unfair discrimination, hate speech and harassment related to the prohibited grounds in its area(s) of operation;
 - b. illustrate how it will advance substantive equality in its area(s) of operation;
 - c. illustrate how it will foster good relations in its area(s) of operation between persons who share a prohibited ground and persons who do not;
 - d. be prepared for a period of five years and must coincide with the financial years of the entity;
 - e. subsequently be prepared at intervals of not exceeding five years beginning with the date of last publication;
 - f. be prepared after consultation with affected communities and affected business sectors through any appropriate means;
 - g. be in writing;
 - h. be signed by the chief executive officer of the entity;

- i. contain specific and measurable objective(s), timeframes for the implementation of each objective, the mechanisms to monitor the implementation of each objective and the criteria to evaluate the implementation of the equality plan;
- j. within 30 days after the signing thereof be circulated under the signature of the chief executive officer of the entity to all its employees and made available for inspection at each of its offices and on its website, if any.

Including human rights and equality law in the school curriculum

5. Over and above any other duty created in terms of these regulations, the Department of Basic Education must within two years after these regulations have entered into force, develop an action plan on how principles of substantive equality and equality law will be embedded in the curriculum from the first to last school year of all public and private schools.¹⁰⁹

107. In this article, we treat as self-evident the benefits of a plain language approach. A full argument on why the Equality Act should be drafted in plain language is beyond the scope of this article.

108. The regulations should also prescribe a clear process to be followed in developing equality plans to ensure that inclusive, participatory processes are followed to allow for substantive input from internal and external stakeholders, civil society and NGOs.

109. See, e.g. www.reaseheath.ac.uk/wp-content/uploads/2012/05/Equality-Curriculum-Handbook.pdf for possible approaches to this proposal (last visited 24 December 2017).

The Potential of Positive Obligations Against Romaphobic Attitudes and in the Development of 'Roma Pride'

Lilla Farkas & Theodoros Alexandridis*

Abstract

The article analyses the jurisprudence of international tribunals on the education and housing of Roma and Travellers to understand whether positive obligations can change the hearts and minds of the majority and promote minority identities. Case law on education deals with integration rather than cultural specificities, while in the context of housing it accommodates minority needs. Positive obligations have achieved a higher level of compliance in the latter context by requiring majorities to tolerate the minority way of life in overwhelmingly segregated settings. Conversely, little seems to have changed in education, where legal and institutional reform, as well as a shift in both majority and minority attitudes, would be necessary to dismantle social distance and generate mutual trust. The interlocking factors of accessibility, judicial activism, European politics, expectations of political allegiance and community resources explain jurisprudential developments. The weak justiciability of minority rights, the lack of resources internal to the community and dual identities among the Eastern Roma impede legal claims for culture-specific accommodation in education. Conversely, the protection of minority identity and community ties is of paramount importance in the housing context, subsumed under the right to private and family life.

Keywords: Roma, Travellers, positive obligations, segregation, culturally adequate accommodation

1 Introduction

'A Persisting Concern: Anti-Gypsyism as a Barrier to Roma Inclusion' reads the title of the recent study by the Fundamental Rights Agency (FRA) on societal attitudes towards Europe's most despised minority group.¹ In 2016, one out of three Roma experienced some form of harassment and 4% reported racially motivated violence to researchers, but not necessarily to the authori-

ties.² An ethnic minority with a distinct language, culture and traditions, the Roma regularly experience racial discrimination based on assumptions and prejudice.

Social deprivation within the group does not only mean that the priority needs of the Roma are fundamentally socio-economic, but that they lack strong middle classes that could maintain minority institutions and lead the (legal) struggle for Roma rights. The lack of standardised Roma language and the scarcity of teachers of Roma origin hamper claims for minority schools or language education. Structural changes within the Roma and Traveller communities require wide-ranging social intervention rather than simple restraint from states and majority populations.

Can positive obligations achieve attitudinal change by countering prejudice, and similarly, can they lead to structural changes in the education and housing of the Roma? Do positive obligations require restraint and/or adaptation from majority societies only, or do they also govern the choices of minorities? In order to answer these questions, the article focuses on the evolution of the positive obligations doctrine in the field of Roma rights, discussing case law from several international tribunals.

The best-known Roma rights cases deal with segregated education (the so-called Roma education cases), forced evictions and Romaphobic violence (death, bodily injury and forced sterilisation). The article focuses on education and housing, because positive obligations (indirectly) address majority as well as the minority communities in these contexts, unlike case law on racially motivated violence, which is heavily tilted towards the reform of law enforcement.

The extent of case law and recommendations covered in the article leaves no room for analysing the oversight of implementation, such as the work of the Council of Europe's Committee of Ministers. Similarly, domestic litigation that yields international verdicts in the first place and/or seeks to enhance compliance afterwards is not analysed. It must be noted, however, that domestic litigation in both education and housing is extensive.

Case law and the recommendations of monitoring bodies are studied in a chronological order to reflect the

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1. European Union Agency for Fundamental Rights, *A Persisting Concern: Anti-Gypsyism as a Barrier to Roma Inclusion* (2018).

2. FRA, *Second European Union Minorities and Discrimination Survey (EU-MIDIS II): Roma – Selected findings* (2016); and FRA, *Roma survey – Data in focus: Discrimination against and living conditions of Roma women in 11 EU member states* 2014.

emergence of legal opportunity structures and the trajectory of litigation tapping into these opportunities. This approach reflects the bottom-up nature of litigation and planning legal strategies as legal opportunities become available. However, it also entails different orders in the description of education and housing jurisprudence as concerns the relevant legal regimes.

The approaches of the relevant legal regimes to compliance vary. The positive obligations doctrine is key to the Council of Europe treaties, being less dominant in the jurisprudence of UN treaty bodies and more so in their monitoring work. Compliance with the relevant EU *acquis* is facilitated by the principle of direct effect and the primacy of EU law.³ These factors explain the focus on Strasbourg jurisprudence and UN monitoring mechanisms.

Treaty bodies address social change at the structural level, which brings concluding observations under the remit of analysis. The article sketches trends emerging from these processes with an eye on systemic issues that cannot properly be captured in complaint procedures. Guidance on the actions of state administrations vis-à-vis citizens is generally provided in concluding observations, but tribunals also increasingly address the need to adopt more *general measures*, which have in fact become a frequent element of Strasbourg jurisprudence.

The limitations of space do not allow comparisons with other racialised minorities, but it must be noted here that the jurisprudence of international tribunals diverges as concerns the different groups. Importantly, while in the Strasbourg Court the Roma serve as a benchmark for racial discrimination, Islamophobia as a form of racism features high on the agenda of UN mechanisms.⁴ In Europe, Romaphobia is understood as discrimination based on racial or ethnic origin, while Islamophobia is framed under religious freedom or treated as a matter of religious discrimination, which, to date, has enjoyed a low level of protection, particularly in the European Court.⁵ Simultaneously, cases filed by Kurds, who suffer the most violent forms of ethnic persecution, are not considered under the prohibition of racial or ethnic discrimination by the Court.

Compliance is understood here as a continuum of formal compliance (legal reform), substantive compliance (institutional reform) and full compliance (social change).⁶ Interestingly, while measuring the impact of legal and institutional reform seems rather complicated, attitudinal changes are canvassed regularly with the involvement of the general and minority public in the

FRA's Eurobarometer and EU Minorities and Discrimination Surveys.

When exploring social change in the sense of changing hearts and minds, we place specific emphasis on the depiction of the media, education, civil society and community approaches in the rulings and concluding observations of international tribunals and monitoring bodies. We do so by exploring a) the extent to which these bodies identify positive state obligations towards the effective protection of the Roma and vulnerable groups within the Roma community, such as women, and b) the way in which they set out to change 'hearts and minds' by tackling prejudices and stereotypes.

Both majority and minority communities are socially and politically diverse, and changes may more easily occur within the elites and those committed to internationalism. Moreover, the further one looks from the geographic centre, the less visible the change may appear. Still, the judicial recognition of wrongdoing and apologies by recalcitrant states are important precursors of social change, in which judicial dialogue across the various tribunals plays a significant part, not least because such recognition feeds Roma self-esteem and facilitates legal mobilisation.

Measuring social change solely from the perspective of legal tools can yield only partial answers of which we are keenly aware when offering conclusions here.⁷ Domestic legal as well as political mobilisations and counter-mobilisations are key to understanding reality, meriting research from the bottom-up, rather than the top-down.⁸ In respect of Roma rights, the law has been but one tool of social change, augmented by political campaigns, awareness raising, training, education, development projects and grassroots organising.⁹

Still, owing to the symbolic nature of judgements and their ability to recognise the harm done to the dignity of minority individuals and communities, but also because of the weight of certain tribunals and the shaming effect of their rulings, the law has perhaps received more attention than other social change tools. Moreover, law is the prime vehicle of European integration, making the sensitisation about Roma rights a necessity. In this respect, the media has played a rather controversial role by fostering Romaphobic prejudice and intolerance in the general population.

The article concludes that positive obligations have achieved a higher level of compliance in housing by requiring majorities simply to tolerate the minority way of life in overwhelmingly segregated settings. Conversely, little has changed in education, where legal and institutional reform, as well as a shift in the hearts and minds of both majority and minority groups, would be necessary to dismantle social distance and generate mutual trust. The interlocking factors of accessibility, judicial activism,

3. B. de Witte, 'Direct Effect, Primacy and the Nature of the EU Legal Order', in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (2011), 323.

4. The Strasbourg Court has delivered approximately 80 judgements so far, establishing discrimination in 15% of these.

5. R. McCrea, 'Singing from the Same Hymn Sheet? What the Differences between the Strasbourg and Luxembourg Courts Tell Us about Religious Freedom, Non-Discrimination, and the Secular State', 5 *Oxford Journal of Law and Religion* 18 (2016).

6. T. Carothers, 'The Rule of Law Revival', 2 *Foreign Affairs* 77, at 100 (1998).

7. Open Society Justice Initiative, *Strategic Litigation Impacts: Insights from Global Experience* (2018).

8. S.L. Cummings, 'Rethinking the Foundational Critiques of Lawyers in Social Movements', 85 *Fordham Law Review* 1987 (2017).

9. J. Bhabha, A. Mirga & M. Matache (eds.), *Realizing Roma Rights* (2017).

European politics, expectations of political allegiance and community resources explain jurisprudential developments. The weak justiciability of minority rights, the lack of resources internal to the community and dual identities among the Eastern Roma impede legal claims for culture-specific accommodation in education. In contrast, the protection of minority identity and community ties is of paramount importance in the housing context, subsumed under the right to private and family life.

The text is divided into five sections. The Introduction is followed by a short summary about the Roma minority and Roma rights, particularly as seen through the concluding observations of monitoring bodies. Section 3 summarises international norms and case law on education. Section 4 provides an analysis along the same lines on housing, and Section 5 carries the conclusions.

2 The Roma, 'Roma Pride' and Roma Rights

An introduction to the minority group, its ethnic identity and relevant human rights issues surfacing in the monitoring processes of international bodies is necessary to ground our analysis. First and foremost, the limitations and constraints to the community's use of (international) human rights law need to be emphasised. Socio-economic conditions, weak internal resources, the lack of minority-specific religion and religious institutions, as well as a high level of political and ethnic assimilation, constitute structural impediments to legal claim making on the part of the Roma and the Travellers, augmented by the lack of minority institutions.

The Roma minority group numbers seven million within the EU, two-thirds of whom live in Bulgaria, Romania, Hungary, Slovakia and the Czech Republic, countries referred to as 'Roma-dense'.¹⁰ France's Traveller community, the *gens du voyage* is sizeable; so are the Roma communities in Spain and Greece. There are various subgroups according to language, descent and/or traditions. The Eastern Roma are overwhelmingly sedentary, but for the Western Travellers, the 'travelling way of life' is a central identity element.¹¹ This distinction generally denotes minority attitudes vis-à-vis majority populations and states: the former seeks to blend in, while the latter to stand apart.¹² Given that the Roma live in nation states, despite their transnational

character, there is a strong tendency to identify as both a Roma and a citizen of a particular European state.

Roma denotes a collective label that more or less adequately reflects self-identification in the Roma-dense countries and for reasons of political exigence includes Western Travellers, a non-sedentary group.¹³ Roma rights is a widely used term, and we conceive of it as encompassing not only claims as a minority, but also as a racialised, poverty-stricken, excluded and subordinated 'pariah' group.¹⁴ Romaphobia is used to denote anti-Roma, anti-Gypsy and anti-Traveller stereotypes. While being the most sizeable racialised minority in Central and Eastern Europe (CEE), the Roma are marginal in Western Europe, where European Muslims and Afro-Europeans occupy central place in policy processes. In the CEE, the Roma are not a politically dominant minority group, and the European 'silence on race' prevents them from becoming the 'archetypical' racial minority.¹⁵

Social deprivation and exclusion are reinforced by unemployment ranging between 50 and 70%, which indicates the inability to break out of illegal or substandard labour conditions.¹⁶ Housing conditions are dire, particularly because the de facto toleration of Roma dwellings on state-owned land was not regulated after the political transition, which continues to undermine security of tenure for those living in segregated Roma districts. Access to schools is generally not a problem, unlike dropout and absenteeism. On paper, the Roma enjoy equal rights, but their residence status may be unresolved, impeding not only participation in public life, but also access to basic social services.

With notable exceptions,¹⁷ public administrations do not promote Roma rights, or worse, are part of the problem of non-implementation of both minority-focused and poverty-reduction policies.¹⁸ This leaves the representation of collective interests to progressive ethno-political formations that successfully resist the pressure of co-optation, friendly public institutions and the civil sector.

There is a strong expectation vis-à-vis the Roma to assimilate or suffer the consequences of social exclusion, but simultaneously, widespread Romaphobic attitudes diminish the chances of integration. These structural conditions undermine identity-based political organisation and diminish appetite for collective interest representation concerning minority identity. The preserva-

10. The term was coined in G. Kertesi and G. Kézdi, *A Cigány Népszerűség Magyarországon* (1998).

11. See, the Council of Europe Descriptive Glossary of terms related to Roma issues, version dated 18 May 2012. For estimates, see, J.P. Liegeois, *Roma, Gypsies, Travellers* (1994), at 34.

12. E. Marushiakova and V. Popov, 'The Roma – A Nation without a State? Historical Background and Contemporary Tendencies', in B. Streck (ed.), *Segmentation und Komplementarität. Organisatorische, ökonomische und kulturelle Aspekte der Interaktion von Nomaden und Sesshaften* (2004) 71.

13. Gy. Csepeli and D. Simon, 'Construction of Roma Identity in Eastern and Central Europe: Perception and Self-Identification', 30 *Journal of Ethnic and Migration Studies* 129 (2004).

14. I. Pogány, 'Pariah Peoples: Roma and the Multiple Failures of Law in Central and Eastern Europe', 21(3) *Social & Legal Studies* 375 (2012).

15. A. Lentin, 'Europe and the Silence about Race', 11 *European Journal of Social theory* 496 (2008).

16. D. Ringold, M.A. Orenstein & E. Wilkens, *Roma in an Expanding Europe: Breaking the Poverty Cycle* (2004).

17. A. Krizsán, 'Ombudsmen and Similar Institutions for Protection Against Racial and Ethnic Discrimination', 4 *European Yearbook Minority Issues* 62 (2004).

18. Gy. Csepeli and A. Örkény, 'Az emancipáció kihívása a mai magyar társadalomban a romák és nem romák viszonyában', *Szociológiai Szemle* 85, at 90 (2015).

tion and cultivation of 'Roma pride', that is, positive minority identity is thus left to the private sphere, despite recent political mobilisation.¹⁹

The Roma became visible in the mid-1990s through legal advocacy efforts in international organisations. Before international case law emerged from the early 2000s on, Roma rights advocacy had already generated important soft law measures. The Roma issue was taken up simultaneously by Council of Europe and UN monitoring bodies. Focusing on treaty mechanism, we begin with the Advisory Committee to the Council of Europe's Framework Convention for the Rights of National Minorities (FCNM), but due to the volume of output, focus more on UN monitoring mechanisms.

The Roma are recognised as a national/linguistic minority in the CEE. This is partly due to the minority conditionality set by the EU prior to accession, manifested in the requirement to sign and ratify the FCNM.²⁰ It is important to note in the Western and Southern European context that regardless of political considerations, non-recognition or mis-recognition at the national level should not prevent the judicial protection of ethnic minority rights, including the use of language and other traditions.²¹

The FCNM Advisory Committee has dealt with rights to/in education, particularly minority language education and multicultural education. It has observed that the equal access of Roma children to good quality education and their integration is a persistent problem across the Council of Europe, with school segregation representing the most extreme example.²² The bullying/harassment of Roma children, inappropriate and culturally biased tests, non-recognition of the Romani language and the lack of provision for socially disadvantaged Roma students constitute the key issues of concern. The Advisory Committee calls for the equal treatment of Roma girls, the offering of school meals, introduction of public transportation and training of Roma school assistants and teachers, stressing that teaching of and through the medium of the Romani language is a necessary element of ensuring access to education.²³

The UN Committee on the Elimination of All Forms of Racial Discrimination (CERD) adopted a General Recommendation on Discrimination Against the Roma in 2000.²⁴ Its key recommendations address the need to 1. enact or amend legislation prohibiting racial discrimination; 2. adopt and implement national strategies and programmes, and express political will and leadership; 3. recognise the Roma's minority or other status in con-

sultation with the minority; 4. mainstream policies on Roma women; 5. develop and encourage dialogue between Roma communities and central/local authorities, as well as between Roma and non-Roma communities, to promote tolerance and overcome prejudice and negative stereotypes on both sides.

When it comes to Roma-dense states, access to education as well as school segregation are treated as a priority issue, although access to housing, employment and healthcare also features high in the recommendations of UN treaty bodies. In relation to Western European countries with sizeable Roma and Traveller communities, the monitoring bodies seem more preoccupied with the need to resolve personal and group status, as well as access to culturally adequate housing.²⁵ The need to properly regulate the status of Roma and Travellers in Western and Southern Europe is a recurring issue.²⁶

Following the global crisis in 2008, with the rise of populist and racially intolerant voices, CERD and the Human Rights Committee raised the alarm about the sharply increasing level of hate speech and states' inability or unwillingness to investigate every incident and punish perpetrators, including politicians.²⁷ The situation escalated to such a degree that the CERD appealed to the president of the European Commission in order to increase vigilance.²⁸

The link between widespread prejudice and hate speech has been regularly made,²⁹ along calls for unbiased and inclusive educational materials and methodologies of teaching to tackle stereotypes. The Committee on the Elimination of All Forms of Discrimination Against Women has emphasised the necessity of weeding out intersectional stereotypes that negatively affect Roma girls, whose school attendance is also hampered by traditions, such as early marriage.³⁰

19. A. McGarry, *Romaphobia: The Last Acceptable Form of Racism* (2017).

20. P. Vermeersch, 'Minority Policy in Central Europe: Exploring the Impact of the EU's Enlargement Strategy', 3 *The Global Review of Ethnopolitics* 3 (2003).

21. UN Human Rights Committee, *Bikramjit Singh v. France*, Communication No. 1852/2008 (2012).

22. Advisory Committee on the Framework Convention for the Protection of National Minorities, *Commentary on Education under the Framework Convention for the Protection of National Minorities*, 21 (2006).

23. *Ibid.*, at 25.

24. CERD General Recommendation XXVII on Discrimination against Roma, A/55/18, annex V (2000).

25. See, for instance, Concluding observations of the Committee on the Elimination of Racial Discrimination on France, 3 (2010).

26. See, for instance, Human Rights Committee, Concluding observations on the sixth periodic report of Italy, 3 (2017).

27. See, for instance, Committee on the Elimination of Racial Discrimination, Concluding observations on the combined nineteenth and twentieth periodic reports of Italy, 3 (2017). See, also, Human Rights Committee, Concluding observations on the fourth periodic report of Czechia, 4 (2019).

28. CERD letter to the president of the European Commission, 27 August 2010.

29. See, Committee on Economic, Social and Cultural Rights, Concluding observations on the combined third to fifth periodic reports of Romania, 4 (2014). See also, Committee on Economic, Social and Cultural Rights, Concluding observations on the second periodic report of the Czech Republic, 3 (2014).

30. See, for instance, Committee on the Elimination of Discrimination against Women, Concluding observations on the sixth periodic report of the Czech Republic, 7 (2016). See, also, Committee on the Elimination of Discrimination against Women, Concluding observations on the combined seventh and eighth periodic reports of Romania, 11 (2017).

3 Roma Rights in the Field of Education

Roma-relevant legal provisions derive from multiple sources, including UN, Council of Europe and EU treaties and directives, as well as countless soft law measures adopted by international organisations. National legislation completes the normative basis, and inconsistencies among the distinct legal regimes surface in domestic litigation, which may or may not lead to international adjudication.

In general, international treaties protect the rights to education alone, as well as in conjunction with the prohibition of discrimination. UN treaties specifically address the treatment of minorities in relation to substantive human rights, while the European Court's interpretation of the principle of equal treatment can achieve the same result, albeit with a 'different speed'.³¹ Strasbourg jurisprudence reads the duty to accommodate cultural differences into substantive rights in relation to forced evictions, but it remains to be seen whether the Court would also follow this approach as concerns minority education.

3.1 International Law Governing the Right to (Racially Equal) Education

International standard setting on the right to education began after World War II. This section reviews relevant treaty provisions in a chronological order to ground the analysis in the following section.

3.1.1 UN Standards and Supervisory Practice

The Universal Declaration of Human Rights (1948) was the first instrument to assert the principle of non-discrimination and proclaim the right to education. The first education- and minority-specific treaty, the Convention Against Discrimination in Education (CADE), was adopted by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) in 1960.

CADE prohibits discrimination and exclusion based on racial or ethnic origin.³² Exceptions to the prohibition of spatially separated educational institutions must be specifically permitted to be acceptable under CADE. The integrationist rationale behind the prohibition of segregation and the limitation of self-segregation in CADE – and subsequent UN treaties – stems from the fear of secession in territories inhabited by minorities.³³

CADE's approach to segregation can be characterised as a prohibition with exceptions, meaning that self-segregation is permitted subject to stringent conditions.³⁴ Segregation for linguistic reasons is permissible but

rarely used by the Roma themselves, because the structural conditions of minority language education are largely missing, and in practice, language does not seem to compel Roma communities to self-segregate.³⁵ Strong allegiance with the majorities in the CEE may also strengthen this trend.

CADE envisages a system in which states bear a duty not to intervene in self-segregation promoting minority identity through the medium of language. It defines the content and manner in which parental choice can be made and professed. It also sets out the criteria under which the state must exercise control over parental choices in the best interest of the child – even though the term as such is not used in CADE.

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) adopted in 1965 and in force since 1969 has been signed and ratified by all EU member states. It prohibits both direct and indirect racial discrimination³⁶ and categorically prohibits segregation³⁷ 'in the enjoyment of the right to education'.³⁸ The CERD Committee has interpreted this provision as prohibiting spontaneous, unintended – de facto – physical separation as well.³⁹

Relatively few EU member states permit individual applications to CERD, which may explain the lack of petitions on Roma and education. CADE and ICERD prohibit segregation even if it is not intentional, coercive or absolute in terms of racial or ethnic proportions. Importantly, the European Court of Human Rights (ECtHR) seems not to accord a central place to these treaties in its jurisprudence, thus ICERD has served as a reference only as far as the definition of racial discrimination is concerned.

Article 24(1) of the International Covenant on Civil and Political Rights (ICCPR) provides every child protection by her family, society and the state without racial or ethnic discrimination. Article 27 of the Covenant confers a right on individuals belonging to ethnic, religious or linguistic minorities to

not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.⁴⁰

Article 28 of the Convention on the Rights of the Child (CRC) guarantees the right to education, while Article 30 guarantees individual minority rights in a fashion identical to Article 27 ICCPR.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) ensures the right to education (Art. 13) and prohibits discrimination on the basis

31. K. Henrard, 'The European Court of Human Rights, Ethnic and Religious Minorities and the Two Dimensions of the Right to Equal Treatment: A Jurisprudence at Different Speeds?', 34(03) *Nordic Journal on Human Rights* 157 (2016).

32. UNESCO Convention against Discrimination in Education (hereinafter: CADE), Art. 1(1).

33. P. Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (2016).

34. CADE, Art. 5(1)(c).

35. CADE Art. 2(b)).

36. ICERD Art. 1(1).

37. ICERD Art. 3.

38. ICERD Art. 5(e)(v).

39. CERD, General recommendation, Racial segregation and apartheid (XIX), (1995).

40. CCPR General Comment No. 23: Art. 27 (Rights of Minorities) (1994).

of racial or ethnic origin (Art. 2(2)).⁴¹ An important consideration is that even though EU member states have signed and ratified the ICESCR, only a tiny minority permit individual complaints under the optional protocol.⁴² This may of course explain the lack of case law as concerns Roma and education.

In the Roma-specific General Recommendation, the CERD calls on states to support inclusion in the school system – in particular of Roma girls – to prevent and avoid segregation, ‘while keeping open the possibility for bilingual or mother-tongue tuition’, and to adopt measures in cooperation with Roma parents, in the field of education, to train Roma teachers and assistants; to improve dialogue and communication between the teaching personnel and Roma children, Roma communities and parents; to include in textbooks, chapters about the history and culture of Roma.

UN treaty bodies have used this General Recommendation as a benchmark, focusing more on special minority rights in the Western context and non-discrimination in the East, with tolerance building and the combatting of stereotypes as an overarching policy. In the East, the CERD Committee recommendations extend to increasing preschool attendance and decreasing dropout rates,⁴³ to teachers and parents being familiarised with desegregation measures,⁴⁴ to developing a desegregation plan including the redesign of compulsory school districts and sanctioning schools that refuse the admission of Roma children.⁴⁵ In the Italian context, the Committee recommended to ensure that Roma, Sinti and Camminanti children are able to access quality education that is culturally and linguistically appropriate, at schools that are geographically accessible and where they suffer no negative treatment by staff or students.⁴⁶

3.1.2 Council of Europe

Under Article 14 of the European Convention on Human Rights and Fundamental Freedoms, the enjoyment of the rights and freedoms set forth in the Convention must be secured without discrimination on the ground of racial or ethnic origin, and so on. Under Protocol I Article 2,

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.

41. Committee on Economic, Social and Cultural Rights, General Comment 11 (1999).

42. Only Belgium, Finland, France, Italy, Luxembourg, Portugal, Slovakia and Spain signed and ratified the optional protocol.

43. CERD, Concluding observations on the combined twentieth to twenty-second periodic reports of Bulgaria, 5 (2005).

44. CERD, Concluding observations of the Committee on Romania, 3 (2010).

45. CERD, Concluding observations on the combined twelfth and thirteenth periodic reports of Czechia (2019).

46. CERD, Concluding observations on the combined nineteenth and twentieth periodic reports of Italy, 6 (2017).

The Convention does not explicitly require states to accommodate ethnic minority children on a par with children belonging to a religious minority when it comes to education. Article 14 safeguards the principle of equal treatment, and the ECtHR applies the same test to both direct and indirect discrimination, meaning that it permits states parties to submit justification defences even in the case of direct racial discrimination and segregation.⁴⁷

Protocol 12 of the ECHR adopted in 2000 guarantees the right to equal treatment in all walks of life and explicitly covers direct and indirect discrimination. Neither the Convention nor Protocol 12 specifically prohibits harassment and segregation. It is important to note that while all EU member states are party to the Convention, Protocol 12 has been signed and ratified by only ten EU countries.⁴⁸ This partly explains why the ECtHR has been seized upon to adjudicate racial discrimination in education with reference to the right to education and the principle of equal treatment, rather than the right to equal treatment in the field of education.

The level of ratification by EU member states of the European Social Charter (Revised) – which covers education – is low, and few permit NGOs to raise collective complaints against states before the European Committee of Social Rights (ECSR).⁴⁹ The majority of collective complaints concerning the Roma pertain to housing.⁵⁰

The FCNM guarantees the right to minority education. It was adopted in 1994 and entered into force four years later; however, it has a weak enforcement mechanism – reporting by the Advisory Committee⁵¹ – so the right to minority education under it is not justiciable in court. The Council of Europe’s Charter for Regional or Minority Languages safeguards minority language rights.⁵² While national minorities that have European kin states are relatively well catered for, Romanes is among the languages that receive a lower level of protection. Both aspects diminish the salience of this otherwise non-justiciable instrument when it comes to the Roma.

Establishing and maintaining ethnic minority schools is a collective right, as spelt out in Article 5(1) CADE and Article 13 of the Council of Europe’s FCNM. The goal of minority education is the preservation of minority

47. L. Farkas, *Segregation of Roma Children in Education: Addressing Structural Discrimination Through the Race Equality Directive* (2007) and L. Farkas, *Report on Discrimination of Roma Children in Education* (2014).

48. Protocol 12 to the ECHR is ratified by the following EU member states: Croatia, Cyprus, Finland, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovenia, Spain.

49. Additional Protocol to the European Social Charter Providing for a System of Collective Complaints is ratified by Belgium, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, Netherlands, Portugal and Sweden.

50. O. de Schutter, *The European Social Charter in the Context of Implementation of the EU Charter of Fundamental Rights* (2016).

51. G. Gilbert, ‘The Council of Europe and Minority Rights’, 18 (1) *Human Rights Quarterly* 162 (1996).

52. F. De Varennes, ‘Language Rights as an Integral Part of Human Rights’, 3 (1) *International Journal on Multicultural Societies* 15 (2001).

identity, in which instruction in the minority language plays an instrumental role. In its general recommendations on specific minority groups, the CERD Committee explicitly calls on states to ensure that mother tongue and bilingual education are guaranteed.⁵³ The FCNM Advisory Committee has developed its ‘jurisprudence’ along the same lines, mindful of the importance of interethnic relations even when minority education is self-segregated. As mentioned, the justiciability of these instruments is extremely limited, leading to a situation in which framing complaints in terms of equal treatment is easier than having recourse to special rights.

3.1.3 The EU

The 2000 EU Racial Equality Directive (RED) prohibits racial or ethnic discrimination in education without, however, explicitly prohibiting segregation.⁵⁴ This makes adjudication in the EU amenable to qualification debates, that is, questions on whether segregation should be interpreted as direct or indirect discrimination, or indeed, whether EU anti-discrimination law can be read in a way that establishes this type of unequal treatment as a *sui generis* form of discrimination.⁵⁵

It is important to note that the EU has manoeuvred itself into this situation by failing to act in time, due mainly to dissipating political support. A recommendation for the adoption of a Roma-specific directive explicitly prohibiting segregation and imposing a duty on member states to take positive action measures to remedy structural discrimination was made in 2004, to no avail.⁵⁶ Since then, several policy measures, including the 2011 EU Framework for National Roma Integration Strategies,⁵⁷ and desegregation guidance have been issued to spur compliance, with mixed results.⁵⁸

The Court of Justice of the EU (CJEU) does not have power to impose positive obligations on member states in preliminary reference proceedings, whose aim is to assist and guide the national courts of member states in the interpretation of EU law. In proceedings initiated by the European Commission against member states for their failure to comply with EU law, the CJEU’s powers are limited to establishing non-compliance and levying a fine. The European Commission has not launched judi-

cial proceedings in relation to discrimination against the Roma.⁵⁹ Political consensus is missing on vigorous enforcement, which explains the Commission’s caution and the focus on soft law measures. National courts have so far refused to make preliminary referrals on education; consequently, there is no CJEU case law to be discussed.

3.2 International Case Law on Discrimination in Education Against the Roma

Case law concerning the education of the Roma concerns segregation, rather than the structural and minority rights-related issues flagged in treaty body recommendations. International jurisprudence as concerns the Roma and discrimination in education emanates from the Strasbourg Court, due partly to the early and easy accessibility of the Convention,⁶⁰ the geographic scope and the Court’s leverage in Europe, but also the lack of preliminary references before the CJEU.⁶¹

The ECtHR has delivered six judgements in the so-called Roma education cases and found three other applications inadmissible.⁶² In the misdiagnosis cases, *D.H. and Others v. the Czech Republic* and *Horváth and Kiss v. Hungary*, the Court dealt with the overrepresentation and concomitant segregation of Roma children in special schools established to educate pupils with (mental) disabilities. Class-level segregation within the same school building and under the pretext of providing education with a view to bridging the language gap of the Roma, who are not native Croatian speakers, was addressed in *Oršuš and Others v. Croatia*. In an analogous case, different buildings were reserved for ethnic majority and Roma students in *Sampanis et autres c. Grèce*. Two other cases examined segregation between Roma only and integrated schools. This resulted from white flight by ethnic majorities in *Sampani et autres c. Grèce* and the designation of catchment areas that failed

53. K. Henrard, *Equal Rights v Special Rights: Minority Protection and the Prohibition of Discrimination* (2007), at 49.

54. G. Cardinale, ‘The Preparation of ECRI General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination’, in I. Chopin and J. Niessen (eds.), *The Development of Legal Instruments to Combat Racism in a Diverse Europe* (2004), 82-83.

55. The issue is analysed in detail in L. Farkas and D. Gergely, *Racial Discrimination in Education and EU Equality Law* (2020).

56. A. Xanthaki, ‘Hope Dies Last: An EU Directive on Roma Integration’, 11 (4) *European Public Law*, 515 (2005).

57. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, An EU Framework for National Roma Integration Strategies up to 2020, COM/2011/0173 final.

58. Guidance for member states on the use of European Structural and Investment Funds in tackling educational and spatial segregation, EGE-SIF_15-0024-01 11/11/2015, European Structural and Investment Funds (2015).

59. It launched pilot infringement proceedings against the Czech Republic, Slovakia and Hungary on account of their non-compliance with the RED. It has moved to the next level as regards Slovakia, but the political will to see these cases through is weak. Infringement number 20142174 Czech Republic. Infringement number 20152025 Slovakia. Infringement number 20152206 Hungary.

60. While the states ratifying the European Convention are under the obligation to grant individuals the right to petition, this is not the case with UN treaties. The European Social Charter provides registered NGOs the right to lodge collective complaints without exhausting effective domestic remedies, but few Roma-dense member states have signed and ratified the relevant treaty provisions.

61. ECtHR case law provides the benchmark of adjudication under the Charter of Fundamental Rights of the European Union, Art. 52(3).

62. ECtHR, *D.H. and Others v. the Czech Republic*, [GC] application No. 57325/00, judgement of 13 November 2007, *Sampanis and Others v. Greece*, application No. 32526/05, judgement of 5 June 2008, *Oršuš and Others v. Croatia*, [GC] application No. 15766/03, judgement of 16 March 2010, *Ioanna Sampani et autres c Grèce*, requête No. 59608/09, arrêt 11 décembre 2012, *Horváth and Kiss v. Hungary*, judgement of 29 January 2013, and *Lavida et autres c Grèce*, requête No. 7973/10, arrêt 30 mai 2013. *Horváth and Vadász v. Hungary*, *CFCF v. Hungary*, and *Amanda Kósa v. Hungary* have been found inadmissible. Two additional applications communicated to Albania also concern school segregation by way of denying access to integrated schools. *X and Others v. Albania*, application No. 73548/17 was communicated on 3 April 2019, while *X and Y v. Albania*, application No. 45521/19 was communicated on 18 December 2019.

to address the consequences of residential segregation in *Lavida et autres c. Grèce*.⁶³

The Court addressed (violent) resistance by non-Roma parents to integrated education, except in the misdiagnosis cases, and examined measures necessary to bring about integration in *Oršuš, Horváth and Kiss, Sampani and Lavida*. Except for *D.H.* and *Oršuš*, the judgements became final without appeal, establishing discrimination in education. Importantly, the Court's *qualification* of unequal treatment as indirect discrimination – explicitly only spelt out in *D.H.*, *Orsus* and *Horváth and Kiss* – has been the subject of criticism.⁶⁴

The Grand Chamber judgement in *D.H.* (2007) found that the overrepresentation of Roma children in special schools amounted to indirect discrimination and ordered the respondent state to pay EUR 4,000 to each applicant. It stated that parental consent should not be construed as overriding the children's right to equal treatment.⁶⁵ The Court has done its utmost to render its reading consistent with relevant international treaties. Nonetheless, *D.H.* has not transformed the Court's application of the *principle of equal treatment* under Article 14 (treating persons in analogous situations unequally and those in different situations equally); thus, the Strasbourg *equality maxim* remains unchanged. The qualification of segregation as direct or indirect discrimination came to the centre of debate in the wake of the judgement. Some commentators argued that in certain instances segregation may amount to indirect discrimination,⁶⁶ others noted that it should always be qualified as direct discrimination, bearing in mind in particular the persistent nature of these practices and

the measures that serve to conceal their existence.⁶⁷ It could not be foretold at the time that the Strasbourg Court would not find discrimination justifiable in the Roma education cases, rendering concerns obsolete.⁶⁸

D.H. has been perceived by critics as unnecessarily limiting the free choice of minority parents.⁶⁹ Still, the limitation of majority parental choices prevalent in the Court's case law – particularly in the Greek cases – seems to refute the suspicion of unjustifiable insensitivity vis-à-vis the Roma only. By finding segregation in violation of the Convention and imposing general measures on Greece and requiring its compliance as a matter of positive obligations, the Court curtailed the right of majority parents to choose segregated education for their children.⁷⁰ The criticism put forward on behalf of the minority parents resonates with concerns about CADE's integrationist rationale, which imposes stringent conditions on ethnic self-segregation. Importantly, however, the judgement does not address minority education; rather, segregation based on the most invidious stigma, namely, the lower intellectual abilities of racial or ethnic minorities.

D.H. imposes obligations on minority as well as majority parents from the perspective of democratic pluralism, which requires the majority's tolerance vis-à-vis minorities. It can be read as a recognition of the many facets of vulnerability and an attempt to address the situation of the socio-economically disadvantaged Roma. The ECtHR grappled in this case with the power imbalance between impoverished Roma parents and majority institutions, recognising that perfect choices are not available to the former, because poverty-stricken Roma children are either segregated or regularly harassed in mainstream schools.

In *Oršuš*, the Grand Chamber ruled in favour of the applicants (2010), establishing indirect discrimination and granting EURO 4,000 to each applicant. The case deals with the limits to and inadequacy of measures addressing the education of non-native speakers, requiring some sort of accommodation of their needs to enable their integrated education.

Four more verdicts were delivered in quick succession. What later became *Horváth and Kiss v. Hungary* was originally filed in 2005. The applicants won compensation for procedural failures in domestic courts, but the

63. For more details, see Farkas (2014), above n. 47.

64. M. Goodwin, 'Taking on Racial Segregation: The European Court of Human Rights at a Brown v. Board of Education Moment?', 3 *Rechtsgeleerd Magazijn THEMIS* 93 (2009); J. Devroye, 'The Case of D.H. and Others v. the Czech Republic', 7(1) *North Western Journal of International Human Rights* 81 (2009); R. Medda-Windischer, 'Dismantling Segregating Education and the European Court of Human Rights. D.H. and Others vs. Czech Republic: Towards an Inclusive Education?', 7/8 *European Yearbook of Minority Issues* (2007). H. O'Nions, 'Divide and Teach: Educational Inequality and the Roma', 14(3) *International Journal of Human Rights* 464 (2010). R. Drown, 'Equal Access to Quality Education' for Roma: How Indirect and Unintentional Discrimination Obstructs Progress', 31(2) *Race Equality Teaching* 32 (2013).

65. *D.H.* (GC) judgement para. 203: "In the circumstances of the present case, the Court is not satisfied that the parents of the Roma children, who were members of a disadvantaged community and often poorly educated, were capable of weighing up all the aspects of the situation and the consequences of giving their consent. ... It also appears indisputable that the Roma parents were faced with a dilemma: a choice between ordinary schools that were ill-equipped to cater for their children's social and cultural differences and in which their children risked isolation and ostracism, and special schools where the majority of the pupils were Roma. 204. In view of the fundamental importance of the prohibition of racial discrimination ... no waiver of the right not to be subjected to racial discrimination can be accepted, as it would be counter to an important public interest."

66. See, in particular S. Van den Bogaert, 'Roma Segregation in Education: Direct or Indirect Discrimination? An Analysis of the Parallels and Differences between Council Directive 2000/43/EC and Recent ECtHR Case Law on Roma Educational Matters', 71 *Heidelberg Journal of International Law* 719 (2011) and K. Arabadijeva, 'Challenging the School Segregation of Roma Children in Central and Eastern Europe', 20(1) *The International Journal of Human Rights* 33 (2016).

67. See, in particular, Farkas (2014), above n. 47.

68. For a detailed analysis, see, O.M. Arnardóttir, *Equality and Non-Discrimination Under the European Convention on Human Rights* (2003).

69. See, for instance, W.S. New, 'Litigating Exclusion, Inclusion and Separation: Dilemmas of Justice in Roma Education Reform', in M. Miskovic (ed.), *Roma Education in Europe: Practices, Policies and Politics* (2013) 189. See, also, 'Judicial Policy Making: The Role of the Courts in Promoting School Desegregation', in I. Rostas (ed.), *Ten Years After A History of Roma School Desegregation in Central and Eastern Europe* (2012) 91-127.

70. In the Greek cases the majority parents protested against integration. Outside the Roma rights context, parental choices have also been curtailed by the Court in relation to home schooling and non-attendance on the grounds of religious education. See, for instance, *Konrad and Others v. Germany*, application No. 35504/03, judgement of 11 September 2006 and *Wunderlich v. Germany*, application No. 18925/15, judgement of 10 January 2019.

Supreme Court refused to find structural discrimination, suggesting that systemic reform be sought from the Constitutional or the Strasbourg Court. By then, however, misdiagnosis was severely curtailed in Hungary by legal amendments adopted in 2007.

Kiss and Horváth is perhaps the most important ruling on account of the ECtHR's clear application of its positive obligations doctrine in the context of racial discrimination in education. In view of the persistent discriminatory practice at hand, the Court emphasised that

the systemic misdiagnosis of Roma children as mentally disabled has been a tool to segregate Roma children from non-Roma children in the Hungarian public school system since at least the 1970s.⁷¹

It further noted that the concept of 'familial disability' played the same role in the Hungarian context as the quasi-automatic placement of Romani children into Czech remedial schools '[owing] to real or perceived language and cultural differences between Roma and the majority',⁷² while it found 'troubling that the national authorities significantly departed from the WHO standards'.⁷³ Based on these antecedents, the Court concluded that 'the State has specific positive obligations to avoid the perpetuation of past discrimination or discriminative practices *disguised* in allegedly neutral tests' (emphasis added).⁷⁴

In the *Sampanis* and *Sampani* judgements, the ECtHR held that public authorities are liable for segregation by omission, that is, by not taking measures to stem de facto/spontaneous segregation. In *Sampani*, the ECtHR did not find it an adequate justification defence that non-Roma parents chose not to register their children in the school with an obligation to enrol and that Greece had no power to stop this trend.⁷⁵ In *Sampani*, the ECtHR prescribed general measures in order to avoid segregation.

3.3 Assessment

The Council of Europe's human rights regime protects minority rights under the Framework Convention, whose enforcement is limited to reporting. The accommodation of Roma-specific needs in the context of education has been dealt with by the Advisory Committee in the reporting process and specific publications.

Under the Convention and the Revised Charter, minority-specific needs can be raised either under the right to education or in claims that pertain to discrimination based on membership of a national minority in conjunction with education. Due to the lack of applications for the safeguarding of minority rights, the positive obligations doctrine has not developed in this direction, being thus limited to the issue of segregation and unequal education.

Over time, the Strasbourg Court's approach grew bolder, motivated partly by the desire to decrease its own workload and increase its legitimacy.⁷⁶ While the Court has powers to establish a violation and provide just satisfaction,⁷⁷ it also uses the binding nature of judgements to impose individual and/or general measures.⁷⁸ It has broadened the clout of its rulings in two ways in the Roma education cases: first, by prescribing general measures, and second, by imposing positive obligations. In *Horváth and Kiss* the Chamber finally bridged the normative prescriptions inherent in positive *action* concerning discrimination and positive *obligations* concerning general treaty obligations. Positive obligations address states rather than the general or minority population and the fulfilment of these obligations seems to be left to the discretion of states parties, with little or no oversight by the Committee of Ministers of compliance in the form of awareness-raising and trust-building efforts.

The positive obligations doctrine in the context of education was first fleshed out in *D.H.*, and this judgement served as a benchmark for consecutive rulings as well. The Strasbourg Court's finding to the effect that Roma parents cannot lawfully consent to the segregation of their children if that would run counter to the prohibition of ethnic discrimination places a direct obligation on minority communities as concerns choice and conduct. Simultaneously, it also regulates the conduct of majority parents and institutions, in as much as *D.H.* renders it unlawful to exclude Roma children from integrated education.

The positive obligations in *D.H.* concern a particular practice of segregation, namely, the misdiagnosis of Roma children as mentally disabled; therefore, during the implementation phase, the Committee of Ministers has been focusing on the reform of diagnostic tools and the education system's response to misdiagnosis. In *Orsus*, the complaint dealt with segregation and only tangentially with the applicants' alleged linguistic deficiencies, so that even though the Court indicated a need to accommodate their needs in mainstream education, it did not engage with the obligation to provide education in the minority language. The equal treatment frame (integrated education) thus pre-empted considerations of special rights (minority language education).

In the Greek cases, the equal treatment frame was addressed by the Court by way of general measures to ensure that the applicants can access integrated education despite majority resistance. These measures can be considered as positive action aimed at equalising historic disadvantages but do not amount to special rights

71. *Horváth and Kiss* judgement, para. 9.

72. *Ibid.*, para. 115.

73. *Ibid.*, para. 118.

74. *Ibid.*, para. 116.

75. *Sampani et autres* judgement, paras. 103-104.

76. The implementation of judgements by states parties reinforces its authority and alleviates the caseload, whose incessant increase weakened the Court's bargaining power on its budget.

77. Just satisfaction is available pursuant to Art. 41 of the Convention. The Court has carved out further remedial powers under Art. 46 that prescribes the binding nature of judgements on states.

78. V. Colandrea, 'On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures: Some Remarks in Light of the Assanidze, Broniowski and Sejdicovic Cases', 7(2) *Human Rights Law Review* 396 (2007).

accommodating specific minority needs. In *Horváth and Kiss* the Strasbourg Court combined the two analogous approaches to strengthen the clout of its ruling. Given that this judgement does not concern the need to accommodate the applicants' minority-specific needs, the ECtHR's case law stops at rendering the positive obligations doctrine coherent with positive action in the context of equal treatment rather than the special rights. International litigation can seldom achieve what states are not prepared to grant. Indeed, the Czech Republic's endless legal and policy reforms triggered (partly) by *D.H.* bear witness to an avoidance technique, whereby nothing much is happening in practice, while an awful lot is going on 'on paper'. Legislative toing and froing has certainly not improved the Czech public's attitudes towards the Roma, nor necessarily towards children with disability, who are caught up in the *D.H.* saga on account of the focus on special schools. While the positive obligations doctrine may have resonated in the hearts and minds of Roma communities – particularly those targeted by litigation – it has not generated meaningful change in majority attitudes, to which the growing level of segregation attests.

In the context of the Roma education cases, the focus of academic research has been on the qualification of segregation and its remedies, rather than on positive obligations. Little has been said about the fact that notwithstanding its undisputable strengths, the Strasbourg approach runs counter to international human rights norms that categorically prohibit segregation, undermines the conception of segregation as an *ipso iure* form of discrimination (prohibiting segregation by the law itself) and remains oblivious to concealment techniques that hide from view the intent to separate Roma students and the failure to end spontaneous segregation. The application of the proportionality test in the Roma education cases creates inconsistencies with UN treaties and opens the door to reading down domestic anti-discrimination law. Moreover, the Strasbourg approach seems to require that applicants show the existence of intent on the part of state authorities to make a finding of direct discrimination. As it is, even a state's unacceptable (in)action will lead to a finding of indirect discrimination, unless discriminatory intent is proven.⁷⁹

Before turning to housing litigation, one aspect needs to be clarified, namely, why has the Strasbourg Court relied so heavily on the principle of equal treatment in the field of education, and why has it failed to do so in other fields? The answer is relatively straightforward. As long as the violation of a substantive right can be established, the Court tends to focus its reasoning on that aspect, weaving arguments about equal treatment

into the primary thread of reasoning in line with the nature of Article 14. To trigger protection under the principle of equal treatment safeguarded in Article 14, the Court must deal with a substantive right violation, which therefore takes the limelight away from the discrimination analysis. In the Roma education cases, this logic could not apply, because of the nature of education as a right as well as an obligation. Given that all complainants had access to education, violation of the substantive right alone was not at issue. The only issue before the Court was discrimination in education.

4 Roma Rights in the Field of Housing

Roma rights litigation in the field of housing began three decades ago, being thus greater in volume, even if less known than the Roma education cases. The number of complaints before international tribunals and the intensity of community involvement indicate that the right to housing is of paramount importance for the Roma and the Travellers themselves. Housing litigation has mobilised a wide array of (inter)national tribunals, primarily the Strasbourg Court. Even though the EU RED has facilitated housing litigation at the national level, it has not triggered meaningful case law from the CJEU.⁸⁰

Several considerations can explain why education case law has taken precedence over housing jurisprudence. First, the right to housing in social rights treaties – Article 11 ICESCR and Article 31 of the European Social Charter (Revised)⁸¹ – became accessible relatively late and only in a limited number of EU member states. Earlier, international litigation focused on the Strasbourg Court, where it took time for housing jurisprudence to mature given that the Convention does not safeguard the right to housing *per se*. The proper frame and argument had to be identified by lawyers and judges. Second, resources for education litigation have been vastly greater and the cause has been supported by international organisations seeking to use school desegregation as a vehicle of their social inclusion agenda.

4.1 International Law Governing the Right to (Racially Equal) Housing

International standards on the right to housing show similarities, but also differences, as compared with education. First of all, a treaty concerning minority identity and housing – like CADE in education – is lacking, and

79. For instance, in *Lavida*, the Court held that 'in the absence of any discriminatory intent on the part of the State, the Court considers that the continuation of the education of Roma children in a public school attended exclusively by Roma and the decision against effective desegregation measures – for example, dividing the Roma in mixed classes in other schools or redrawing catchment areas – due in particular to the opposition of parents of non-Roma pupils, cannot be regarded as objectively justified by a legitimate aim' *Lavida et autres* judgement, para. 73.

80. See, further, T. Kádár, 'The Standing of National Equality Bodies before the European Union Court of Justice: The Implications of the *Belov* Judgment', 11 *Equal Rights Review* 13 (2013) and S.B. Lahuerta, 'Ethnic Discrimination, Discrimination by Association and the Roma Community: *CHEZ*', 53(3) *CMLR* 797 (2016).

81. Art. 11.1 ICESCR stipulates that states parties recognise the right of everyone to an adequate standard of living for himself and his family, including housing. The European Social Charter (Revised) provides for the right to housing under Art. 31.

second, the explicit protection of the right to housing and the prohibition of discrimination in treaties governing social rights are augmented by provisions that can trigger protection under treaties governing civil and political rights for certain aspects of housing, such as forced evictions. Protection from forced evictions can be sought under the right to private and family life; therefore, the analysis in Section 3.1 is pertinent when it comes to Article 8 of the European Convention and Article 17 of the ICCPR.⁸²

The analysis concerning protection from segregation under the ECHR and the EU RED applies to housing as well, with the caveat that Article 3 of the Directive covers discriminatory scenarios concerning the allocation of social housing under the heading ‘social protection’, while racial or ethnic discrimination in relation to private housing is covered under the heading ‘services available to the public’.

The 2000 CERD General Recommendation contains a three-tiered approach to housing. The first tier focuses on ‘avoiding segregation’ by appropriate planning and partnering with the Roma and charitable organisations in the construction, rehabilitation and maintenance of housing. The second tier addresses the need to ‘firmly’ tackle discrimination by local authorities and private owners both in relation to ‘taking up residence and access to housing’, particularly when it comes to unlawful expulsion and the placement of ‘Roma in camps’ in remote areas without access to public utilities. The third tier requires that measures be taken for the culturally adequate accommodation of Roma nomadic groups and Travellers.

Given the scarcity of social housing in the CEE, the Roma’s access to accommodation in social housing features high on the list of CERD recommendations, while with the rise of forced evictions, the Committee is calling on states to put an end to this practice and provide alternative accommodation across Europe. This should, at times, necessitate legal reform, as borne out, for instance, in the concluding observations of the Human Rights Committee (HRC) on Bulgaria.⁸³

In relation to Italy, the CERD recommends that the state party halt plans to carry out further evictions, end the use of segregated camps, ensure the provision of adequate and culturally appropriate accommodation as a matter of priority and review and amend housing legislation, policies and practices at all levels to end discrimination in access to social housing and housing benefits.⁸⁴ In addition, the HRC recommends that the Italian government ensure that specific security measures imposed on segregated Roma-only settlements are repealed.⁸⁵ With respect to France, the CERD recommended that

the Besson Act, regulating the right to housing, ‘be implemented swiftly’ and that travel permits for Travellers be abolished.⁸⁶

4.2 International Case Law on the Right to Housing

Given the prolific nature of housing litigation, this section discusses case law in the framework of relevant strategies through which applicants channel their arguments. It must be noted at the outset that regardless of the strategy that yields applications, reference to the principle of equal treatment enshrined in Article 14 of the European Convention is almost non-existent in the Strasbourg Court’s case law. As mentioned above, this is because the Court tends to resolve matters concerning equal treatment in its analysis of a violation of core Convention rights, such as the right to private and family life under Article 8 in the housing context, without then taking up claims that combine unequal treatment with the violation of core rights.

4.2.1 Civil Rights Strategy

The European Convention was first engaged by the Traveller litigation campaign launched in the United Kingdom in the early 1990s. Seeking the annulment of legislation repressing the Travelling way of life, the campaign yielded complaints under the right to private and family life (Art. 8) in conjunction with the principle of equal treatment (Art. 14).⁸⁷ The campaign coincided with the accession of Roma-dense CEE countries, which made Traveller litigation relevant for the Roma.⁸⁸

The United Kingdom gradually curtailed the right of Travellers and Gypsies to lawfully stop and park their caravans. As a knock-on effect, they lost security of tenure and access to social services, education and so on. Adopted in 1994, the Criminal Justice and Public Order Act repealed the duty of local authorities to accommodate Travellers and Gypsies. It also abolished the statutory, full-scale budgetary grants for site provision, while giving wider powers to local authorities and the police to evict, effectively criminalising those unable or unwilling to find lawful halting sites.⁸⁹ Planning regulation made it more cumbersome to obtain permission to buy land and park caravans there.⁹⁰

Travellers wanted to preserve the status quo, but the government’s intention to restrict ‘new nomads’, whose numbers increased after the 1980s and who were not members of the ethnic group, exacerbated their struggle.⁹¹ Despite a generous legal aid scheme, only ‘proce-

82. Art. 17 ICCPR stipulates that no person shall be subjected to arbitrary or unlawful interference with his privacy, family and home.

83. Human Rights Committee, Concluding observations on the fourth periodic report of Bulgaria, 4 (2018).

84. CERD, Concluding observations on the combined nineteenth and twentieth periodic reports of Italy, 7 (2017).

85. Human Rights Committee, Concluding observations on the sixth periodic report of Italy, 3 (2017).

86. CERD, Concluding observations on France, 4 (2010).

87. Prior to the 1994 legislation, complaints were found inadmissible. See, L. Clements, P.A. Thomas & R. Thomas, ‘The Rights of Minorities—A Romany Perspective’, 4(4) *ODIHR Bulletin* 3 (1996).

88. In the United Kingdom, Gypsies were protected under the Race Relations Act.

89. R. Morris and L. Clements, *At What Cost? The Economics of Gypsy and Traveller Encampments* (2002).

90. D. Hawes, *The Gypsy and the State* (1995).

91. L. Clements, ‘Human Rights and Gypsy Identity in British Law’, in A. Simoni (ed.), *Stato Di Diritto E Identita Ro-M* (2003).

dural access to justice' could be obtained, without substantive changes on the ground.⁹²

Given the lack of regional norms on minority rights at the time, the Traveller cases were framed as discrimination under the European Convention in conjunction with the right to private and family life, given that discrimination can only be established if there is an arguable claim under a Convention right. The ambivalence to minority rights,⁹³ compounded by the difficulty to fit Travellers under the minority category and the misuse of this frame by ethnic majority caravan dwellers, hampered admissibility.⁹⁴

Prior to *Buckley v. the United Kingdom*, complaints were found inadmissible.⁹⁵ The first applications to reach the Court were those of *Jones v. the United Kingdom*⁹⁶ and *Smith and Others v. the United Kingdom*.⁹⁷ The former bears little jurisprudential value, but in the latter, the Commission held that, in principle, the traditional lifestyle of a minority attracts the protection afforded by Article 8. However, given that the applicants' complaints touched upon questions of policy and public administration, issues that the Commission was rather ill-suited to address, the complaints were ill-founded.

The great breakthrough in *Buckley*, which concerned the criminalisation of the occupancy of land by English Gypsies, was admissibility itself. Earlier, the Commission's test appeared 'disproportionately harsh'.⁹⁸ Even though the Council of Europe was the first international organisation to single out Roma and Travellers for protection, a quarter century passed between the adoption of its recommendation on 'Gypsies and other travellers' in 1969 and the admissibility decision in *Buckley*.⁹⁹

The Strasbourg Court did not find a violation in *Buckley*, missing the momentum to critique discriminatory legislation that could have reverberated across Europe.¹⁰⁰ It did, however, seize the momentum to note obiter dicta that

the vulnerable position of Gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in reaching decisions in particular cases.¹⁰¹

92. P. Wheeler, 'Accessing Legal Services - Traditional Travellers in England and Wales', 1 J. C.L. 230 (1996) 244.

93. Clements et al., above n. 87. The '... creation of a Sub-Committee on Minorities in 1957 and a proposal in 1959 for an additional Protocol on Minorities. Since that time the Protocol has remained on the drawing board for 37 years, with the Parliamentary Assembly becoming ever more insistent about the need for its adoption'.

94. *Ibid.*

95. *Buckley v. the United Kingdom*, judgement of 25 September 1996.

96. *Jones v. the United Kingdom*, application no. 14837/89, 7 May 1990. An even earlier case was struck off the list. See *Drake v. the U.K.*, application no. 11748/85, 7 May 1990.

97. *Smith and Others v. the United Kingdom*, Application no. 14455/88, 4 September 1991.

98. Clements et al., above n. 87.

99. Recommendation 563 (1969) of the Consultative Assembly on the situation of Gypsies and other travellers in Europe (1969).

100. N. Gughinski, 'The European Court of Human Rights Turns Down the First Case Involving a Gypsy Applicant', 1 *Roma Rights* 25 (1996).

101. *Buckley* judgement, paras. 76, 80 and 84.

This embryonic formulation of a positive obligation was considered inadequate by Judge Lohmus, who wished to go further, observing that equal treatment in case of an ethnic minority required special measures. Judge Pettiti urged the Court to adopt a more activist approach also with a view to the Eastern Roma, while Judge Repik was concerned about the message the Court's first Roma rights judgement would send.

Despite defeat, the Traveller cases nevertheless constitute evolutionary milestones in the jurisprudence, because they enabled the Court to crystallise its approach to minority-specific housing.¹⁰² The Court considered that states are under an obligation to facilitate the 'Gypsy way of life',¹⁰³ while intimating that it will be willing to review its jurisprudence inasmuch as a pan-European consensus emerges.¹⁰⁴ A very important (and often overlooked) aspect relates to the Court's holding that, in cases of eviction, the availability and provision by the authorities of alternative accommodation are countervailing factors that should be taken into account when assessing the proportionality of the interference, thereby suggesting that an eviction not accompanied by provision of alternative accommodation might run counter to Article 8.¹⁰⁵ In sum, the Traveller litigation campaign lay the ground for the Court's robust approach in later cases on positive obligations, including culturally appropriate alternative accommodation.

In *Connors v. the United Kingdom*,¹⁰⁶ the first successful Traveller complaint, the Court held that the eviction was not attended by any due process safeguards and was therefore in breach of Article 8's procedural limb. The applicant's living in a lawfully established site distinguished *Connors* from the previous cases, but also limited its jurisprudential value. Regrettably, the Court did not provide any directions to the respondent state as to the measures it should take in order to comply with the judgement.¹⁰⁷

In *Codona v. the United Kingdom*, the applicant challenged the nature of the alternative accommodation provided in the wake of eviction,¹⁰⁸ affirming that she was averse to 'bricks and mortar' accommodation and preferred instead the allocation of a new site for her caravan. The Court found this application inadmissible, while interestingly reviewing the Article 14 arguments, only to reject them by noting that in such emergency cases, both the applicant and her comparator would

102. *Chapman v. United Kingdom*, application no. 27238/95; *Beard v. United Kingdom*, application no. 24882/94; *Coster v. United Kingdom*, application no. 24876/94; *Lee v. United Kingdom*, application no. 25289/94; *Jane Smith v. United Kingdom*, application no. 25154/94. All five cases were joined by the Grand Chamber that delivered its judgement on 18 January 2001.

103. *Chapman*, para. 96.

104. *Ibid.*, para. 70.

105. *Ibid.*, para. 103.

106. *Connors v. the United Kingdom*, application no. 66746/01, judgement of 27 May 2004.

107. Regarding the *Connors* judgement, it would be only in April 2011 and only in relation to England that the relevant legislation would be amended.

108. *Codona v. the United Kingdom*, application no. 485/05, 7 February 2006.

have been provided with the same kind of accommodation. The ruling did not clarify whether a specific minority need could in fact have an ethnic majority comparator. In *Buckland v. the United Kingdom*,¹⁰⁹ the Court applied for the first time the proportionality test to the eviction order, which became the cornerstone of its Article 8 jurisprudence in the landmark case of *Yordanova and Others v. Bulgaria* discussed later in this article.¹¹⁰

Over time, the Court's majority became more sympathetic to the cause,¹¹¹ and a growing number of judges steered adjudication towards a more robust reading of minority rights.¹¹² Nonetheless, the Court did not go as far as to impose a duty on states parties to adopt positive action measures to remedy past discrimination.¹¹³ This would have been impossible, given that discrimination in the Traveller cases was not in fact established.

The synchronicity of regional standard setting on minority rights, awareness of the situation of Eastern Roma and the adjudication of Traveller complaints created a fortunate constellation. Before examining a single Roma complaint from the East, the Strasbourg Court recognised the group's vulnerability and lay the foundations of its positive obligations jurisprudence concerning housing. The Court's activism was needed to make the link between the Traveller and Roma *causes* and merge the two minority groups into one legal category with a view to reinforcing an emerging political consensus. Without the accession of Roma-dense CEE states and standard setting on minority rights, the judicial recognition would have taken longer or would not have occurred. Had it not been for the Traveller cases, the Roma may have had to wait longer for recognition. As it is, Travellers won the battle for the whole group.

In the East, it took considerable time to find the most effective argument and forum in cases of forced eviction due to the mismatches between domestic and international legal opportunities. Nonetheless, by 2009, when the FRA report on the minority's housing rights made apparent the lack of Roma-related case law,¹¹⁴ the issue of forced evictions of Roma communities in the CEE had already been channelled to the Strasbourg Court in *Yordanova and Others v. Bulgaria*.

The case concerns the eviction of a Roma community that had settled in a locality of Sofia in the early 1960s

and built their houses without planning permissions. The local municipality decided to evict them, and following an unsuccessful judicial challenge, the applicants lodged a complaint with the Court. The Court – for the first time in the housing context – indicated interim measures to the Bulgarian government in July 2008, requesting the suspension of the execution of the final domestic court decision that authorised the applicants' eviction.

The Court's final judgement was even more groundbreaking: while reiterating that Article 8 did not provide for a right to a home, it was nevertheless held that such an obligation could arise, under exceptional circumstances, with a view to securing shelter to 'particularly vulnerable individuals'. The fact that the applicants themselves had not benefitted from the government's policy initiatives weighed heavily in the Court's finding of a violation under Article 8, despite some share of responsibility attributable to the Roma. The Court called upon the Bulgarian authorities to amend the relevant legal framework and allow for the review of the proportionality of the eviction order, to either repeal the final domestic decision concerning eviction or suspend it pending the applicants' housing rehabilitation.

A year later, the Court halted the eviction of 26 *gens du voyage* families in *Winterstein et autres c. France*.¹¹⁵ The true significance of the French case lies in the wide interpretation of positive obligations concerning protection from forced evictions mindful of the cultural adequacy of alternative accommodation. Pursuant to *Winterstein*, states must provide culturally adequate alternative accommodation, except in cases of force majeure.

The *Winterstein* applicants lived on private land, as tenants, owners or squatters; still, the Court found the principles enunciated in *Yordanova* fully applicable to the case. Moreover, it found a separate Article 8 violation on account of the failure of the authorities to provide culturally adequate alternative accommodation to those semi-sedentary applicants who refused majoritarian social housing. This does not, however, imply a full recognition of a right to culturally sensitive accommodation; rather, the Court felt emboldened by the fact that such a right was recognised under French law.

The civil rights strategy was pursued in cases before the HRC, with the caveat that reference to minority rights is available before that tribunal. The first Roma housing case to reach the UNHRC was *Georgopoulos and Others v. Greece*.¹¹⁶ The HRC found that the applicant and his family's consecutive evictions were in violation of the ICCPR – including the right to protection of minorities – and called upon Greece to provide an effective remedy as well as adequate reparation, including compensation. It also reminded Greece of its obligation to ensure that no similar violations take place in the future.

109. *Ibid.*, para. 68.

110. *Yordanova and Others v. Bulgaria*, application no. 25446/06, judgement of 24 April 2012.

111. In *Chapman*, the majority recognised that vulnerability resulted from an asymmetry between the situation of the Roma and Travellers as compared to ethnic majorities, which merited different treatment both in administrative practice and legislation. *Chapman*, para. 96.

112. L. Clements, 'An Emerging Consensus on the Special Needs of Minorities: The Lessons of Chapman v. United Kingdom, Roma Rights', 2 *Roma Rights* 8 (2001) and R. Sandland, 'Developing a Jurisprudence of Difference: The Protection of the Human Rights of Travelling Peoples by the European Court of Human Rights', 8(3) *Human Rights Law Review* 475 (2008).

113. C. Cahn, 'Towards Realising a Right to Positive Action for Roma in Europe: Connors v. UK', 1 *Roma Rights* 13 (2005).

114. FRA, *Housing Conditions of Roma and Travellers in the European Union* (2009).

115. *Winterstein et autres c France*, application no. 27013/07, judgement of 17 October 2013.

116. HRC, *Georgopoulos and Others v. Greece*, communication no. 1799/2008, views adopted on 29 July 2010.

The case of *Naidenova and Others v. Bulgaria*¹¹⁷ is the HRC's equivalent of *Yordanova*. The HRC held that the eviction would be in violation of the ICCPR, unless satisfactory replacement housing was made available immediately.¹¹⁸ The case of *Cultural Association of Greek Gypsies Originating in Halkida and Suburbs 'I Elpida' and Mr. Stylianos Kalamiotis v. Greece*¹¹⁹ was analogous to *Naidenova*. The HRC held that eviction without provision of 'alternative accommodation immediately' would be in violation of the Covenant. The municipality has made use of a series of government-funded programmes (including rent subsidies) to implement the verdict.

4.2.2 Social Rights Strategy

The ECSR is accessible from few Roma-dense countries, which severely hampers its clout on Roma rights. Legal action was first channelled to the ECSR in 2004, when the European Social Charter (Revised) came into force. The social rights strategy was short lived in the Roma context, which is partly due to the unavailability of collective complaints¹²⁰ in the majority of Roma-dense CEE countries and the weak pulling effect of the Charter itself.¹²¹

Pursuant to the Committee's progressive jurisprudence, states must show due regard for the specific circumstances of the Travellers and the Roma in both legislation and decision-making, while serving the public interest by striking the right balance between the interests of the minority and the majority.¹²² Furthermore, states have the duty to adopt an overall and coordinated approach, consisting of an analytical framework, a set of priorities and measures and a monitoring mechanism involving all stakeholders.¹²³ The Committee set out requirements for national legislation by turning the limelight away from the question of whether illegal occupation may justify evictions to whether the criteria of illegal occupation are unduly wide, including conditions such as permanent residence or domiciliation on which access to healthcare, education and other social services are conditioned.¹²⁴ This approach is based on the realisation that evictions render the Roma effectively homeless, because individuals or groups are in fact forced to behave reprehensibly, if their membership in a minority would otherwise prevent their enjoyment of a

right in a manner enshrined in national legislation. Legislative amendment is needed to ensure the compatibility of minority identity and majority legal norms, so that evictions do not result in homelessness.¹²⁵

The lack of domestic litigation inherent in the collective complaint mechanism means that the ECSR jurisprudence does not resonate at the national level. Another reason why the Committee's progressive jurisprudence has not become a standard reference is the mismatch between the social rights and the equality frames and the latter's dominant influence on legal strategies in the CEE.

4.2.3 The Equal Treatment Strategy

The equal treatment strategy has not contributed meaningfully to the doctrine of positive obligations, because under ICERD – where it could be fleshed out – only one complaint has been made so far, and also because under EU anti-discrimination law – which has been used in housing litigation – compliance is ensured in different ways.

*L.R and Others v. Slovakia*¹²⁶ originated in a resolution, adopted by the Municipal Council of the town of Dobšiná in Slovakia, approving a housing policy for the local Roma community. Local non-Roma residents petitioned the municipality not to proceed with the housing plan, and the Council abandoned the project. In its March 2005 opinion, the CERD Committee found the revocation of the first municipal resolution to be racially motivated and in violation of the state's obligation to ensure that all authorities exercise their functions in a non-discriminatory manner as well as the obligation to provide for effective remedies in cases of discrimination. The CERD held that the authorities should reinstate the status quo ex ante and proceed with the housing plan. Slovakia did not comply.

Housing litigation often relies on EU anti-discrimination law at the national level. Importantly, positive obligations or injunctive relief is either not available or not imposed, while damages granted ex post – the RED's key feature – cannot adequately remedy forced evictions. *Cazacliu and Others v. Romania* demonstrates that once some sort of remedy is provided, even the Strasbourg Court will be disinclined to review its (cultural) adequacy.¹²⁷ Litigating in the equality frame may be counterproductive when it comes to housing and specific minority accommodation because claims for special treatment cannot be addressed under this frame, unlike under the aforementioned civil or social rights frames. Moreover, at the EU level, even the shocking French eviction and expulsion campaign failed to trigger action. Due to insufficient political support in the

117. HRC, *Naidenova and Others v. Bulgaria*, communication no. 2073/2011, views adopted on 20 October 2012.

118. Human Rights Treaties Division Letter to Ms Mihailova and Mr Thiele 9 May 2012.

119. *Cultural Association of Greek Gypsies Originating in Halkida and Suburbs 'I Elpida' and Mr. Stylianos Kalamiotis v. Greece*, communication no. 2242/2013, views adopted on 3 November 2016.

120. Even where collective complaint is available, the majority of domestic NGOs are not registered with the Committee.

121. *European Roma Rights Centre v. France*, Complaint No. 51/2008, decision of 19 October 2009, paras. 93 and 51.

122. *Centre on Housing Rights and Evictions v. Italy*, Complaint No. 58/2009, decision of 25 June 2010, paras. 39-40.

123. *European Roma Rights Centre v. France*, Complaint No. 51/2008, decision of 19 October 2009, para. 93.

124. *European Roma Rights Centre v. Greece*, Complaint No. 15/2003, decision of 8 December 2004, para. 51 and *International Federation of Human Rights v. Belgium*, Complaint No. 62/2010, decision of 21 March 2012, paras. 168-182.

125. *European Roma Rights Centre v. Bulgaria*, Complaint No. 31/2005, decision of 18 October 2006, paras. 53 and 57, and *European Roma Rights Centre v. Italy*, Complaint No. 27/2004, decision of 7 December 2005, para. 21.

126. CERD, *L.R and Others v. Slovakia*, No. 31/2015, opinion of 7 March 2005.

127. ECtHR, *Aurel Cazacliu and others against Romania*, application no. 63945/09, decision on inadmissibility of 4 April 2017.

Commission, France was finally condemned by the ECSR.¹²⁸

4.3 Analysis

Housing litigation in the Strasbourg Court commenced with complaints from Western Travellers who sought the accommodation of their minority-specific needs under the ambit of the right to private and family life with reference to due process in the legislative as well as the policy context. This approach framed the Court's jurisprudence in subsequent Traveller as well as Roma cases, even though the Roma invoked community ties as an important value rather than culture-specific accommodation.

Positive obligations under Article 8 require states to consider the cultural specificities of the minority during the legislative, policy and administrative processes to the effect that they tolerate – in other words, refrain from outlawing – self-segregated, non-majoritarian ways of life. In case minority dwellings are situated on public land, compliance with the Court's and the Social Committee's case law requires a type of culture-specific (social) housing provision. In case dwellings are situated on private land owned by minority individuals, the obligation entails no interference. As far as private landowners from the majority are concerned, they can seek protection for their property rights, but states are under the obligation to provide alternative, culture-specific accommodation to members of the minority group.

As concerns compliance, approaches in the East and the West differ because in the latter context legislatures and judiciaries – and in their wake, hopefully societies – slowly learn to tolerate self-segregation. In the East, national legislation and policies do not comply with the standards of the Strasbourg tribunals. In the CEE, authorities routinely use the law to exclude the Roma from integrated spaces,¹²⁹ against which equality arguments are inadequate, being irrelevant for the small group of middle-class Roma, who can actually afford housing in integrated districts, but even more so for those who lack the means to rebel against the status quo. Legislation accommodating minority needs is needed to ensure their right to housing.

Compliance is not perfect in the West either, even though the situation is markedly improving.¹³⁰ The United Kingdom slowly amended its legislation, and unfavourable case law has recently taken a positive

turn.¹³¹ In France, special legislation¹³² protects everyone from homelessness, and mayors have the duty to ensure that a sufficient number and quality of halting sites are available.¹³³ The duty is regularly breached and mayors are rarely sanctioned, even though French high courts tend to rule in favour of occupants¹³⁴ and the French equality body has made efforts to end status inequality hindering access to social rights.¹³⁵ Bureaucratic contingency is problematic in Belgium too.¹³⁶ France's ongoing expulsion policy shows most vividly that the hearts and minds of Westerners may not have changed much when it comes to migrant Roma from the CEE. Presently, half a dozen housing complaints are pending before the Strasbourg Court, and lawyers call for mass filings.¹³⁷ Interim measures can defer but cannot resolve the eviction disaster.¹³⁸

5 Conclusions

The ECtHR has been at the forefront of jurisprudential developments concerning positive obligations in Roma rights cases dealing with integrated education and forced evictions. The Court's Article 8 jurisprudence accommodates cultural differences in the latter context through due process reasoning. The protection of special minority rights upholds self-segregation, with reference to the positive aspects of ethnic identity and community ties. The Court recognises the need of Roma and Traveller minorities to 'stick together' in the face of racial harassment by ethnic majority neighbours and local authorities, which is a permanent feature of their life and complaints. Minority rights claims have not been raised under the right to education. Rather, the

128. *European Roma and Travellers Forum v. France*, Complaint No. 64/2011, decision of 24 January 2012.

129. High Court of Cassation and Justice, Romania, file 1741/33/2011, decision no. 640/27.09.2013.

130. For instance, in September 1998, Ireland adopted the Housing (Traveller Accommodation) Act, placing all local authorities under the duty to adopt a five-year programme for the creation of halting sites. New halting sites law for Irish Travellers. Failure to adopt a halting site plan automatically ceded competence to civil servants, whose approach is generally more favourable. Still, in 2015, the ECSR found Ireland in violation of the Charter for failing to provide a sufficient number of sites. *European Roma Rights Centre v. Ireland*, Complaint No. 100/2013, decision of 1 December 2015.

131. *Davis and Others v. Tonbridge and Malling Borough Council*, Court of Appeal of England and Wales, CA 26 February 2004, [2004] EWCA Civ 194, See, however, *Wrexham County Borough Council v. Berry*; *South Buckinghamshire District Council v. Porter and Another*; *Chichester District Council v. Searle and Others*, House of Lords, 22 MAY 2003, [2003] UKHL 26, [2003] 2 WLR 1547, [2003] 2 AC 558.

132. Loi no 90-449 du 31 mai 1990 visant à mettre en oeuvre le droit au logement (Lois Besson).

133. J. Charlemagne, *Le droit au logement des gens du voyage: un droit en trompe l'oeil?*, 15 *Etudes tsiganes*, 66 (2000).

134. D. Schaffhauser, *Droits des occupants de terrain: Evolution récente de la jurisprudence* (Intervention au séminaire interrégional d'avocats du 18 mars 2016. See, most recently, Conseil d'État, N° 427423, CLI:FR:CEORD:2019:427423.20190213, 13 février 2019).

135. The National Assembly adopted a bill on 9 June 2015 to repeal Law no 69-3 of 3 January 1969 on Travellers, ending their obligation to carry special identity papers. The bill gives effect to the French equality body's recommendations and condemnation by the UN Human Rights Committee and the Conseil d'Etat that invalidated this part of the law.

136. *FIDH v. Belgium*, ECSR, para. 146.

137. T. Alexandridis and A. Dobrush, 'International Housing Rights and Domestic Prejudice: The Case of Roma and Travellers', in M. Langford, C. Rodríguez-Garavito & J. Rossi (eds.), *Social Rights Judgments and the Politics of Compliance: Making It Stick* (2017).

138. D. Mihaylova and A. Kachamov, *Roma Evictions and Demolition of Roma Houses: A Sustainable Solution for Roma Integration or a Problem of Roma Discrimination in Bulgaria? Analysis of the Legislation Regulating the Demolition of Illegal Housing and Its Implementation in Bulgaria to Identify Its Compliance with the EU Legislation on Protection from Discrimination on Grounds of Ethnic Origin* (2017).

positive obligations doctrine has emerged in response to complaints promoting integrated education.

Jurisprudential differences in the two fields stem from the function of education in the nation-building project. Education as an obligation is a means of assimilation with majoritarian history, language and values, which explains why the Roma are not en bloc excluded from schools, albeit increasingly excluded from integrated education. Some provision is made to accommodate their minority traits, but education systems are rather rigid in this respect. Conversely, due to historic oppression, Roma communities lack the internal resources needed for minority language education or self-segregation in minority schools, which explains why these types of claims do not come before international tribunals.

Challenges in housing arise in relation to the minority group's culturally adequate accommodation and its toleration in the proximity of non-Roma, especially when legislation, policy or administrative practice fails to take into account minority specificities. The right to housing – inasmuch as covered by Article 8 of the Convention – is not connected to the assimilationist agenda as is education, meaning that the right is not augmented with a corresponding obligation to provide housing even if under discriminatory or segregated conditions. The lack of such inherent obligation at the national level renders claim making – legal as well as political – more frequent in the housing context. The nature of exclusion is dependent on the field, because segregation does not absolutely exclude Roma children from educational institutions, whereas housing legislation and practices often pursue this aim, failing only because of the impossibility of the task, lest the policy aim is expulsion – of non-citizens – or genocide. The nature of exclusion and minority responses explain both the variability of litigation trends and positive obligations jurisprudence in the two fields.

Positive obligations can naturally achieve a higher level of compliance in situations in which they ask less of stakeholders. Rulings in the field of housing require small steps from legislatures and policymakers and a bit of tolerance from majority populations, while improving the situation of the Roma and the Travellers tremendously. The situation is fundamentally different when it comes to education, where legal and institutional reform, but also a fundamental change in the hearts and minds of both majority and minority groups, would be necessary to bridge the social distance and generate mutual trust between ethnic majorities and the minority. Integrated education places severe demands on public education systems, particularly if they also cater for needs to stand apart.

Importantly, Roma communities have not used the law's adversarial powers to claim special rights in education, nor to eliminate segregation in housing. Structural constraints, including the lack of resources within the community and the lack of pre-existing minority institutions and linguistic standardisation, explain this in the context of education. In housing, community ties signify impor-

tant resources for the Roma, who suffer from extreme levels of social exclusion and harassment.

The article has explored the differences in the manner and extent to which jurisprudence has impacted Westerners and Easterners vis-à-vis the Roma at home and abroad. Eastern Roma gained powerful allies in Western states and international organisations as long as they stayed at home, while the 'Europeanisation' of Roma rights leveraged the situation of Travellers and Roma in Western Europe belatedly. These developments have passed by Eastern societies. International tribunals have undoubtedly contributed to the development of a legally more conscious Roma minority, while causing dismay in various strata of majority societies as an inevitable reaction to legal mobilisation by a historically disenfranchised group. Sadly, attitudinal studies have not found meaningful change in Romaphobic prejudice.

Change is incremental and often circular. While the minds of decision makers may be swayed by international dicta, ingrained social prejudices are more resilient to change. The language in reports and policy documents inspired by monitoring bodies is more amenable to legal and policy reform at the national level but achieving more systemic attitudinal and societal change at the local level is an arduous task. It is a hard job not only for the law, but also for other social change tools.

Local power structures resist reform, particularly with respect to the participation and inclusion of minorities. Members of the Roma community are seldom admitted to the decision-making table to oversee the distribution of public funds, access to good schools and housing within city limits. A mismatch between the discourse and the action of local and national agents is greater than between the representatives of states parties and international organisations. Bureaucratic contingency, the resistance of the local administration bending to the pressure of majority constituencies hampers actual change, often deflating central reform initiatives, particularly in countries that lack the resources to implement or simply neglect the implementation of their own measures.

Legal proceedings are time bound, and the law's engagement with an issue or a community is seldom sustained over a longer period due to resource constraints. Local resistance may prevail even in situations in which long-term investment is made to foster social change, as the example of desegregation shows. Conversely, there is strength in individual complaints, as borne out by the Traveller litigation campaign.

The final conclusion is that it is worth studying long-term processes prospectively, with specific attention to the emergence and accessibility of legal opportunities, the ebbing and flowing of judicial activism, the rising and subsiding importance of European politics, community resources and assimilation trends. These factors explain why the right to family life has become the vantage point for the development of the positive obligations doctrine under the ECHR and the (Revised) Social Charter. EU law's compliance toolbox places emphasis on different measures, while in the UN context, moni-

toring rather than litigation yields important insights on positive obligations. The weak justiciability of minority rights, the lack of resources internal to the community, but also a high level of political assimilation among the Roma, impede legal claims for special rights in education. Conversely, the protection of minority identity and community ties is of paramount importance in the housing context, which is where the most significant change has occurred in the hearts and minds of both the majority and the minority, albeit more so in the West than the East of Europe.

State Obligations to Counter Islamophobia: Comparing Fault Lines in the International Supervisory Practice of the HRC/ICCPR, the ECtHR and the AC/FCNM

Kristin Henrard*

Abstract

Islamophobia, like xenophobia, points to deep-seated, ingrained discrimination against a particular group, whose effective enjoyment of fundamental rights is impaired. This in turn triggers the human rights obligations of liberal democratic states, more particularly states' positive obligations (informed by reasonability considerations) to ensure that fundamental rights are effectively enjoyed, and thus also respected in interpersonal relationships. This article identifies and compares the fault lines in the practice of three international human rights supervisory mechanisms in relation to Islamophobia, namely the Human Rights Committee (International Covenant on Civil and Political Rights), the European Court of Human Rights (European Convention on Human Rights) and the Advisory Committee of the Framework Convention for the Protection of National Minorities. The supervisory practice is analysed in two steps: The analysis of each international supervisory mechanism's jurisprudence, in itself, is followed by the comparison of the fault lines. The latter comparison is structured around the two main strands of strategies that states could adopt in order to counter intolerance: On the one hand, the active promotion of tolerance, inter alia through education, awareness-raising campaigns and the stimulation of intercultural dialogue; on the other, countering acts informed by intolerance, in terms of the prohibition of discrimination (and/or the effective enjoyment of substantive fundamental rights). Having regard to the respective strengths and weaknesses of the supervisory practice of these three international supervisory mechanisms, the article concludes with some overarching recommendations.

Keywords: Human rights, positive state obligations, islamophobia, international supervisory mechanisms

1 Introduction: Islamophobia, Human Rights Implications and Related Positive State Obligations

The increasing incidence of Islamophobia in the Western world, not in the least since the terrorist attacks of 9/11, and the violent attempts to establish an Islamic State (ISIS),¹ has been difficult to ignore. Notwithstanding the abundant literature on Islamophobia, no generally agreed upon definition can be identified.² Nevertheless, in its core, Islamophobia refers to prejudice against Muslims and, by way of translation of this state of mind, actual intolerant attitudes towards Muslims, ultimately resulting in policies and practices that target and discriminate against Muslims.³ Importantly, Islamophobia does not merely concern discrimination on grounds of belief, but often concerns intersectional discrimination, that is discrimination on a combination of grounds.⁴ Muslims are indeed not only defined in terms of their religious affiliation but also in terms of their assumed ethnicity, the exact dividing line between

1. See, inter alia www.theguardian.com/world/isis. Several reports by prominent non-governmental organisations (NGOs), as well as various bodies of the Council of Europe, and the European Union (EU)'s Fundamental Rights Agency document on the worrying trend of multiple manifestations of intolerance against Muslims: see, inter alia, Ernes Bayrakli and Farid Hafez, *European Islamophobia Report 2017* (SETA 2018), Parliamentary Assembly of the Council of Europe (PACE), *Islam, Islamism and Islamophobia in Europe* (Resolution 1743) Council of Europe 2010; inter alia EU High Level Group on Combating Racism, Xenophobia and Other Forms of Intolerance, available at: https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=51025 (last visited 30 September 2019). See also EU Midis II Main Results (Second EU Minorities and Discrimination Survey), available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-eu-midis-ii-main-results_en.pdf (last visited 30 September 2019), at 64-5.
2. A definition which is well regarded is the one by the British race relations NGO the Runnymede Trust, that coined the term in 1997 in the report 'Islamophobia: A Challenge for Us All'.
3. E. Bayrakli and F. Hafez, *European Islamophobia Report 2017* (SETA 2018), at 25.
4. T. Makkonen, *Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalised to the Fore*, Turku, Abo Akademi (2002), at 9.

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religious and ethnic elements of group identity often difficult to separate. In this respect, Islamophobia has been described as a particular kind of racism targeting Muslims, acknowledging that religion plays a weighty role in xenophobia.⁵ Furthermore, when Islamophobic measures are directed towards the wearing of religious clothing, this tends to affect predominantly women, thus potentially combining three grounds of discrimination: religion, race and gender.⁶

Furthermore, it is important to realise that an instance of discrimination does not only affect the right not to be discriminated against, as a distinct fundamental right, but often also disproportionately limits the enjoyment of other fundamental rights. Having a closer look at the broad range of manifestation of Islamophobia helps clarify the potentially far-reaching human rights implications of Islamophobia.⁷ Discriminatory violence against Muslims may fall in the scope of application of the prohibition of torture and inhuman and degrading treatment (or the right to respect for privacy, as encompassing respect for the physical integrity). Discrimination infused by Islamophobia can also block one's equal and effective access to education, employment or public services, because of one's (assumed) Muslim identity. Such instances of direct discrimination jeopardise Muslims' equal participation in society.⁸ A disproportionate limitation on the freedom to manifest Islam in public, and, more particularly, when the manifestation concerns the wearing of religious garments,⁹ or the eating of halal food or respecting prayer times, can also be infused by Islamophobia.¹⁰ The related violation of the freedom of religion and the more latent, more hidden, more indirect discrimination also limits one's equal and effective access to education, to employment and even to public space at large, thus similarly translating into the violation of multiple overlapping fundamental rights and undermining Muslims' participation in society.¹¹ ECRI General Policy Recommendation no 5 on combating intolerance and discrimination against Muslims confirms this broad understanding of Islamophobia as inter-related with multiple human rights violations, constitut-

ing 'a multifaceted problem of restricted religious freedom, religious and intersectional discrimination and social exclusion'.¹²

The often far-reaching human rights implications of Islamophobia invite liberal democracies to counter Islamophobia, given their commitment to respecting fundamental rights throughout their policies and activities. In addition to states' negative state obligations not to engage in Islamophobic policies and acts, states also have a variety of positive state obligations, aimed at ensuring that fundamental rights are effectively enjoyed, also in horizontal, interpersonal relations.¹³ This article sets out to analyse and compare the positive state obligations to counter Islamophobia that are identified by selected international supervisory mechanisms of relevant human rights conventions.

The following paragraphs of this introduction not only expand on the notion of positive state obligations and their relation to the effectiveness principle but will also reflect on the notion of 'countering Islamophobia' as encompassing both countering a state of mind and countering acts/policies informed by that state of mind. This in turn triggers the question whether human rights requires states to change the hearts and minds of their subjects. The introduction then proceeds with the identification of the human rights the analysis zooms in on, as well as with the selection of the human rights conventions and related international supervisory mechanisms. The second part of the article proceeds with highlighting the parallels and differences between these three supervisory mechanisms and their supervisory practices, which will colour the extent to which the latter are comparable and can be fully compared. Furthermore, a more detailed overview is given of the subsequent two-step analysis of the supervisory practice of the selected international supervisory mechanisms: first, an analysis mechanism by mechanism; second, a comparison of the respective fault lines in these supervisory practices, including the respective strengths and weaknesses.

It is important to realise that, particularly for civil and political rights, positive state obligations have been identified through reliance on the effectiveness principle, namely the understanding that fundamental rights need to be real and effective, not theoretical or illusory.¹⁴ Over time, the overarching concern with the effective protection of fundamental rights has steered the interpretation of human rights and the related state obligations towards an ever more elaborate list of positive

5. *Ibid.*

6. See HRC, *Sonia Yaker v. France*, CCPR/C/123/D/2747/2016, 17 July 2018, at para. 8.17.

7. See also preamble of ECRI General Policy Recommendation no 5 on combating intolerance and discrimination against Muslims. See also I. Trispiotis, 'Islamophobia as a Key Contextual Factor in Human Rights Adjudication', in I. Law et al. (eds.), *Countering Islamophobia in Europe* (2019), at 9.

8. See in this regard the reports, above n. 1.

9. The Council of Europe's Parliamentary Assembly has noted with concern the negative stereotypes about Muslim women in the debate about the Islamic headscarf and veil: see, inter alia, PACE Resolution 1887.

10. The UN Human Rights Council does not only explicitly recommend states to foster a domestic environment of religious tolerance, peace and respect (Human Rights Council Resolution 16/18, Combating intolerance, negative stereotyping and stigmatisation of, and discrimination, incitement to violence and violence against, persons based on religion or belief, A/HRC/RES/16/18, 12 April 2011, at para. 5) but also highlights in this respect the importance of the effective protection of religious minorities' freedom to manifest their religion (*ibid.*, at para. 6b).

11. See *infra* on *S.A.S. v. France*.

12. Trispiotis, above n. 7, at 16.

13. See, inter alia HRC, General Comment no 31, at paras. 7-8.

14. The ECtHR has developed a steady line of jurisprudence to this effect, see, e.g. *Airey v. Ireland*, ECHR *Fair Balance: Proportionality, Subsidiarity and Primarity in the ECHR*, Brill (2009), at 238. (1979) Series A, No. 6389/73, at para. 24; *Artico v. Italy*, ECHR (1980) Series A, No. 6694, 74, at para. 33; *Mehmet Eren v. Turkey*, ECHR (2008) Series A, No. 32347, at 2. The Human Rights Committee also refers numerous times to the effective protection principle in its supervisory practice, inter alia in General Comment no 31 on the Nature of the General Legal Obligation Imposed on State Parties to the Covenant.

state obligations.¹⁵ The effectiveness principle is thus a key consideration throughout this article, which is also returned to when discussing the level of scrutiny that is adopted by international supervisory mechanisms.

When focusing on positive state obligations, it is important to highlight that the dividing line between negative and positive state obligations is not always that clear-cut, also because of the interaction between the public and the private sphere. Negative state obligations constrain public policies and actions. Still, public policies, even when formulated in neutral terms, can nevertheless be stigmatising (due to the overall context in which the policy is adopted) towards particular groups, further increasing societal intolerance against these groups.¹⁶ Put differently, the negative obligation not to adopt such stigmatising legislation goes hand in hand with positive state obligations to actively counter intolerance between groups.¹⁷

Since Islamophobia is described above as a particular state of mind (prejudice against Muslims) as well as the acts of discrimination informed by this state of mind, countering Islamophobia similarly has two strands, namely countering both the state of mind and the acts informed thereby. The sociological article in this special issue by Böcker has revealed that the answer to the question whether law can change the hearts and minds does not have a clear-cut answer. Law is primarily targeted at people's actions, which in turn may influence, over time, the way they actually feel about persons/things. Nevertheless, as was further developed in Berry's paper in this special issue, public authorities' have the power to regulate mechanisms that can have meaningful impact on the way people see others, including (public) education, through its socialisation function, and the media.¹⁸ Relatedly, public authorities can organise awareness-raising campaigns, and related campaigns aimed at different population groups coming together, and building shared experiences.

This article focuses on what a selection of international supervisory mechanisms has identified in terms of posi-

tive state obligations regarding fundamental rights, either explicitly in relation to manifestations of Islamophobia or having the potential to be used to counter Islamophobia. It will have regard to two strands of obligations, both obligations that concern countering acts of discrimination, and obligations that rather concern the proactive promotion of reducing prejudice itself, and thus more directly aimed at changing the hearts and minds.

As Islamophobia targets Muslims as members of an ethnic and or religious minority, it is surely relevant to consider the foundational principles of minority protection. These core concerns of minority-specific rights speak to the particular vulnerabilities minorities experience in terms of equality (effective protection against discrimination and right to substantive equal treatment), identity (right to respect for the separate minority identity) and participation.¹⁹ The broad range of manifestations of Islamophobia has revealed fundamental problems in relation to these three principles.

Given Islamophobia's intrinsic link to prejudice and discrimination against Muslims, particular attention will be had to the way in which the international supervisory mechanisms assess alleged instances of discrimination, be that direct or indirect discrimination. The prohibition of discrimination is crucially about preventing disadvantageous treatment based on prejudice, since the latter does not constitute a reasonable and objective justification.²⁰

Furthermore, several fundamental rights are of special relevance to (religious) minorities in themselves, and in combination with the prohibition of discrimination, so as to ensure the equal and effective enjoyment of these fundamental rights. The freedom of religion is obviously an important right that nurtures the right to a separate religious identity for persons belonging to religious minorities. Education has a key role to play in relation to the shaping of the society of tomorrow: It does not only have an important qualification function but also a vital socialisation function. Education's socialisation function is important for government in the sense that it is a crucial vehicle to pass national values and ways of life to the next generation, enabling them to function optimally in society. At the same time, education is also crucially important for minorities in the sense that they want protection against indoctrination, so that their right to a separate identity is not disregarded. Civil and political human rights law obliges public authorities to respect a parent's religious convictions throughout public education, which has repercussions for the content of the cur-

15. Inter alia, J.-F. Akandji-Kombe, *Positive Obligations Under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights* (Human rights handbooks, No. 7) Strasbourg, Council of Europe (2007).

16. International courts should reflect this interrelation between public policies and private intolerance in their review of the public policies concerned. See *infra* the critical analysis in relation to ECtHR case law in *S.A.S v. France*.

17. PACE Res. 1743 contains a very negative assessment of total bans on full-face veils in public, exactly because of the underlying exclusionary message.

18. For a further discussion of the importance of the right to education, see *infra*. Freedom of expression also benefits the media, but it is important to keep in mind that the exercise of the freedom of expression carries with it duties and responsibilities (see, inter alia Art. 10(2) ECtHR). In terms of minority-specific rights, these duties and responsibilities are further expanded upon, e.g. 9(4)FCNM which obliges state parties to adopted 'adequate measures in order to facilitate access to the media for persons belonging to national minorities and in order to promote tolerance and permit cultural pluralism'. Whilst not intending to discount the importance of media and their coverage of minorities, the analysis of this article does not expand upon the media.

19. See, inter alia K. Henrard, 'Challenges to Participation in the Name of "Integration": Participation, Equality and Identity as Interrelated Foundational Principles of Minority Protection', in W. Romans, I. Ulasuk and A. Thomson (eds.), *Effective Participation of National Minorities and Conflict Prevention*, The Hague, Martinus Nijhoff (2019), at 43-80. See also A. Verstichel, *Participation, Representation and Identity: The Rights of Persons Belonging to Minorities to Effective Participation in Public Affairs: Content, Justification and Limits*, Antwerp, Intersentia (2009).

20. See, inter alia www.coe.int/en/web/compass/discrimination-and-intolerance.

riculum and possible exemption schemes.²¹ Social human rights add that ‘education shall ... strengthen the respect for human rights and fundamental freedoms ... promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups’.²² To some extent, this protection against indoctrination, and the duty to have a pro-tolerance curriculum, strengthens the right to equal and effective access to education of minority children.²³ Education’s qualification function concerns the passing on of knowledge and qualifications, enabling one’s participation in society. Equal and effective access to education is thus key to one’s equal participation in society. Similarly, equal access to employment, and to public space at large, is essential for one’s equal participation in society. This article focuses on three conventions and what the supervisory practice of their respective international supervisory mechanisms has clarified about the positive state obligations to counter Islamophobia and provide effective protection against discrimination and of the freedom to manifest one’s religion, also in relation to access to public education, to employment and to public space at large.²⁴ In light of that thematic focus in relation to a particular minority group, the following analysis focuses on the supervisory practice of three international human rights supervisory mechanisms, namely the Human Rights Committee (HRC; International Covenant on Civil and Political Rights (ICCPR)), the European Court of Human Rights (ECtHR) and the Advisory Committee of the Framework Convention for the Protection of National Minorities (AC/FCNM).

2 International Supervisory Practice Concerning Positive State Obligations in Relation to Islamophobia: HRC/ ICCPR, ECtHR, AC/FCNM

Prior to zooming in on the analysis of the (fault lines of the) supervisory practice of these three selected mechanisms, it is important to highlight the respective differences and similarities between these mechanisms. There are various types of supervisory practice: complaints procedures, the review of periodic state reporting, and overarching (not state-specific) thematic documents. The ECtHR only has complaints procedures; the AC/FCNM reviews periodic state reporting, and devel-

ops thematic commentaries; and the HRC combines all three modalities of supervisory practice.

When international supervisory mechanisms’ supervision happens through complaints procedures, this also means that the extent to which they can develop (quasi) jurisprudence, and provide clarification about the extent of state parties (positive) obligations, depends on the cases brought to them. Periodic state reporting, on the other hand, provides the opportunity to the supervisory mechanism to review the total picture of the extent to which and the way in which a state implements its obligations under the convention. To the extent that this review also takes into account NGO’s shadow reports and conducts visits in the country under review, it allows the supervisory mechanism to conduct a rather searching and encompassing review. Furthermore, due to the recurring process of the review, this type of supervisory practice also allows the development of lines of supervisory practice that can be refined over subsequent review cycles, particularly when follow-up procedures are devised.

Only the ECtHR is an international court in the narrow sense, having the power to pronounce legally binding judgments.²⁵ The HRC can also hear individual complaints against particular states,²⁶ but its ‘views’ are not legally binding. Nevertheless, the de facto difference between legally binding judgments and not legally binding views of Treaty Bodies officially mandated to review compliance of state parties with their treaty obligations is becoming less visible. On the one hand, the pressure to comply with non-legally binding views is heightened through the public availability of these views and exposure by civil society (and media). On the other, in the end, states cannot be forced to comply with legally binding judgments; so also, here the political will to comply needs to be present (or created).²⁷ The vast difference in quantity of case law of the ECtHR as compared to the HRC confirms the dependence of this type of supervisory practice on complaints being filed by applicants. The HRC can expand its supervisory practice through the review of periodic state reporting, and the adoption of general comments, that crystallise its supervisory practice in relation to a particular matter.²⁸

The supervisory practice of the FCNM does not encompass complaints procedures, which limit the extent to which this practice directly can contribute to the effective protection of rights of particular complainants. Nevertheless, the review of periodic state

21. Art. 18(4) ICCPR and Art. 2, protocol 1 ECHR.

22. Art. 13(1) ICESCR.

23. See, inter alia A Human Rights based Approach to Education for All, UNICEF 2007, 13.

24. See also Human Rights Council Resolution 16/18 on Combating Intolerance, Negative Stereotyping and Stigmatisation of, and Discrimination, Incitement of Violence and Violence against Persons based on Religion or Belief, A/HRC/RES/16/18, 12 April 2011, at paras. 1 and 6.

25. Art. 32 ECHR. See also Arts. 33 and 34 regarding individual and interstate complaints.

26. See ICCPR, First Optional Protocol.

27. See, inter alia N. Grossman, H.G. Cohen, A. Follesdal and G. Ulfstein (eds.), *Legitimacy and International Courts*, Cambridge, CUP (2018).

28. These general comments are not updated on an ongoing basis, and the general comments on the prohibition of discrimination (no 18) and on the freedom of religion (no 22) date back from 1989 and 1993, respectively. General comment no 31 on the Nature of the General Legal Obligation Imposed on State Parties to the Covenant dates back from 2004 and has been referred to above in relation to the effective protection principle.

reporting does allow the Advisory Committee to develop – through its not legally binding opinions – lines of supervisory practice, as well as follow-up review. To the extent that these opinions are compiled on an article-by-article basis per review cycle,²⁹ it optimises the accessibility of these lines of supervisory practice, and the way these develop over the distinctive review cycles. Similarly, the development of so-called thematic commentaries crystallises this supervisory practice about a particular theme, such as education, and participation.³⁰

The following parts analyse the selected supervisory practice in two steps; first, the selected practice of each supervisory mechanism is analysed (parts 3–5), after which a comparison is made of the fault lines of the respective supervisory practice (part 6). In the first step, the analysis of the supervisory practice starts with an assessment of the relevant baseline, after which the most relevant available supervisory practice, for this article, is reviewed. For the HRC (part 3), first the most relevant individual complaints are assessed, followed by the identification of lines of practice that become visible through the concluding observations (periodic state reporting). Subsequently, the relevant case law of the ECtHR is discussed (part 4), against the background of the general development lines of the Court's jurisprudence concerning the prohibition of discrimination and the freedom to manifest one's religion. While both the HRC and ECtHR have cases that concern the more latent forms of Islamophobia with impact on effective access to education (including requirements as to the content of the curriculum and exemption schemes), the public space at large and/or employment, the ECtHR, in addition, has a line of jurisprudence pertaining to discriminatory violence against religious minorities. The fifth part shifts the focus of analysis to the AC/FCNM. As the central features and related content of the FCNM is less well-known, the analysis of the supervisory practice of the AC/FCNM is preceded by a discussion of the most relevant provisions of the FCNM in relation to positive state obligations concerning Islamophobia.

When turning to the comparison of the fault lines in these supervisory practices, it is important to emphasise that these fault lines are not fully comparable because of the respective differences in the nature of supervisory practice. Nevertheless, a comparison at a higher level of abstraction remains possible, more particularly returning to the two strands of countering Islamophobia identified above: fighting instances of discrimination versus actively promoting understanding and respect of groups with a different identity, a Muslim identity in particular. Having regard to the respective strengths and weaknesses of the supervisory practice of these three international supervisory mechanisms, the article concludes with some overarching recommendations.

3 The Human Rights Committee of the ICCPR and Islamophobia

In line with the limited jurisprudence of the HRC, very few cases can be identified as directly or indirectly relevant to gauge the extent to which the Committee identifies positive state obligations to counter Islamophobia. Nevertheless, as the baseline attitude of the HRC to its supervisory role has positive repercussions for the extent to which it offers protection of Muslim minorities against Islamophobia, and measures infused by Islamophobia, an evaluation of this baseline in the HRC's case law is called for (3.1.1). Subsequently, cases concerning more latent forms of Islamophobia, namely neutral measures that amount to considerable limitations on the freedom to manifest the Muslim religion, are discussed (3.1.2). Thirdly, the attention shifts to the case law on state duties to respect the religious and philosophical convictions of the parents throughout public education (3.1.3). In addition, the review of the HRC's Concluding Observations (3.2) provides insights into what the HRC considers more generally important to contribute to the effective protection of the prohibition of discrimination and the freedom to manifest one's religion, also of relevance in relation to acts of Islamophobia.

3.1 Individual Complaints

3.1.1 Admittedly, the HRC supervising the ICCPR does not have a lot of cases on Article 18, ICCPR's freedom to manifest religion, nor cases brought in terms of Article 27, ICCPR's right not to be denied the right to profess and practice their own religion in community with the other members of their group.³¹ *Waldman v. Canada* is relevant to highlight in several respects. The claimant invoked the violation of Article 27, Article 26 ICCPR and Article 18 ICCPR because of the lack of public funding Canada made available to Jewish private schools, in contrast to the public funding of Catholic private schools. The Committee decided this case on the basis of Article 26 ICCPR, as a prohibited discrimination:³² A state does not have to provide public funding to private schools, but if it does so, it needs to proceed on a non-discriminatory basis; only providing public funding to one minority religion is not reasonable and objective.³³ It would not be necessary to still evaluate the alleged violation of Article 18, ICCPR's freedom of religion, and Article 27 ICCPR.³⁴ The HRC thus highlights the central importance of the right to equal treatment in the human rights paradigm: It first tries to

29. www.coe.int/en/web/minorities/compilation-of-opinions.

30. www.coe.int/en/web/minorities/thematic-commentaries.

31. S. Berry, 'A Good Faith Interpretation of the Right to Manifest Religion? The Diverging Approaches of the ECtHR and the UNHRC', 37 *Legal Studies* 672, at 681 (2017).

32. HRC, *Areah Hollis Waldman v. Canada*, Communication No. 694/1996, CCPR/C/67/D/694/1996.

33. *Ibid.*, at para. 10.5.

34. *Ibid.*, at para. 10.7.

settle cases on this ground. As is confirmed in the discussion of the cases directly relevant for the Islamophobia angle of this article, the HRC does not shy away from evaluating complaints in terms of the prohibition of discrimination.

Several of the HRC cases on the freedom of religion concern interferences by the states, and thus negative state obligations, not so much positive state obligations. Nevertheless, these cases merit some attention as they nicely reflect the rather high baseline scrutiny adopted by the HRC, resulting in elevated protection levels.³⁵ The HRC each time engages in an *in concreto* analysis of the alleged threat, the appropriateness of the invoked legitimate aim, the suitability and the proportionality of the measure towards the legitimate aim. In relation to the French prohibition to wear religious headwear for identity cards, the HRC acknowledged the legitimate aim that a picture needs to allow identification but engaged in a critical proportionality review, underscoring that wearing a turban does not hide the face and is actually very representative as he wears this at all times.³⁶ Similarly, the HRC does not accept the prohibition on wearing a *keski*, a small dagger to school, when this is a religious manifestation for Sikhs, while the *keski* does not pose a real threat to the rights and freedoms of other pupils or to order at the school.³⁷

3.1.2 The HRC has more recently been confronted with cases that concern more latent forms of Islamophobia which impact on the effective access of Muslims to employment and the public space at large, more particularly of Muslim women who want to wear a headscarf or burqa. Admittedly, these cases concern the operation of acts of legislation and thus rather interferences by public authorities with fundamental rights. Nevertheless, the HRC's jurisprudence sends a clear message to states about the unacceptability of legislation which disproportionately limits the manifestation of the religion of particular religious minorities. On 17 July 2018 the HRC pronounced two views in similar cases against France, brought by women who wear the full-face veil for religious reasons and who complain about³⁸ the French law criminalising the wearing of face-covering clothes in public. In *Hebbadj v. France*³⁹ and *Yaker v. France*,⁴⁰ the HRC concludes to a violation not only of the freedom of religion but also of the prohibition of discrimination, adopting in both respects a suitably strict scrutiny.

In relation to the former, the Committee accepts that in certain situations it may be necessary to see the face of persons in order to identify them, but public order arguments cannot uphold a total ban on face-covering

clothes in public.⁴¹ France also invoked 'respect for the rights of others' because the ban would be necessary to ensure living together. The HRC does not accept the connection claimed by France between 'the rights of others' and living together,⁴² while the legislative ban would in any event not be proportionate,⁴³ concluding to a violation of Article 18.⁴⁴ The HRC continues its critical assessment when it proceeds with the discrimination complaint of the women. The legislative ban obviously has a disproportionate impact on (Muslim) women who want to wear a veil for religious reasons. The HRC does not stop its⁴⁵ assessment of the complaint of indirect discrimination there, but also critically notes that because of the many exceptions the law contains, Muslim women who wear the burqa are left as the main addressees of the law, as is also confirmed by the enforcement of the law.⁴⁶ Furthermore, the Committee emphasises that France does not provide any justification for the disproportionate manner in which the law is applied, which is even more problematic because criminal sanctions are imposed.⁴⁷ In the end, the Committee concludes to intersectional discrimination based on gender and religion.

On 16 July 2018, the HRC also concludes to a violation of the freedom of religion and the prohibition of (intersectional) discrimination in *F.A. v. France*,⁴⁸ on another individual complaint by a Muslim woman against France, this time complaining about a dismissal only because she is wearing a headscarf in a child care centre. Also, in this case, the HRC adopts a critical level of scrutiny both in relation to the legitimate aims invoked by the state, and of the alleged proportionality of the limitation. The Committee does not accept the argument that the prohibition of a headscarf at a child care centre would be necessary to secure the rights and freedoms of parents or children, since the wearing of a headscarf is not in itself proselytising.⁴⁹ The Committee correctly highlights that the ban on wearing a headscarf at a child care centre has a stigmatising effect on the religious community concerned.⁵⁰ Turning to the complaint that the internal regulation of the child care centre has a disproportionate impact on Muslim women, in violation of the prohibition of discrimination, the Committee acknowledges the disproportionate impact on the women of a particular religious community, and again highlights its concern about the feelings of exclusion and marginalisation this may cause for the group concerned.⁵¹ The Committee critically opines that France has not provided a sufficient reasonable and objective justification for the disproportionate impact on Muslim

35. Berry, above n. 31, at 683.

36. HRC, *Ranjit Singh v. France*, Communication No. 1852/2008, 4 February 2013, at para. 8.4.

37. HRC, *Bikramjit Singh v. France*, Communication No. 1852/2008, 1 November 2012, at para. 8.7.

38. *Ibid.*, at para. 8.10.

39. HRC, *Hebbadj v. France*, Communication No. 2807/2016, views of 17 July 2018, CCPR/C/123/D/2807/2016.

40. HRC, *Yaker v. France*, Communication No. 2747/2016, views of 17 July 2018, CCPR/C/123/D/2807/2016.

41. *Ibid.*, at para. 8.7.

42. *Ibid.*, at para. 8.10.

43. *Ibid.*, at para. 8.11.

44. *Ibid.*, at para. 8.12.

45. *Ibid.*, at para. 8.17.

46. *Ibid.*, at para. 8.13.

47. *Ibid.*, at para. 8.16.

48. HRC, *F.A. v. France*, Communication No. 2662/2015, 16 July 2008.

49. *Ibid.*, at paras. 8.8-8.9.

50. *Ibid.*, at para. 8.9.

51. *Ibid.*, at para. 8.12.

women who want to wear the headscarf, thus again concluding to intersectional discrimination on grounds of religion and gender.⁵²

3.1.3 Finally, considering the importance of education, and, more particularly, the values transposed through education for the future of society, and thus also for a societal project of changing the hearts and minds, regard should also be had to the provision on the state duties in relation to the content of the public curriculum. In terms of civil and political rights conventions, such as the ICCPR and the ECtHR, this is framed in terms of state duties to respect the religious and philosophical convictions of the parents throughout public education.⁵³ Admittedly, this provision does not impose an obligation on states to adopt an inclusive curriculum, nor a curriculum that is geared towards the promotion of tolerance amongst population groups. Nevertheless, the HRC has a steady line of jurisprudence following which Article 18(4) implies a duty for public education to be neutral and objective, which would also imply protection against latent Islamophobia in the way the curriculum is constructed and applied.

In *Leirvag et al. v. Norway*,⁵⁴ parents complain about a change in public education in Norway following which the curriculum now contains an obligatory course on Christianity and other religions, which disproportionately favours Christianity, includes too many practice elements and a complex and demanding system of partial exemptions. According to the parents, this would amount to a violation of their rights to have their religious convictions respected in the public education system. Following a critical assessment of the content of the course, the Committee concludes that this course is indeed not neutral,⁵⁵ which shifts the focus to the exemption scheme. Since the Committee notes several shortcomings to the system of partial exemptions which would be too demanding on parents, and ultimately unable to address their substantive concerns,⁵⁶ it concludes to a violation of Article 18, para. 4. While this case does not concern latent forms of Islamophobia creeping in the public curriculum, or the way the exemption scheme is operated,⁵⁷ the critical review by the HRC implies a suitable check on any such potential developments.

3.2 Concluding Observations

The review of the HRC's Concluding Observations in relation to European countries in the past few years confirms the HRC's strong concern with the optimisation of the effective enforcement and realisation of the prohibition of discrimination also in relation to Muslims. In its review of the non-discrimination provisions of the Covenant,⁵⁸ the Committee is rather demanding about

the need for comprehensive coverage of non-discrimination legislation, both concerning grounds and material fields of operation.⁵⁹ Of relevance to the focus of this article, the HRC noted with concern – and asked Belgium to eliminate – the legislative and procedural distinction between the treatment of racist and xenophobic hate speech, on the one hand, and Islamophobic hate speech, on the other.⁶⁰ Notwithstanding the lack of individual complaints about discriminatory violence before the HRC, a recurring theme in several of the HRC's concluding observations is the concern it expresses about the perseverance of hate crimes and hate speech against religious and ethnic minorities, and problems in investigation and prosecution thereof.⁶¹ In this regard, the HRC develops three lines of supervisory practice, one on the need to improve law enforcement to combat hate crimes and hate speech, the second one on state duties to actively promote tolerance among different population groups and/or to eradicate stereotypes. The third line focuses on ensuring adequate training of law enforcement officials, judges and prosecutors, and actually can be seen to strengthen the two preceding lines, which in turn correspond to the two strands of strategies that public authorities can adopt to counter prejudice against particular groups, identified in the introduction.

In addition to general statements concerning extra efforts regarding law enforcement,⁶² the HRC urges states specifically to 'develop an effective strategy, in cooperation with digital technology companies, to reduce online hate speech'⁶³ and to develop 'effective programmes for addressing manifestations of racial discrimination and hate speech at public events, including football matches'.⁶⁴ The second line, regarding the state duties to promote tolerance amongst different population groups, at times does not go beyond the mere statement calling on the state to heighten its efforts to promote tolerance.⁶⁵ At times, the HRC becomes more explicit by adding that the state should envisage 'measures to promote an environment inclusive of persons belonging to minorities, including with

52. *Ibid.*, at para. 8.13.

53. Art. 18, 4 ICCPR.

54. HRC, *Leirvag et al. v. Norway*, Communication No. 1155/2003, 3 November 2004.

55. *Leirvag et al. v. Norway*, above n. 54, at para. 14.5.

56. *Leirvag et al. v. Norway*, above n. 54, at paras. 14.6-14.7.

57. See infra on *Osmanoglu and Kocabas v. Switzerland*.

58. Arts. 2, 3 and 26 ICCPR.

59. See also K. Henrard, *The Impact of International Non-discrimination Norms in Combination with General Human Rights for the Protection of National Minorities: Several United Nations Human Rights Conventions*, DH-MIN (2006), at 02, W. van den Hole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies*, Antwerp, Intersentia (2005).

60. Concluding Observations on Belgium, 6 December 2019, CCPR/C/BEL/CO/6, at para. 19.

61. Concluding Observations on Hungary, 9 May 2019, CCPR/C/HUN/CO/6, at para. 17; Concluding Observations on Norway, 25 April 2018, CCPR/C/NOR/CO/7, at para. 17.

62. Concluding Observations on Romania, 11 December 2017, CCPR/C/ROU/CO/5, at para. 44; Concluding Observation on Norway, 25 April 2018, at para. 17 (with specific focus on the need to improve the investigation capacity); Concluding Observations on Hungary, 9 May 2018, CCPR/C/HUN/CO/6, at para. 19; Concluding Observations on the Czech Republic, 6 December 2019, CCPR/C/CZE/CO/4, at para. 17(c).

63. Concluding Observations on the Netherlands, 6 December 2019, CCPR/C/NLD/CO/5, at para. 16.

64. *Ibid.*

65. Concluding Observations on Norway 2018, at para. 17.

respect of their linguistic and cultural rights'.⁶⁶ In some concluding observations, the Committee elaborates on this further by calling on states to increase their 'efforts to eradicate stereotyping and discrimination ... among others by conducting public awareness campaigns to promote tolerance and respect for diversity'.⁶⁷ In the third line, the HRC urges states to 'ensure adequate training on the promotion of racial, ethnic, and religious diversity'⁶⁸ and/or 'on addressing hate crimes'⁶⁹ not only of law enforcement officials but also of judges and prosecutors. The HRC also highlights the important role of the media as regards both the avoidance of speech that can be used to 'instil fear of migrants and asylum seekers and to strengthen stereotypical prejudices based on ethnicity or religion'⁷⁰ and the active promotion of understanding and respect for minority groups. In the latter respect, the HRC recommends to states to provide training aimed at media workers on promoting racial, ethnic and religious diversity.⁷¹ Put differently, the HRC is crucially aware of the important role the media can play to influence public opinion, and thus potentially changing the hearts and minds, also in relation to Muslims.⁷²

In line with its jurisprudence in *Yaker v. France* and *Hebbadj v. France*, the HRC is critical in its Concluding Observations about legislation that criminalises the wearing of garments that conceal the face (in the Netherlands and Belgium). The Committee does not only note that this ban risks disproportionately infringing the freedom to manifest one's religion but even acknowledges that this ban could increase the marginalisation of Muslim women in society.⁷³ Similarly, the Committee notes that prohibitions to wear religious symbols at work, in certain public bodies and by teachers and students in public schools might entail violations of the freedom of religion and the prohibition of discrimination, which could enhance the marginalisation of religious minorities.⁷⁴ The Committee thus demonstrates a keen awareness of the threats Islamophobia poses for the equal participation of Muslim minorities in society, and urges states to reconsider legislative bans with an Islamophobic undercurrent.⁷⁵

66. Concluding Observations on Romania 2018, at para. 44.

67. Concluding Observations on Hungary, at para. 18. See also Concluding Observations on the Czech Republic, at para. 17, where the HRC calls for 'campaigns aimed at promoting respect for human rights and tolerance for diversity and revisiting and eradicating stereotypical prejudices based on ethnicity or religion'.

68. Concluding Observations on the Netherlands 2019, at para. 16.

69. Concluding Observations on the Czech Republic 2019, at para. 17(d).

70. *Ibid.*, at para. 16.

71. *Ibid.*

72. Concluding Observations on Hungary 2018, at para. 17.

73. Concluding Observations on the Netherlands, at para. 58; Concluding Observations on Belgium, at para. 17.

74. Concluding Observations on Belgium, at para. 17.

75. Concluding Observations on the Netherlands, at para. 59; *ibid.*, at para. 18.

4 The European Court of Human Rights and Islamophobia

The ECtHR is undoubtedly one of the most highly valued international human rights courts, whose jurisprudence often serves as a source of inspiration for other international and national courts.⁷⁶ Nevertheless, some of its lines of jurisprudence are criticised, some of which concern the two fundamental rights most at issue in relation to Islamophobia, namely the prohibition of discrimination and the freedom to manifest one's religion.⁷⁷ The analysis of the jurisprudence that is most relevant for the perspective of this contribution needs to be placed against the background of the typical features of the ECtHR's jurisprudence in relation to the two most relevant rights, the freedom to manifest one's religion and the prohibition of discrimination.

4.1 ECtHR Jurisprudence in Relation to the Freedom of Religion and the Prohibition of Discrimination

The Court's jurisprudence regarding the freedom to manifest one's religion certainly has several promising features regarding positive state obligations to counter intolerance against particular religious groups. Indeed, the Court tends to underscore that the freedom of religion is centrally concerned with protecting and promoting religious pluralism and mutual tolerance,⁷⁸ following which states are supposed to be neutral and impartial towards the multiple religions in its jurisdiction.⁷⁹ This in turn has led the Court to highlight that in case of struggles or tensions between religions, states should not choose sides – they'd rather promote religious harmony and tolerance.⁸⁰ It needs to be acknowledged though that the identification of these promising positive state obligations go hand in hand

76. References to ECtHR jurisprudence can be found in the judgements of the Inter-American Court of Human Rights and also several prestigious national courts such as the Canadian Supreme Court: *Ricardo Canese v. Paraguay*, Judgement, 31 August 2004, at paras. 89-90; *Alberta v. Hutterian Brethren of Wilson Colony* [2009] SCR 567 (Canada), at paras. 90, 128-131.

77. See Berry, above n. 31, and K. Henrard, 'How the European Court of Human Rights' Concern regarding European Consensus Tempers the Effective Protection of Freedom of Religion', 4(3) *Oxford Journal of Law and Religion* 398 (2015) and K. Henrard, 'The European Court of Human Rights, Ethnic and Religious Minorities and the Two Dimensions of the Right to Equal Treatment: A Jurisprudence at Different Speeds?', 34(03) *Nordic Journal on Human Rights* 157-77 (2016).

78. Inter alia, ECtHR, *Metropolitan Church of Bessarabia v. Moldova*, App no 45701/99, 16 December 2001. See also F. Tulkens, 'The European Convention on Human Rights and Church-State Relations: Pluralism v Pluralism', *Cardozo Law Review* 2579 (2009).

79. *Noland and K v. Russia*, ECHR (2009) Series A, No. 2512, 4, at para. 73. See also J. Murdoch, *Council of Europe Human Rights Handbooks: Protecting the Right to Freedom of Thought, Conscience and Religion Under the ECHR*, Strasbourg: Council of Europe (2012), at 8.

80. *Hasan and Chaush v. Bulgaria*, ECHR (2000) Series A, No. 30985, 96.; *Metropolitan Church of Bessarabia v. Moldova*, ECHR (2001) Series A, No. 45701, 99; *Serif v. Greece*, ECHR (1999) Series A, No. 38178, 97, at para. 53.

with the grant of a broad margin of appreciation.⁸¹ Furthermore, the Court has a long and steady line of jurisprudence granting states a broad margin of appreciation in relation to the broad category of church-state relations.⁸² It is important to highlight that the grant of a broad margin to states implies a particularly low level of scrutiny by the Court, which potentially undermines the effective protection of the freedom to manifest one's religion.⁸³ While it has been argued more fully elsewhere that the Court de facto reduces the margin of appreciation concerning religious matters in those instances in which a noticeable European consensus can be denoted,⁸⁴ this still leaves several controversies about which no such consensus exists. The numerous cases of prohibitions on wearing headscarves and the broad margin of appreciation left to states are a case in point.⁸⁵

An important development in the Court's jurisprudence on the evaluation of allegedly neutral courses on religions and related exemptions needs highlighting, as this is related to parents' rights under Article 2 of the first additional protocol to the ECtHR to have their religious and philosophical convictions respected in the public education system. In *Folgero v. Norway*, the ECtHR departs from its traditional jurisprudence that left states a very broad margin of appreciation, to the extent that it allowed classes with a de facto dominant focus on the traditional religion of a state. Indeed, in *Folgero*, the Court, in line with the HRC's *Leirvag* decision, most critically assessed the course on religions and had concluded that there was both quantitatively and qualitatively much more focus on Christianity than on other religions.⁸⁶ Following this critical assessment of the required neutrality of the public school curriculum, the Court emphasises the need for a proper system of exemptions.⁸⁷ Also, here the Court critically assessed the partial system of exemptions in light of the need to effectively protect the rights of parents to ensure the education of their children in line with their own religious convictions,⁸⁸ and concludes to a violation.⁸⁹ The shift in the Court's jurisprudence implies that states need to make sure that any course on religions does not disproportionately focus on one religion, or does not discredit (one or more) minority religions.

81. As Murdoch underscores 'the maintenance of pluralism seems to be distinguishable from its active promotion': Murdoch, above n. 79, at 35.

82. *Sindicatul 'Paștorul cel Bun' v. Romania*, ECHR (2013) Series A, No. 2330, 9, at paras. 61, 133, 160 and 171; *Hasan and Eylem Zengin v. Turkey*, ECHR (2007) Series A, No. 1448, 4, at para. 63; *Lautsi and others v. Italy*, ECHR Grand Chamber (2011) Series A, No. 30814, 6, at para. 61.

83. See, inter alia, J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primacy in the ECHR*, Brill (2009), at 238.

84. For a detailed discussion and analysis, see Henrard (2015), above n. 77.

85. Inter alia *Leyla Sahin v. Turkey*; App no 44774/98, 10 November 2005, *Dahlab v. France*, App no 42393/98, 15 January 2001; *Ebrahimian v. France*, App no 64846/11, 26 November 2015.

86. *Folgero and others v. Norway*, ECHR (2007) Series A, No. 15472, 2, at paras. 90-95.

87. *Ibid.*, at para. 96.

88. *Ibid.*, at paras. 97-100.

89. *Ibid.*, at para. 102.

Furthermore, for the longest time, the ECtHR's non-discrimination jurisprudence was compared to Cinderella, as the Court tended to avoid evaluations of this prohibition as much as possible, and when it did engage in a non-discrimination analysis, it scrutinised lightly, thus not providing effective protection.⁹⁰ Admittedly, over time, several improvements took place, such as the increasing recognition of suspect grounds of discrimination, triggering heightened scrutiny.⁹¹ However, so far the Court has avoided explicitly calling religion suspect in cases in terms of Article 9 plus 14.⁹² Admittedly, this does not mean that the Court does not provide proper protection against cases of invidious discrimination, particularly when the intolerance takes on violent forms, as is visible in the cases on religiously inspired violence against Jehovah's Witnesses. The string of cases against Georgia, a country known for the high levels of societal intolerance against and discrimination of Jehovah's Witnesses, show that the ECtHR becomes ever demanding in terms of positive state obligations to prevent, stop, prosecute and punish discriminatory violence by private parties.⁹³ Furthermore, the Court's initial reticence to acknowledge and problematise the apparent state acquiescence and silent support of this private violence, was transformed in an identification of discriminatory intent and prejudice against Jehovah's Witnesses among the Georgian police. The Court actually established direct discrimination by the police, due to the general and documented practice of the

90. R. O'Connell, 'Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECHR', 29(2) *Legal Studies: the Journal of the Society of Legal Scholars* 211 (2009).

91. Several promising developments are noted in the article of O'Connell, above n. 90; Henrard (2016), above n. 77; O.M. Arnardottir, 'The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the ECHR', 14 *Human Rights Law Review* 647 (2014). For an argument on the growing list of grounds that are considered suspect in terms of non-discrimination law, see also A.F. Bayefsky, 'The Principle of Equality and Non-discrimination in International Law', 11 *Human Rights Law Journal* 1, at 24 (1990).

92. The Court has hinted at the suspect nature of religion as ground of differentiation in cases on Art. 8 in combination with Art. 14 when a parent was refused custody because of the religious minority background: *Hoffmann v. Austria*, ECHR (1993), No. 12875, 87, at para. 36. More recently confirmed in *Vojnity v. Hungary*, ECHR (2013) Series A, No. 29617, 7. Similarly, the Court is ever more critical about the need for non-discriminatory criteria and procedures concerning the registration and recognition of religions but this critical scrutiny is confined to Art. 9 after which no scrutiny in terms of Art. 14 would be necessary: *Savez Crkava and others v. Croatia*, ECHR (2010) Series A, No. 7798, 8, at para. 88. A noticeable exception in this respect is *Izzettin Dogan and others v. Turkey*, ECHR (2016) Series A, No. 62649, 10, at paras. 170-173. *Izzettin Dogan* as the Court actually did engage in a very promising and explicit non-discrimination analysis under Art. 14, building on the critical assessment of serious problems regarding the state duty of neutrality and impartiality under Art. 9, to highlight the need for 'particular scrutiny' of the less favourable treatment of the Alevi's under Art. 14 junctio 9.

93. *Gldani Congregation of Jehovah's Witnesses and others v. Georgia*, ECHR (2014) Series A, No. 71156, 1; *Begheluri and others v. Georgia*, ECHR (2014) Series A, No. 28490, 2; *Tsartsidze ea v. Georgia*, ECHR (2017) Series A, No. 18766, 4.

police to condone private violence against this religious group.⁹⁴

Notwithstanding the promising developments in relation to invidious discrimination, the Court still avoids a distinct non-discrimination analysis in cases of direct or indirect discrimination, when the complaint concerns the expression of a separate minority identity (about which no European consensus exists).⁹⁵ In this respect, it is also considered unlikely that the Court would follow arguments about Islamophobia as a case of racial discrimination, since race triggers heightened scrutiny.⁹⁶

4.2 ECtHR Case Law ‘Concerning’ Islamophobia

Notwithstanding the growing prevalence of Islamophobia in European societies, explicit acknowledgements by the Court of an Islamophobic context are strikingly sparse.⁹⁷ So far, this only happened in one case, namely *S.A.S. v. France*. The Court has been criticised for not sufficiently acknowledging the Islamophobic context and using Islamophobia as a key contextual factor in its human rights analysis.⁹⁸

In addition to the cases on religious discriminatory violence (against Muslims) (4.2.1.), several other cases of more latent Islamophobia are relevant, more particularly cases in which at first sight neutral measures are adopted/applied in an Islamophobic context and result in far-reaching limitations to the freedom to manifest the Muslim religion, disproportionately affecting Muslim women (4.2.2).

4.2.1 Regarding the former, the ECtHR’s case law on Jehovah’s Witnesses demonstrates a proper protection against hate crimes with a religious background, and has considerable potential in relation to Islamophobic hate crimes as well. Nevertheless, so far the Court does not seem to have transposed its reasoning and strictness of review regarding discriminatory violence against Jehovah’s Witnesses to similar incidents against members of the Muslim minority. *Karaahmed v. Bulgaria* concerned a violent and severe disruption of the Friday prayer at the Mosque in Sofia, by a political party known for its anti-Islam attitude. Unfortunately, the Court avoided a discrimination analysis altogether, including the possi-

ble discriminatory animus among the police, and did not identify a context of Islamophobia.⁹⁹

4.2.2 Regarding the latter, Trispiotis noted that by 2018 the ECtHR has had roughly 40 cases brought by Muslim individuals, complaining about the violation of the freedom to manifest their religion and/or of the right not to be discriminated against on grounds of religion.¹⁰⁰ In line with the preceding account of the Court’s reluctance to engage in an explicit non-discrimination analysis when a case is intrinsically concerned with the expression of a distinct minority identity, most of these cases are dealt with in terms of Article 9’s freedom of religion.¹⁰¹ Notwithstanding the worrying signs about increasing Islamophobia in Europe, as in the Western world generally, particularly since the terrorist attacks of 9/11 2001,¹⁰² there are hardly any explicit references to Islamophobia in the ECtHR case law. Since 2014, only two third-party interveners have highlighted the Islamophobic context of particular limitations to the freedom to manifest the Muslim religion.¹⁰³ The Court itself has only once explicitly acknowledged the presence of an Islamophobic context, without, however, giving any weight to this context in the actual proportionality analysis.¹⁰⁴ It is important to realise that the lack of explicit argumentation about an Islamophobic context does not mean that Islamophobia did not play (an important role) in other cases. The analysis of the *Osmanoglu* case below will demonstrate how Islamophobia, and related anxieties about the growing presence of the Muslim minority in a state, can be present in a more hidden form. Put differently, a close analysis of some of the older cases (prior to 2001) could similarly reveal early stages of Islamophobia, more particularly (most) cases pertaining to the wearing of headscarves.¹⁰⁵

The following analysis zooms in on the two most prominent cases in which measures entailing restrictions on the freedom to manifest the Muslim religion were adopted in an explicit or at least implicit Islamophobic context.

S.A.S. v. France is the very famous first case in which the ECtHR was confronted with a piece of legislation, dubbed burqa ban, which criminalised the concealing of the face in public with garments.

The case was brought by a French Muslima who wears the burqa for religious reasons, invoking a violation of the freedom of religion and an indirect discrimination on grounds of religion, since the ban would dispropor-

94. Compare the 2007 *Gidani* case, on the one hand with the 2014 *Begheluri* and 2017 *Tsartsidze* one. In the case of *Tsartsidze*, the Court did not only establish bias and prejudice against Jehovah’s Witnesses among the police but also among judges: at paras. 84-88.

95. See the Court’s reasoning in relation to Art. 14 inter alia in *Winterstein v. France*, ECHR (2016) Series A, No. 27013, 7; *Yordanova and Others v. Bulgaria*, ECHR (2012) Series A, No. 25446, 6; *Cha’are Sjalom ve Tsedek v. France*, ECHR (2000) Series A, No. 27417, 95, at para. 87; *Hamidovic v. Bosnia and Herzegovina*, ECHR (2017) Series A, No. 57792, 15.

96. T. Loenen, ‘Framing Headscarves and Other Multi-cultural Issues as Religious, Cultural, Racial or Gendered: The Role of Human Rights Law’, *NQHR* 488 (2012).

97. Trispiotis, above n. 7, at 21-2.

98. *Ibid.*, at 21. Trispiotis highlights that the Court ‘as a result is liable to a heightened danger of majoritarian bias’. 98 *Karaahmed v. Bulgaria*, ECHR (2015) Series A, No. 30587, 13.

99. *Ibid.*; L. Peroni, ‘The (In)Visible Racial and Religious Motivation of Violence’, *Strasbourg Observers* (27 March 2015), available at: <https://strasbourgobservers.com/2015/03/27/karaahmed-v-bulgaria-the-invisible-racial-and-religious-motivation-of-violence/> (last visited 30 September 2019).

100. Trispiotis, above n. 7, at 21-2, with reference to the Annex of his article where all the cases are enumerated.

101. *Ibid.*

102. See the credible reports referred to above n. 1.

103. *S.A.S. v. France*, Human Rights Centre of Ghent University, at para. 98; *Dakir v. Belgium*, NGO Liberty, at para. 35.

104. For a more detailed analysis, see infra on the *S.A.S. v. France* case.

105. *Leyla Sahin v. Turkey* would probably be the exception, since Turkey is a country with a dominant Muslim population.

tionately affect Muslim women who want to conceal their face for religious reasons. While the Court is suitably critical towards several of the legitimate aims invoked by France, it did accept that the legislative ban served ‘requirements of living together’ which would qualify as the legitimate aim respect for the rights and freedoms of others.¹⁰⁶ Strikingly, in its review of this legitimate aim, the Court notes itself with concern the information it received that the legislative discussions concerned were tainted by Islamophobic remarks.¹⁰⁷ The Court noted that ‘a state which enters into a legislative process of this kind takes the risk of contributing to the consolidation of stereotypes and of encouraging the expression of intolerance, while states actually have a duty to promote tolerance.’¹⁰⁸

Unfortunately, the Court develops at least three worrying lines of reasoning in this judgment, amounting to three failures to provide a counter narrative to the Islamophobia it has expressed concern about.¹⁰⁹ Critical arguments can be formulated about the legitimate aim the Court accepts, the light proportionality review and the avoidance of a proper non-discrimination analysis. First of all, it is far from obvious that the Court would accept ‘requirements of living together’ as amounting to ‘respect for the rights and freedoms of others’, one of the exhaustively enumerated legitimate aims in Article 9 ECtHR. Indeed, who are ‘the others’ the protection of whose rights would legitimate an interference with the rights of Muslim women wanting to wear the full-face veil? The others can only refer to the majority population in France. The Court’s acceptance of this majoritarian argument by the French government squarely contradicts the counter-majoritarian core of the entire fundamental rights paradigm.¹¹⁰ Secondly, when the Court proceeds to grant France a broad margin of appreciation, the Court extends the majoritarianism it introduced with the legitimate aim, thus producing a second failure to counter the underlying Islamophobia. Importantly, when evaluating the legitimate aim of ‘living together’, the Court had underscored that the flexibility of this notion entails the risk of abuse which would require a careful examination of the proportionality of the interference concerned.¹¹¹ Unfortunately, when proceeding with the proportionality review the Court chooses to highlight and rely on reasons why France should still get a broad margin of appreciation, namely because it would concern a choice of society about which no European consensus exists.¹¹² The third

failure to counter the underlying Islamophobia lies in the Court’s refusal to engage in a distinct, proper non-discrimination analysis. Indeed, the Court swiftly dismisses the non-discrimination complaint with a simple reference to the reasons it has adduced to conclude to a non-violation of Article 9 ECtHR.¹¹³ The Court thus extends the majoritarian reasoning it introduced under Article 9 to Article 14 junctio 9. Put differently, in a situation the Court itself notes as being tainted by Islamophobia, and thus prejudice against the Muslim minority,¹¹⁴ instead of giving pride of place to the prohibition of discrimination, and being extra vigilant when scrutinizing the discrimination complaint, the Court further demotes this norm notwithstanding its central role for the human rights paradigm.¹¹⁵

Osmanoglu and Kocabas v. Switzerland is at first sight a very different case as it does not concern the criminalisation of the wearing of garments with religious connotations. It does concern the limitation of the rights of Muslim parents to have their daughters, for religious reasons, exempted from mixed swimming classes, a compulsory course in the public school concerned. When the parents persisted in their refusal to let their girls take part in the mixed swimming classes, they were fined. The parents claimed the violation of their right to manifest their religion.¹¹⁶ The government justifies the interference in the parents’ rights as necessary for respect of the rights of others, more particularly the social integration of foreign children from different cultures and religions, and to protect them against every phenomenon of social exclusion.¹¹⁷ There is no comparable case of biased law making as in *S.A.S.*, but the highest Swiss Court had explicitly noted in relation to this case that the concern about social integration is particularly relevant for the Muslim minority, as it has grown so exponentially over the years.¹¹⁸ This may not constitute outright Islamophobia; the Muslim minority is conceived as a threat to the integrity of the Swiss society. When the highest national Court expresses such a concern, this arguably reflects a broader societal context of unease about the Muslim minority in Switzerland.

Unfortunately, the Court’s reasoning in several respects constitutes a failure to address the underlying negative sentiment about the Muslim minority. First of all, accepting as legitimate aim ‘respect for the rights of others’ the argument about the need to optimise the social integration of foreign children from different cul-

106. *S.A.S. v. France*, ECHR (2014) Series A, No. 43835, 11, at para. 122. In the meantime, two similar cases against Belgium (both decided 11 July 2017, have resulted in similar defences by Belgium with the ECtHR confirming its (troubling) argumentation in *S.A.S.: Dakir v. Belgium* and *Belcemi and Oussar v. Belgium*.

107. *S.A.S. v. France*, at para. 149.

108. *Ibid.*

109. See also Trispiotis, above n. 7, at 21.

110. K. Henrard, *The Ambiguous Relationship between Religious Minorities and Fundamental (Minority) Rights*, Boom Eleven International (2011), at 19-34.

111. *S.A.S. v. France*, at para. 122.

112. *Ibid.*, at paras. 154-156.

113. *Ibid.*, at paras. 161-162.

114. See also L. Peroni, ‘Religion and Culture in the Discourse of the ECtHR: The Risk of Stereotyping and Naturalising’, 10 *International Journal of Law in Context* 215 (2014).

115. See also Trispiotis, above n. 7, at 26-9.

116. Since Switzerland has not ratified the first optional protocol, including the provision on the right of parents to have their religious convictions respected throughout public education, the Court needs to address this complaint in light of Art. 9 ECHR.

117. *Osmanoglu and Kocabas v. Switzerland*, ECHR (2017) Series A, No. 29086, 12, at para. 31.

118. Decision of the Swiss Federal Tribunal (2008) BGW 135179.

tures and religions, again constitutes majoritarian reasoning, since the rights of the minority are opposed to the interests of the majority in an integrated society. This majoritarianism is again extended through the Court's grant of a wide margin of appreciation, resulting in a minimal level of scrutiny of the interference concerned. Admittedly, the Court cannot evaluate this matter in light of protocol 1, Article 2; nevertheless, it is quite striking that the Court does not undertake any effort to evaluate the actual tension between a mixed swimming class and the religious convictions of parents, nor the impact of the extremely restricted exemption scheme used in the public school concerned.

Arguably, what both these cases show is that the ECtHR does not guide states towards tolerance, but rather confirms the Islamophobic attitude of the governments,¹¹⁹ thus allowing the majority to be intolerant towards the manifestation of the Muslim identity, which in turn may actually fuel Islamophobia.¹²⁰ Furthermore, the lack of engagement with the explicit or implicit¹²¹ discrimination complaint by the claimants seems ill placed: Particularly in the European societies with the increasing prevalence of Islamophobia, one would expect a human rights court to take every opportunity to deploy the prohibition of discrimination, heed and employ signs of an Islamophobic context in the evaluation of a disproportionate application of neutral rules that seem to target Muslims.¹²²

Sadly, two more recent cases on limitations to wearing the headscarf confirm the Court's lack of using Islamophobia as a relevant contextual factor in its human rights analysis. Both cases concern limitations on the wearing of the headscarf in the Court setting, one by a witness (*Hamidovic v. Bosnia Herzegovina*) and one by a civil party in a criminal case (*Lachiri v. Belgium*).^{123, 124} Importantly, the Court did establish a violation of Article 9, thus helpfully indicating limits to the extent to which states can limit religious dress in public settings. Nevertheless, the Court still chose not to engage in an explicit non-discrimination analysis,¹²⁵ notwithstanding

the clearly Islamophobic context in which the application of neutral rules has a disproportionate impact on women wearing Islamic headscarves. Indeed, it is impossible to miss the elevated levels of Islamophobia in Belgium, while the Bosnian genocide in the territory of Bosnia Herzegovina targeted Muslim Bosnians, and anti-Muslim sentiments in the region have been noted to be on the increase.¹²⁶ Both of these cases raise interesting questions about disproportionate applications of neutral rules that seem to point to the targeting of Muslims. The Court's failure to address these questions ignores the underlying Islamophobia, instead of providing the much-needed counter narrative.

5 The Framework Convention for the Protection of National Minorities and Its Advisory Committee

The preamble to the FCNM highlights the importance of an adequate protection of minorities for peace and stability in Europe, while highlighting that a climate of tolerance and dialogue needs to be created so that cultural diversity is a source of enrichment, not of division for each society. The preamble also clarifies that in the end the FCNM is about ensuring that the fundamental rights of minorities are fully and effectively protected, while building on United Nations (UN) and Organisation for Security and Cooperation in Europe (OSCE) standards in this respect. The preamble thus already identifies the foundational principles and the ultimate goals of the FCNM and minority protection, namely equality, identity and participation, aimed at the inclusion of minorities in national society. The FCNM can be seen to be built on three pillar provisions:¹²⁷ Article 4 on full and effective equal treatment of persons belonging to minorities, Article 5 on the right to respect for the separate minority identity and Article 6 on the inclusion/integration of minorities.

5.1 Possibly Relevant Provisions FCNM

When considering the explicit provisions of the FCNM that concern state duties to counter intolerance and prejudice against national minorities, there are two that require special attention, namely Article 6 and 12 FCNM. Article 6 indeed obliges state parties to

119. See also Peroni (2014), above n. 114, at 215-6.

120. See also S. Gohir, 'The Veil Ban in Europe: Gender Equality or Gendered Islamophobia', 24 *Georgetown Journal of International Relations* 30-31 (2015); K. Brayson, 'Of Bodies and Burkinis: Institutional Islamophobia, Islamic Dress and the Colonial Condition', 46 *Journal of Law and Society* 80-81 (2019).

121. *Osmanoglu and Kocabas v. Switzerland*, above n. 117, at paras. 61 and 96. The parents in *Osmanoglu and Kocabas v. Switzerland* had not formulated an explicit discrimination complaint, but they had argued that the exemption scheme in the public school had been implemented in a discriminatory fashion, as they alleged that exemptions asked by Christian Orthodox parents had been approved. The Court simply notes that the parents had not supported their claims by adequate proof.

122. See also Trispiotis, above at n. 7, at 32-3.

123. *Hamidović v. Bosnia and Herzegovina*, ECHR (2017) Series A, No. 57792, 15, at para. 40.

124. *Lachiri v. Belgium*, ECHR (2018) Series A, No. 3413, 09.

125. In *Hamidovic v. Bosnia Herzegovina*, the Court opined that following the establishment of a violation of Art. 9, it would no longer be necessary to evaluate the Art. 14 complaint (at para. 47). *Lachiri v. Belgium* the plaintiff did not raise an Art. 14 complaint before the ECtHR but she has done so before the national courts, so that the ECtHR could have requalified her complaint, following the *jura novit curia* adagio.

126. See, inter alia the EU-funded European Islamophobia Report 2018, available at: www.islamophobiaeurope.com/wp-content/uploads/2019/09/EIR_2018.pdf.

127. Arts. 4-6 are the first three articles of Section II, containing the substantive articles of the FCNM. Section I concerns the 'location' of the FCNM in the broader field of human rights and international law; Section III pertains to possible limitations and restrictions, whilst Section IV outlines the supervision system of the FCNM and Section V ratifications, denunciations, etc.

encourage a spirit of tolerance and intercultural dialogue, and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons' ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media.

The relevant educational article, Article 12(1) FCNM identifies state obligations in relation to the public curriculum, more particularly to 'take measures in the fields of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority'. The Explanatory Report to the FCNM clarifies that Article 12 FCNM 'seeks to promote knowledge of the culture, history, language and religion of both national minorities and the majority population *in an intercultural perspective. The aim is to create a climate of tolerance and dialogue*' (emphasis added). Article 12(1) FCNM clearly aims at an inclusive educational setting, in which the distinctive groups are taught together, in a spirit of tolerance and mutual understanding. Inclusive, multicultural education is furthermore promoted by state duties to facilitate contact between students and teachers of different communities (Article 12(2) FCNM) and state duties to promote equal access to education at all levels for minority students (Article 12(3) FCNM).

Given the close link between discrimination on the one hand, and the underlying stereotypes, prejudice and intolerance on the other, one would expect extensive attention to problems of Islamophobia in relation to Article 4 (equality) FCNM. Similarly, as Islamophobic acts and policies often imply limitations to the freedom of religion, attention to Islamophobia is similarly envisaged in the supervisory practice under Article 8 FCNM.

5.2 FCNM Supervisory Practice Countering Islamophobia: Articles 6 and 8 FCNM

When reviewing the AC/FCNM supervisory practice, it is striking that for two of these four articles, there is (virtually) no attention to Islamophobia and Muslims as minority, more particularly Articles 4 (equality)¹²⁸ and 12 (3) (education, curriculum) FCNM.¹²⁹ The AC/FCNM does contain elaborate attention for Islamophobia and state duties to counter this in terms of Articles 6 (integration, inclusion) and 8 (freedom of religion) FCNM.

In relation to Article 6, the Committee highlights the inhibiting impact of prejudice, in the sense that prejudice can block equal access to jobs and socio-economic participation more generally.¹³⁰ The AC does not shy away from identifying clear state obligations to combat stereotypes and prejudice and to promote tolerance and

intercultural dialogue throughout society as a whole.¹³¹ In relation to Muslims, the AC notes with concern that many stereotypes are at play, often impeding the manifestation of their religion.¹³² In this respect, the AC recommends to state parties to make active efforts to improve dialogue between Muslims and non-Muslims and to fight intolerance and Islamophobia.¹³³ Governments are urged to be vigilant that public discourse, e.g. against wearing the hijab in public spaces, does not fuel Islamophobia.¹³⁴

Also, in terms of Article 8 on the freedom to manifest the minority religion, there is considerable attention for problems of Islamophobia and discrimination of Muslims. The AC problematises several forms of intimidation such as raids by the police, and insults and attacks against people who wear religious clothes, and places these restrictions in an Islamophobic context. The Committee correctly highlights that these disproportionate restrictions have a stifling effect on the manifestation of Islam, making the practice of the Muslim religion more complicated. Insofar as these restrictions originate from public authorities, they are not only problematic in themselves but also contain a symbolic message to society at large, disfavours the Muslim population group, 'othering' them.¹³⁵ This carries the risk of influencing the public at large, feeding into pre-existing stereotypes about Muslims, with the concomitant exclusionary effects. Insofar as these restrictions originate from private persons (insults and attacks related to manifestations of the Muslim religion), the AC identifies positive state obligations to develop legislation prohibiting such actions, and enforcing these prohibitions.¹³⁶

128. Compilation 3rd cycle Art. 4, has only four references to Muslims (next to other groups, such as Roma), and only one to Muslims specifically. Strikingly, the references to stereotypes all concerned Roma.

129. Compilation 4th cycle and 3rd cycle Art. 12 does not feature the word Islam or Muslim, at all.

130. Compilation 4th cycle Art. 15, Opinion on Finland, at 20.

131. Compilation 4th cycle Art. 6, Opinion on Czech Republic, at 14. Compilation 3rd cycle Art. 6, Opinions on Moldova, at 44, Slovak Republic, at 52 and Spain, at 54-6.

132. Compilation 4th cycle Art. 6, Opinion on Austria, at 6. The AC highlights in the Compilation of opinions under Art. 6 from the 3rd cycle, inter alia that public debate against particular manifestations of Muslim religion, such as ritual slaughter and the wearing of headscarves, can be seen to reveal anti-Muslim sentiments and undermine a culture of dialogue: Council of Europe, 'Compilation of Advisory Committee Public Opinions from the 3rd cycle relating to Article 6 of the Framework Convention for the Protection of National Minorities' (hereafter: Compilation 3rd cycle Art. 6) (13 May 2016), Opinion on Azerbaijan, at 5; Opinion on Russian Federation, at 19 and Opinion on Ukraine, at 21. AC/FCNM Compilation of Opinions of the AC relating to Art. 6 of the FCNM (Third Cycle), May 2016, at 86-7 (Moldova). Available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805a99f0>. AC/FCNM Compilation of Opinions of the AC relating to Art. 6 of the FCNM (Fourth Cycle), September 2017, at 6-7 (Austria), 26 (Germany) and 54-5 (Spain). Available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680648f59>.

133. Compilation 3rd cycle Art. 6, Opinion on UK, at 152-215.

134. Compilation 3rd cycle Art. 6, Opinion on Spain, at 133.

135. The AC problematises several other disproportionate restrictions by public authorities, such as limiting the availability of burial sites and funeral services, the regulation of religious holidays, and restrictions on additional places of worship: AC/FCNM Compilation of Opinions of the AC relating to Art. 8 of the FCNM (Third Cycle), May 2016, at 6 (Bulgaria), 15 (Moldova) and 17-18 (Russian Federation). Available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805a99f2>.

136. *Ibid.*

5.3 Existing Lines of FCNM Jurisprudence That Could Be Used in Relation to Islamophobia

The AC could develop this ‘Islamophobia’ awareness also in relation to other FCNM articles, in line with several of its overarching lines of jurisprudence.

The AC/FCNM tends to underscore that governments should attach a positive value to diversity and different identities in society, diversity being represented as something that should be embraced, not something that should be shunned or eliminated. State parties are even urged to protect and promote the image of national society as an inclusive society.¹³⁷ Furthermore, the AC exhibits a keen understanding of what is presupposed for the effective enjoyment of rights, for the importance of measures that are needed to make rights accessible and effective. Arguably, state obligations to counter prejudice and intolerance against particular groups, blocking these groups’ effective participation in society, nicely fits in this strand of thinking.

In relation to *Article 4 FCNM* on equality, the AC’s supervisory practice has recurring themes that also work in favour of improving Muslims’ effective protection against discrimination. The AC is rather demanding about the legislative framework that needs to be in place, encompassing all relevant grounds, including religion and race/ethnicity, and having a broad material scope of application.¹³⁸ In addition, this equality legislation needs to be properly monitored, special attention going to the establishment of equality bodies, with sufficient competences and resources.¹³⁹ The AC furthermore highlights state duties to combat intolerance and promote mutual understanding (in line with *Article 6 FCNM*) and even urges states to develop campaigns to eradicate stereotypes.¹⁴⁰ Nevertheless, as it stands, these general obligations are extensively developed in relation to Roma, but not (yet) in relation to Muslims.¹⁴¹ Put differently, the general awareness of the importance of public authorities’ active engagement in campaigns to counter intolerance and prejudice in order to give effect to state obligations under *Article 4 FCNM* have not yet been translated in positive state obligations to counter Islamophobia. The potential is there though.

Similarly, the AC has developed steady lines of jurisprudence in terms of *Article 12 FCNM* (as combined with *Article 6*) about the importance of an inclusive, multicultural curriculum, which encourages tolerance, dialogue and mutual understanding amongst the differ-

ent groups living together in society,¹⁴² ultimately promoting the teaching of the different groups together.¹⁴³ The AC’s Thematic Commentary on Education follows *Article 29* of the UN Convention on the Rights of the Child (CRC) in this respect.¹⁴⁴

While the AC has not been explicit about a place for Islam in the curriculum in this respect, it regularly underscores throughout its opinions the importance of an inclusive curriculum, promoting respect for religious diversity, and combating stereotypes affecting religious and ethnic groups.¹⁴⁵ The AC furthermore urges state parties to regularly review curricula and textbooks,¹⁴⁶ so as to ensure that the entire curriculum reflects the diversity of religious and ethnic identities.¹⁴⁷ Furthermore, the AC emphasises the importance of religion as element of identity to be taken into account when promoting multicultural and intercultural education, and, ultimately, equal access to education in an atmosphere of tolerance.¹⁴⁸ Unsurprisingly, the AC’s Thematic Commentary on Education similarly aims at promoting effectively equal access to education of religious minorities, which is facilitated through the multicultural content of the curriculum, also having regard to the distinctive religions of minorities. Hopefully, the AC can apply in the upcoming supervision cycles this general line of reasoning also in favour of Islam, promoting the understanding of this religion, and thus the equal and effective inclusion of Muslim minorities in public education. Finally, when exploring the potential of the FCNM to counter Islamophobia and identifying positive state obligations in this respect, it is important to also have regard for the transversal importance of *Article 15 FCNM* on

137. The AC, e.g. urges states to overcome linguistic barriers of national minorities to effective access to public services by making the public service more multilingual: Compilation 4th cycle Art. 15, Opinion on Moldova, at 32; Compilation 4th cycle Art. 15, Opinion on Finland, at 21; Compilation 4th cycle Art. 15, Opinion on Hungary, at 25; Compilation 4th cycle Art. 15, Opinion on Moldova, at 32.

138. Compilation Art. 4 – Cycles 3 and 4.

139. *Ibid.*

140. Compilation Art. 4, Cycles 3, at 61 and at 90.

141. When reviewing the Compilation of views on Art. 4 of the 3rd and 4th cycles, the AC views tend to have a separate heading on Roma, and most talk about stereotypes is formulated in relation to Roma. Somehow there are only a few references to Muslims: the exception in cycle 3, at 60 and 97.

142. Advisory Committee on the Framework Convention for the Protection of National Minorities – Opinion on the Netherlands (25 June 2009) ACFC/OP/II(2009)002, at para. 56. See also Second Opinion on Switzerland (2 September 2008) ACFC/OP/II(2008)002, at para. 85; Opinion on Germany (1 March 2006) ACFC/OPII(2006)001, at para. 88.

143. Thematic Commentary No.1 on Education, at 16-17.

144. The Hague Recommendations regarding the Education Rights of National Minorities promoted by the HCNM similarly highlight the importance of an inclusive curriculum, in the sense that the teaching of histories, cultures and traditions of their respective national minorities should be included. This type of curriculum is depicted as essential for the promotion of tolerance and multiculturalism (paras. 19-20).

145. Council of Europe, ‘Compilation of Advisory Committee Public Opinions from the fourth cycle relating to Article 6 of the Framework Convention for the Protection of National Minorities’ (hereafter: Compilation 4th cycle Art. 6) (18 September 2017), Opinion on Denmark, at 15 and Opinion on FYROM, at 39. See also OSCE High Commissioner on National Minorities (HCNM), ‘Ljubljana Guidelines on Integration of Diverse Societies’ (7 November 2012) at 54.

146. AC/FCNM Compilation of Opinions of the AC relating to Art. 12 of the FCNM (4th Cycle), September 2017, at 11; AC/FCNM Compilation of Opinions of the AC relating to Art. 12 of the FCNM (3rd Cycle), May 2016, at 24-25.

147. Thematic Commentary No. 1 on Education, at 11. AC/FCNM Compilation of Opinions of the AC relating to Art. 12 of the FCNM (3rd Cycle), May 2016, at 13-14 (Bosnia-Herzegovina); AC/FCNM Compilation of Opinions of the AC relating to Art. 12 of the FCNM (4th Cycle) September 2017, at 9-12 (Cyprus) and 41 (Northern Ireland).

148. Thematic Commentary No. 1 on Education, at 15-16. AC/FCNM Compilation of Opinions of the AC relating to Art. 12 of the FCNM (4th Cycle), September 2017, at 39 (FYROM). Available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680648f93>.

participation and participatory rights of minorities, not in the least because of its close interrelation with Article 4 on real and effective equality for persons belonging to minorities.¹⁴⁹ The reach of participatory rights encompasses not only political participation but also socio-economic participation, and, ultimately, participation in society at large.¹⁵⁰ When combining these participatory rights with the pillars of the FCNM, namely equality, identity and participation/inclusion, this would protect and promote the full inclusion of minorities, with their distinct identity, as component part of society, on an equal footing with members of the majority.¹⁵¹ As with Articles 4 and 12 FCNM, so far Islamophobia has not received much attention in terms of Article 15 FCNM. Nevertheless, the above-mentioned baseline understanding of Article 15 FCNM and its implications clearly has potential to counter acts/policies with an Islamophobic undercurrent, such as indirectly discriminatory measures that de facto exclude minorities from society, from public life and from public education.

6 Comparison of Fault Lines in the Jurisprudence of the Three International Supervisory Mechanisms

96 Islamophobia, like xenophobia, points to deep-seated, ingrained discrimination against a particular group, whose effective enjoyment of fundamental rights is impaired. This in turn triggers the human rights obligations of liberal democratic states, more particularly states' positive obligations to ensure that fundamental rights are effectively enjoyed, and thus also respected in private, horizontal relationships.

As states, positive human rights obligations are not absolute but are constrained by reasonability considerations (what can one reasonably expect from a government), and by possible conflicting fundamental rights and related state obligations, this raises difficult questions about the extent to which and the way in which states would be obliged to counter Islamophobia, and particularly the underlying prejudice.

As highlighted in the introduction, when conceiving of strategies that states could adopt in order to counter Islamophobia, roughly two strands come to mind: On the one hand, the active promotion of tolerance, inter alia through awareness-raising campaigns and the stimulation of intercultural dialogue; on the other, counter-

ing acts informed by intolerance, bringing the non-discrimination strategies to mind, including the prevention/halting/punishment of discriminatory violence. Reviewing the relevant standards and the related supervisory practice of three international supervisory mechanisms has shown that the first strand is markedly less developed in terms of human rights law, especially in terms of explicit standards that easily allow through interpretation to identify positive state obligations to promote tolerance. Indeed, it is mainly in the FCNM, in some of the minority-specific standards that explicit references can be found to positive state obligations to encourage a spirit of tolerance and intercultural dialogue. Notwithstanding these promising explicit references to state duties to counter intolerance, it has been noted that the AC/FCNM supervisory practice has not yet fully embraced all its potential to counter Islamophobia and identify positive state obligations to counter it, more particularly in relation to the equality and the educational themes.

Still, the acknowledgement of the crucial importance of education for the promotion of tolerance, including the content of the curriculum and the extent to which the educational system is geared towards educating the different groups together, brings the educational provisions in general human rights conventions to the fore. After all, education concerns the future generations, and is generally a key concern for both minorities¹⁵² and the majority society. The supervisory practice, in terms of the ECtHR and ICCPR, has developed a more outspoken concern about indoctrination, and scrutinises states' choices in terms of curriculum stricter so as to prevent too one-sided an attention to one particular (dominant) religion. Nevertheless, no state obligations in terms of an inclusive curriculum have been identified as yet, nor the possible implications for religious dress and mixed swimming in public schools. The HRC's strict approach towards the legitimacy of limitations to the enjoyment of fundamental rights has managed to provide space for the expression of Muslim religion in the public school environment though.

When turning to the second strand, that of countering acts of intolerance, and the related anti-discrimination strategies, a rather mixed picture emerges. The baseline strict level of scrutiny adopted by the HRC appears to entail the highest level of actual protection against acts of intolerance infused by Islamophobia, also the more hidden forms of intolerance, in contrast to the overall disappointing record of the ECtHR. The AC/FCNM's religious sensitive approach leads to promising supervisory practice in terms of Article 8's freedom of religion, but is neither matched by the supervisory practice in terms of the FCNM's prohibition of discrimination nor the educational rights.

149. Explanatory Note to FCNM (1995) H(95)10, at para. 80.

150. See, inter alia Advisory Committee on the Framework Convention for the Protection of National Minorities Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, ACFC/31DOC(2008)001, 27 February 2008.

151. See also F. Palermo, 'The Dual Meaning of Participation: The Advisory Committee's Commentary to Article 15 of the FCNM', *European Yearbook of Minority Issues* 412 (2007/8).

152. Minority-specific instruments always have ample attention for education, as does the supervisory practice, including any thematic recommendations or commentaries: the HCNM sponsored The Hague Recommendations on Education Rights of persons belonging to National Minorities, and the AC/FCNM Thematic Commentary on Education are documents in point.

The HRC's jurisprudence reveals that with a strong baseline protection against interferences with fundamental rights, pricking through prejudice, a strong protection against Islamophobia is forthcoming also when one does not acknowledge the Islamophobic context. The HRC's willingness to engage in non-discrimination analysis also implies an openness to recognise intersectional discrimination, which is often at play in case of Islamophobia.¹⁵³ The multiple criticisms against the ECtHR's jurisprudence regarding the freedom of religion and the prohibition of discrimination remain valid in relation to its case law on cases with an Islamophobic undertone. Indeed, in these cases, the Court miserably fails to give due weight to an Islamophobic context, while its majoritarian reasoning rubberstamps governments policies informed by Islamophobia, and it evades an actual non-discrimination analysis. Arguably, when an international supervisory mechanism does not have a strong baseline protection against interferences with fundamental rights, it is essential that an Islamophobic context is factored in explicitly in the human rights analysis, triggering heightened scrutiny for the freedom of religion, as well as an explicit non-discrimination analysis.

7 By Way of Conclusion: Recommendations for International Supervisory Mechanisms Concerning the Identification of Positive State Obligations to Counter Islamophobia

The convincingly documented and far-reaching human rights implications of Islamophobia make the question how far states' positive obligations extend to counter Islamophobia highly relevant. The preceding comparative analysis of the practice of three international supervisory mechanisms has revealed a rather mixed record and overall considerable scope for a clarification of positive state obligations to counter Islamophobia, regarding both of the possible strands of strategies of states to counter intolerance. The following recommendations are meant to contribute to the emergence of a more complete and coherent body of international supervisory practice regarding positive state obligations to counter Islamophobia.

In relation to the strand of active promotion of tolerance, the practice of international supervisory mechanisms could complement the scarce provisions in human rights instruments, explicitly imposing obligations to

promote tolerance, mutual understanding and intercultural dialogue. The use of systematic interpretation would be commendable here as this would enable the interpretation of general human rights in light of the overarching effectiveness principle while taking into account more elaborate and explicit human rights provisions on state duties to promote tolerance. Article 31(3)© Vienna Convention on the Law of Treaties (VCLT) indeed allows international supervisory mechanisms when interpreting a treaty to take into account the broader normative environment, including general international law and any relevant legal obligation.¹⁵⁴ In relation to education, and the effective and equal access to education, the requirements in terms of an inclusive curriculum visible in the International Covenant on Economic, Social and Cultural Rights, the CRC and FCNM could inspire the interpretation of educational provisions in other conventions as well. Similarly, as elsewhere extensively argued, the right to equal treatment allows for an interpretation of the right to equal treatment as encompassing duties of reasonable accommodation also on grounds of religion.¹⁵⁵ The related duties of differential treatment could also encompass the recognition of exemptions to general (neutral) rules, especially when not doing so would entail exclusions of particular religious groups, as we identified above in relation to Muslim minorities in Europe.

In relation to acts informed by intolerance, the international supervisory practice could highlight that in case of signs of an Islamophobic context, strict scrutiny of alleged violations of fundamental rights is called for, as well as an explicit non-discrimination analysis. The latter explicit engagement with the prohibition of discrimination would be in line with the higher risk of unlawful discrimination in an Islamophobic context.¹⁵⁶ Furthermore, an Islamophobic context could work similarly as the presence of a suspect ground, thus triggering heightened scrutiny, including a more probing scrutiny to unveil hidden direct discrimination.

In the end, if international supervisory mechanisms would develop this more complete understanding of positive state obligations to counter Islamophobia, this would not only put states on notice that they should more proactively counter the underlying anti-Muslim prejudice but would also avoid any impression that these international supervisory mechanisms themselves are condoning or disregarding deep-seated discrimination against Muslim minorities in Europe.

153. Trispiotis, above n. 7, at 14. Argues that many cases of Islamophobia can be framed as cases of intersectional discrimination.

154. Inter alia V.P. Tzevelekos, 'The Use of Article 31(3)© of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? Between Evolution and Systemic Integration', 31 *Michigan Journal of International Law* 631 (2009-2010).

155. K. Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities', 14(4) *ICON* (2016).

156. Trispiotis, above n. 7, at 32-3.

Positive State Obligations under European Law: A Tool for Achieving Substantive Equality for Sexual Minorities in Europe

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Abstract

This article seeks to examine the development of positive obligations under European law in the specific context of the rights of sexual minorities. It is clear that the law should respect and protect all sexualities and diverse intimate relationships without discrimination, and for this purpose it needs to ensure that sexual minorities can not only be free from state interference when expressing their sexuality in private, but that they should be given the right to express their sexuality in public and to have their intimate relationships legally recognised. In addition, sexual minorities should be protected from the actions of other individuals, when these violate their legal and fundamental human rights. Accordingly, in addition to negative obligations, European law must impose positive obligations towards sexual minorities in order to achieve substantive equality for them. The article explains that, to date, European law has imposed a number of such positive obligations; nonetheless, there is definitely scope for more. It is suggested that European law should not wait for hearts and minds to change before imposing additional positive obligations, especially since this gives the impression that the EU and the European Court of Human Rights (ECtHR) are condoning or disregarding persistent discrimination against sexual minorities.

Keywords: Positive obligations, sexual minorities, sexual orientation, European law, human rights

1 Introduction

Historically, persons with non-heterosexual sexualities – namely, lesbian, gay and bisexual (LGB) persons – were considered to be subjects of non-belonging, the ‘other’, as members of an ‘out-group’,¹ and, thus, judged as not

worthy of rights. The dominance of heterosexuality as the only legitimate form of sexual orientation and the silencing of all other discourses of sexuality have traditionally legitimised exclusionary laws and policies that completely ignored the existence of sexual minorities and relegated them to a second-rate position. Nonetheless, as human beings, persons with non-heterosexual sexualities have the same human rights as everyone else. This has been recognised in European law (i.e. the law stemming from the European Convention on Human Rights (ECHR) and the European Union (EU)). Accordingly, as a first move towards equality for persons with non-heterosexual sexualities, European States have been required – as part of their obligations arising from European law – to fulfil their (negative) obligations towards sexual minorities, by refraining from violating their fundamental human rights: this has been achieved through, *inter alia*, the decriminalisation of same-sex acts (ECHR),² the equalisation of the age of consent (ECHR)³ and the prohibition imposed *on the State itself* of any discriminatory practices based on sexual orientation (ECHR & EU law).⁴ At the same time, LGB persons also need specific guarantees against discrimination if they are to enjoy substantive equality with everyone else. This requires the imposition of positive obligations on States, requiring them to protect LGB persons from discrimination and other hostile acts perpetrated by others that are based on their non-heterosexual sexuality, as well as to promulgate laws that extend to sexual minorities access to numerous civil, social and cultural rights granted (by default) to their heterosexual peers, such as the right to have their relationships legally recognised.

This article seeks to examine the development of positive obligations under European law in the specific context of the rights of sexual minorities.⁵ Such obligations

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1. For an argument that international human rights law must develop a positive State obligation to counter the dehumanisation of out-groups, given that there is a clear connection between the dehumanisation of out-groups and violations of the human rights of members of such groups see Berry in this special edition.

2. *Dudgeon v. United Kingdom*, no. 7525/76, 22 October 1981; *Norris v. Ireland*, no. 10581/83, 26 October 1988; *Modinos v. Cyprus*, no. 15070/89, 22 April 1993.

3. *Sutherland v. United Kingdom*, no. 25186/94, Commission report, 1 July 1997; *L and V v. Austria*, nos. 39392/98 and 39829/98, 9 January 2003.

4. *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, 21 December 1999; Case C-528/13 *Léger* ECLI:EU:C:2015:288.

5. For the purposes of this article, the phrase ‘sexual minorities’ should be taken to refer to persons with a non-heterosexual sexual orientation and, in particular, LGB persons. Although in many instances – namely, when they are in an opposite-sex relationship – bisexual persons will

can be used – together with negative obligations – as a tool to counter prejudice against sexual minorities. By imposing positive obligations on States to make provision in their legislation for sexual minorities in a way that ensures that substantive equality is achieved between them and the majority, European law can aspire to change hearts and minds not only among the general population of States but, also, among politicians and lawmakers. This is because it demonstrates that persistent discrimination against sexual minorities can no longer be permitted or tolerated, whether this is perpetrated by the State or by other individuals.

The development of positive obligations under European law is a topic that is almost completely uncharted in the existing literature: although there is some literature focusing on the positive obligations imposed on Member States by the ECHR in general,⁶ there is next to nothing *on this particular topic* (i.e. positive obligations) in the specific context of sexual minority rights, either under the ECHR or under EU law.

The two supranational European courts (the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU)) have not provided an authoritative definition of positive obligations, nor does the ECHR or the constituent EU Treaties make any reference to – let alone define – positive obligations. Hence, unlike negative obligations that, in most instances, are derived from express textual requirements of the Treaties, positive obligations are very rarely explicitly articulated in the various instruments: therefore, they are either implied judicial creations⁷ or – in the case of the EU – they are laid down in secondary legislation. Put simply, positive obligations impose on States the duty to do something – to ‘take action’⁸ – or provide something to individuals or to protect them from other individuals: they are obligations ‘to take positive steps or measures to protect’ the rights of individuals.⁹ They can encompass procedural/institutional duties to undertake specific acts (e.g. investigations), obligations to amend domestic laws (e.g. in order to criminalise specific actions and in

this way protect individuals from other individuals or to extend certain rights to specific groups), requirements to deploy police and security personnel, and duties to take steps to protect individuals from the actions of other individuals. These should be contrasted with negative obligations that, simply, require States to abstain from undue interference with the rights granted to individuals by the law.

Of course, in practice, the line dividing negative from positive obligations is not so clear,¹⁰ and, thus, it is not surprising that the EU institutions do not explicitly draw any distinction between the two while the ECtHR in its rulings does draw a distinction, albeit only when it is obvious which type of obligation is involved in the particular case.¹¹ As the latter court has noted in, *inter alia*, *Keegan v. Ireland*,

the boundaries between the State’s positive and negative obligations ... do not lend themselves to precise definition. The applicable principles are, none the less, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation.¹²

In this article, there will be no a priori, academic, discussion of whether the various rights that are discussed here impose, indeed, positive obligations (as is argued), nor will there be an effort to convince the reader that this is the case. This is for the simple, practical reason that doing so would be a gigantic task that would be worthy of a monograph in its own right and, thus, a journal article is not a suitable place to engage in this exercise.¹³ Moreover, this would be an unnecessary exercise given that – in the author’s view – it is quite clear that the chosen obligations are, indeed, positive ones, not least because for many of them this has been explicitly acknowledged by judges and/or other scholars, as will be seen when these will subsequently be analysed.

Following this introduction, the article will proceed to explore how far, first, the ECHR (Section 2.1), and, second, EU law (Section 2.2), impose upon States positive obligations towards sexual minorities. The analysis will then proceed to consider whether *more* such obligations *should* be imposed by European law (Section 3) – in other words, what are the gaps that European law

not be (legally) disadvantaged in the same way as gays and lesbians are (e.g. availability of marriage), in the majority of instances they can potentially be disadvantaged in the same way and, thus, the article treats LGBT persons as one category for its purposes. In any event, in court jurisprudence, it is rarely, if ever, specified if the applicant is L/G or B, as the claim usually is that they are disadvantaged as a result of the fact that they are in a same-sex relationship or that they are attracted to persons of the same sex.

6. See, most fundamentally, A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart, 2004); D. Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge, 2012). See, also, M. Pitkänen, ‘Fair and Balanced Positive Obligations – Do They Exist?’, 5 *European Human Rights Law Review* 538 (2012); A.I.L. Campbell, ‘Positive Obligations under the ECHR: Deprivation of Liberty by Private Actors’, 10 *Edinburgh Law Review* 399 (2006).
7. Pitkänen, above n. 6, at 539.
8. Dissenting Opinion of Judge Martens in *Gül v. Switzerland*, no. 23218/93, 19 February 1996.
9. K. Starmer, *European Human Rights Law: The Human Rights Act 1998 and the European Convention on Human Rights* (Legal Action Group, 1999), at 194.

10. *Ibid.*, at 206.

11. *Orlandi and Others v. Italy*, nos. 26431/12, 26742/12, 44057/12 and 60088/12, 14 December 2017, para. 198.

12. *Keegan v. Ireland*, no. 16969/90, 26 May 1994, para. 49; this was confirmed more recently in, *inter alia*, *Orlandi and Others v. Italy*, *ibid.*, para. 197. For an analysis of the argument that the court hearing a case should apply the same proportionality principles when deciding positive obligations as when deciding whether there has been a breach of a negative obligation, see Pitkänen, above n. 6.

13. By way of indication, one article that (convincingly) argues that the right to marry (which is one of the rights mentioned in this article) derives from a positive obligation runs more than 70 pages! See G. Strauss, ‘The Positive Right to Marry’, 102 *Virginia Law Review* 1691 (2016).

should fill in by imposing additional positive obligations towards sexual minorities? The section will, also, explore the possible reasons behind the reluctance on the part of the EU and the ECtHR to impose additional such obligations. Section 4 will analyse the argument that European law should not wait for hearts and minds to change before it imposes more positive obligations but rather that it should impose positive obligations exactly in order to contribute to changing hearts and minds. Section 5 will then conclude.

2 Positive Obligations Towards Sexual Minorities Under European Law: The Current Position

This section will aim to present the positive obligations towards sexual minorities that have *already* been imposed on European States by the ECHR and by EU law.

2.1 Positive Obligations Towards Sexual Minorities Under the ECHR: The Current Position

The ECHR is a regional human rights Treaty that was drafted by the Council of Europe in 1949, signed by the original ten member states in 1950 and entered into force in 1953.¹⁴ To ensure the observance of the obligations imposed on the contracting States, the Convention created two part-time institutions, the European Commission of Human Rights and the ECtHR. However, in 1998, with the coming into force of Protocol 11, the Commission was abolished, and the two old institutions were replaced by a full-time Court. The Convention focuses primarily on civil and political rights, which, at first glance, seems to be the reason that it is often read as a Treaty that imposes mainly negative obligations.

In the remainder of this part of the section, we shall focus on the various *positive* obligations that the ECtHR has expressly imposed on signatory states in situations involving sexual minorities. The ECtHR has not determined any general theory of positive obligations under the ECHR,¹⁵ but it has been noted that the theoretical basis for imposing such obligations is the combined effect of three, interrelated, principles:

1) First, the principle that, under article 1 of the Convention, states should *secure* Convention rights to everyone within their jurisdiction. 2) Second, the

principle that the Convention rights so secured must be practical and effective not “theoretical and illusory”. 3) Third, the principle that, under article 13, effective remedies should be provided for arguable breaches of Convention rights.¹⁶

2.1.1 Positive Obligation to Protect LGB Persons Who Are Exercising Their Right to Freedom of Assembly and Association from the Hostile Acts of Other Individuals

As Johnson has explained, when it comes to gay pride marches, Article 11 ECHR – which provides to everyone the right to freedom of assembly and association – can be breached as a result of a violation of both negative and positive obligations by signatory states:

First, there are the direct interferences by public authorities with demonstrations in the form of actions designed to disrupt them or prevent them from taking place. Second, where such events do take place, public authorities often fail to meet their positive obligations to ensure the protection of participants from counter-demonstrations.¹⁷

Similarly, emphasising the positive obligations that emerge in such situations, the Council of Europe has suggested that

Member States should ensure that law enforcement authorities take appropriate measures to protect participants in peaceful demonstrations in favour of the human rights of lesbian, gay, bisexual and transgender persons from any attempts to unlawfully disrupt or inhibit the effective enjoyment of their right to freedom of expression and peaceful assembly.¹⁸

The Court’s approach in its case law does not diverge from the foregoing suggestions. The applicants in *Identoba and others v. Georgia*¹⁹ were the eponymous applicant (Identoba – a Georgian LGBT NGO) and a number of LGB individuals claiming that the violence perpetrated against them by private individuals and the lack of police protection during a peaceful march to mark the International Day Against Homophobia constituted a breach of their rights under a number of ECHR provisions. The ECtHR held that there was a violation of Article 3 ECHR (which prohibits torture and inhuman or degrading treatment or punishment) read in conjunction with Article 14 ECHR (which prohibits discrimi-

14. For a detailed explanation of the ECHR, see E. Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (OUP, 2010); B. Rainey, P. McCormick, & C. Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (OUP, 2020); D. Harris, M. O’Boyle, E. Bates & C. Buckley, *Harris, O’Boyle and Warbrick: Law of the European Convention on Human Rights* (OUP, 2018).

15. Harris, O’Boyle, Bates, & Buckley, above n. 14, at 342.

16. Starmer, above n. 9, at. 194.

17. P. Johnson, *Homosexuality and the European Court of Human Rights* (Routledge, 2014), at 184.

18. Council of Europe, ‘Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity’, para. 15.

19. *Identoba and Others v. Georgia*, no. 73235/12, 12 August 2015. For comments see P. Dunne, ‘Enhancing Sexual Orientation and Gender-Identity Protections in Strasbourg’, 75 *Cambridge Law Journal* 4 (2016).

nation on a number of grounds in the enjoyment of the rights laid down in the ECHR):²⁰

Given that they were surrounded by an angry mob that outnumbered them and was uttering death threats and randomly resorting to physical assaults, demonstrating the reality of the threats, and that a clearly distinguishable homophobic bias played the role of an aggravating factor, the situation was already one of intense fear and anxiety. The aim of the verbal – and sporadically physical – abuse was evidently to frighten the applicants so that they would desist from their public expression of support for the LGBT community. The applicants’ feelings of emotional distress must have been exacerbated by the fact that the police protection which had been promised to them in advance of the march was not provided in due time or adequately.²¹

Accordingly, the Court concluded that the failure of the State to protect the demonstrators was considered degrading as it aroused in its targets feelings of fear, anguish and inferiority capable of humiliating and debasing them. It was noted that

[h]aving regard to the reports of negative attitudes towards sexual minorities in some parts of the society, as well as the fact that the organiser of the march specifically warned the police about the likelihood of abuse, the law-enforcement authorities were under a compelling positive obligation to protect the demonstrators, including the applicants, which they failed to do²²

The Court also held that the disruption of the applicants’ participation in the peaceful march – and the failure of the State to stop this, despite the fact that it had prior notice about the organisation of the march – amounted to a breach of the State’s positive obligations under Article 11 ECHR (which protects the right to freedom of assembly and association) taken in conjunction with Article 14 ECHR. The Court pointed out that

pluralism and democracy are built on genuine recognition of, and respect for, diversity. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. Referring to the hallmarks of a “democratic society”, the Court has attached particular importance to pluralism, tolerance and broad-mindedness. In that context, it has held that although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment

of minorities and avoids any abuse of a dominant position.²³

The ECtHR then also noted that

[t]he State must act as the ultimate guarantor of the principles of pluralism, tolerance and broadmindedness. Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11 of the Convention. This provision sometimes requires positive measures to be taken even in the sphere of relations between individuals, if need be. That positive obligation is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation.²⁴

Accordingly, the ECtHR, in this ruling, made it clear that States must act to protect the right of the members of sexual minorities to hold a peaceful demonstration, not *despite* the fact that they may hold unpopular views that meet with disapproval by the majority, but, exactly, because – due to the majority’s disapproval – they may be more vulnerable to victimisation. Hence, ECHR signatory states have the positive obligation to protect LGB persons who are exercising their right to peaceful assembly and association from the hostile acts of others.

2.1.2 Positive Obligation to Protect LGB Persons from Homophobic Speech

The Council of Europe has confirmed that homophobic speech is covered by the term ‘hate speech’,²⁵ and the ECtHR has held that concrete expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 ECHR (which provides the right to freedom of expression) and, thus, signatory states may be allowed to prohibit them.²⁶

In the recent case of *Beizaras and Levickas v. Lithuania*,²⁷ the Court held that Article 8 ECHR (which provides for the right to private and family life), read in conjunction with Article 14 ECHR, imposes a positive obligation on signatory states to protect individuals from hate speech by other individuals. In particular, in this case the ECtHR held that Lithuania was in breach of the foregoing provisions as a result of failing to fulfil its positive obligation to LGB individuals to effectively investigate, prosecute and punish homophobic hate speech, which took the form of homophobic comments and threats made on a picture depicting a same-sex cou-

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20. See, also, *M.C. and A.C. v. Romania*, no. 12060/12, 12 April 2016.

21. *Identoba and Others v. Georgia*, above n. 19, para. 70.

22. *Ibid.*, para. 80.

23. *Ibid.*, para. 93.

24. *Ibid.*, para. 94.

25. A. Weber, *Manual on Hate Speech*, Strasbourg (Council of Europe Publishing, 2009).

26. *Jersild v. Denmark*, no. 15890/89, 23 September 1994, para. 35. For a case that involved homophobic speech that the signatory state used as its defence in limiting the right to freedom of expression, see *Vejdeland and Others v. Sweden*, no. 1813/07, 9 February 2012.

27. *Beizaras and Levickas v. Lithuania*, no. 41288/15, 14 January 2020.

ple kissing, which was posted (as a public post) on Facebook by the couple.

The Court noted that

the hateful comments including undisguised calls for violence by private individuals directed against the applicants and the homosexual community in general were instigated by a bigoted attitude towards that community and, secondly, that the very same discriminatory state of mind was at the core of the failure on the part of the relevant public authorities to discharge their positive obligation to investigate in an effective manner whether those comments regarding the applicants' sexual orientation constituted incitement to hatred and violence, which confirmed that by downgrading the danger of such comments the authorities at least tolerated such comments.²⁸

As noted by another commentator, in this case

[t]he Court once again stressed that arguments based on the preferences of an (intolerant) majority in a society are not sufficient and have not been sufficient for a long time already.²⁹

Accordingly, States must take positive steps to protect the rights of sexual minorities from the prejudiced majority as the (intolerant) hearts and minds of the majority cannot be used as an excuse for a failure (or, even worse, refusal) to act. For this reason, they have a positive obligation to protect LGB persons from homophobic speech.

2.1.3 Positive Obligation to Put in Place a Legal Framework for the Legal Recognition of Same-Sex Relationships

The first step towards imposing a positive obligation on signatory states to make provision in their legal system for the legal recognition of same-sex relationships came in 2013, with the case of *Vallianatos v. Greece*.³⁰ In this case the ECtHR held that if a contracting State makes available a system of registered partnerships as an 'alternative to marriage', Article 8 ECHR, read in conjunction with Article 14 ECHR, requires it to extend this status also to same-sex couples. Subsequently, the Court went further in the *Oliari v. Italy* case,³¹ where it held that Article 8 ECHR imposes a positive obligation to ensure respect for LGB persons' right to private and family life through the provision of a legal framework allowing them to have their relationship recognised and protected under domestic law. Nonetheless, as submit-

ted by others,³² the ruling seems to have imposed this obligation only on Italy, since the ECtHR in its judgment emphasised that the particular legal and social context in that signatory state seemed to require this.³³ As Fenwick and Fenwick have stressed, in this case the ECtHR

identified *two* localised factors in particular that influenced its findings as to those requirements. The first comprised the "conflict between the social reality of the applicants, who for the most part live their relationship openly in Italy, and the law, which gives them no official recognition". The second concerned the "unheeded" calls of the Italian courts to introduce a legal framework providing same-sex couples with such recognition.³⁴

More recently, in *Orlandi v. Italy*,³⁵ the ECtHR imposed on signatory states a positive obligation deriving from Article 8 ECHR to provide *some means of recognition* (i.e. not necessarily as 'marriages') to same-sex marriages contracted in other jurisdictions when these are sought to be registered in their territory. Nonetheless, being unwilling 'to disturb the privileged status often afforded to married couples',³⁶ the Court has – to date – refused to impose a positive obligation on the contracting parties to extend marriage to same-sex couples. In *Schalk and Kopf v. Austria*, it held that Article 12 ECHR (which provides the right to marry) and Article 8 ECHR, read in conjunction with Article 14 ECHR, do not impose the positive obligation on signatory states to introduce same-sex marriage.³⁷ As regards Article 12 ECHR, the ECtHR noted that at the time,

28. *Ibid.*, para. 129.

29. I. Milkaite, 'A Picture of a Same-Sex Kiss on Facebook Wreaks Havoc: Beizaras and Levickas v. Lithuania', *Strasbourg Observers*, 7 February 2020, <https://strasbourgobservers.com/2020/02/07/a-picture-of-a-same-sex-kiss-on-facebook-wreaks-havoc-beizaras-and-levickas-v-lithuania/> (last visited 7 February 2020).

30. *Vallianatos and Others v. Greece*, nos 29381/09 and 32684/09, 7 November 2013.

31. *Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, 21 July 2015.

32. P. Dunne, 'Who Is a Parent and Who Is a Child in a Same-Sex Family: Legislative and Judicial Issues for LGBT Families Post-Separation, Part I: The European Perspective', 30 *Journal of the American Academy of Matrimonial Lawyers* 27, at 29-30 and 36-37 (2017); S. Ragone and V. Volpe, 'An Emerging Right to a "Gay" Family Life? The Case of *Oliari v. Italy* in a Comparative Perspective', 17 *German Law Journal* 451, at 481 (2016); J. Mulder, 'Dignity or Discrimination: What Paves the Road Towards Equal Recognition of Same-Sex Couples in Europe?', University of Bristol Law School Blog, 26 March 2018, <https://legalresearch.blogs.bris.ac.uk/2018/03/dignity-or-discrimination-what-paves-the-road-towards-equal-recognition-of-same-sex-couples-in-europe/> (last visited 25 January 2020). In his Concurring Opinion in *Oliari*, in which he was joined by Judges Tsotsoria and Vehabovic, Judge Mahoney noted – referring to the other judges – 'Our colleagues are careful to limit their finding of the existence of a positive obligation to Italy and to ground their conclusion on a combination of factors not necessarily found in other Contracting States' – Concurring Opinion in *Oliari*, above n. 31, by Judge Mahoney joined by Judges Tsotsoria and Vehabovic, para. 10.

33. *Oliari*, above n. 31, para. 181.

34. H. Fenwick and D. Fenwick, 'Finding "East"/"West" Divisions in Council of Europe States on Treatment of Sexual Minorities: The Response of the Strasbourg Court and the Role of Consensus Analysis', 3 *European Human Rights Law Review* 247, at 264 (2019). See, also, H. Fenwick, 'Same Sex Unions at the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court's Authority Via Consensus Analysis?', 3 *European Human Rights Law Review* 248, at 262 (2016).

35. Starmer, above n. 10.

36. Johnson, above n. 17, at xii.

37. *Schalk and Kopf v. Austria*, no. 30141/04, 24 June 2010. This was subsequently confirmed in *Chapin and Charpentier*, no. 40183/17, 9 September 2016 and *Orlandi*, above n. 11.

there was no European consensus regarding same-sex marriage,³⁸ and thus it should ‘not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society’.³⁹ From this, it followed that the obligation to open marriage to same-sex couples did not arise from Article 8 ECHR read in conjunction with Article 14 ECHR either, as ‘the Convention is to be read as a whole and its Articles should therefore be construed in harmony with one another’.⁴⁰

Accordingly, at present, as long as one method of formalisation of same-sex unions is made available, the state’s positive obligations under Article 12 ECHR and Article 8 ECHR read alone or with Article 14 ECHR are likely to be found to be fulfilled, and the fact that same-sex couples are not allowed access to marriage on grounds of their sexual orientation is not deemed to be discriminatory, even where there are significant differences between marriage and the other status(es) available to same-sex couples.⁴¹ When it comes to the issue of marriage equality, therefore, the ECtHR seems to have adopted a more cautious approach, indicating that it prefers to step back and wait for hearts and minds (and, for the majority of States’ laws) to change before it interprets the ECHR as imposing on *all* signatory states a positive obligation to open marriage to same-sex couples.

2.1.4 Positive Obligation to Extend the Right to Adopt to Single LGB Persons and to Same-Sex Couples If this is Available to Single Heterosexual Persons and to Unmarried Opposite-Sex Couples

The same, cautious, approach, has been adopted by the Court in the context of parenting rights. In *E.B. v. France*,⁴² the ECtHR made it clear that Article 8 ECHR read in conjunction with Article 14 ECHR requires that if a signatory state grants the right to adopt to single persons, LGB single persons should also enjoy this right and, thus, should not be refused the right to adopt simply on the basis of their sexual orientation. Similarly, in *X and Others v. Austria*,⁴³ the Court held that the same provisions require that the (unmarried) same-sex partner of a woman is granted the right to apply for step-parent adoption of the latter’s child, if such a right is granted to the (unmarried) opposite-sex partner of a heterosexual person. Nonetheless, in *Gas and Dubois v.*

France,⁴⁴ it was held that if a signatory state makes available step-parent adoption *only* to married couples (and in that signatory state only opposite-sex couples can marry), then it is not obliged by the ECHR to make step-parent adoption available to same-sex couples, in this way allowing signatory states to maintain the distinction between married couples and unmarried couples – by maintaining a preferential status for married couples – and to discriminate against same-sex couples in the context of parenting.

2.1.5 Positive Obligation to Extend Family Reunification Rights to Same-Sex Couples

In *Pajic v. Croatia*,⁴⁵ the ECtHR held that Article 8 ECHR, read in conjunction with Article 14 ECHR, requires signatory states that grant family reunification rights to unmarried, opposite-sex couples to extend these in the same way to unmarried same-sex couples.

Moreover – and going one step further – in *Taddeucci and McCall v. Italy*,⁴⁶ the Court departed from its usual approach of maintaining a separate – preferential – status for married couples, which justifies better treatment being reserved for them and which (in States which have not introduced same-sex marriage) justifies discrimination against same-sex couples who are *legally* incapable of contracting a marriage. In this case, Italy did not grant a residence permit on family reunification grounds to *unmarried partners* (whether they were in an opposite-sex or same-sex relationship). The Court held that this amounted to a violation of Article 14 ECHR, read together with Article 8 ECHR, in cases involving unmarried *same-sex* couples, as the latter were not similarly situated with unmarried opposite-sex couples, in that same-sex couples did not have the option of marrying or, at the relevant time, of obtaining any other form of legal recognition of their situation in Italy. Accordingly, the Court found that same-sex unmarried couples should not be treated in the same way as opposite-sex unmarried couples, as Italy should have taken into account – when defining ‘family members’ for the purposes of family reunification – that same-sex couples could under no circumstances formalise their relationship in its territory. Hence, signatory states that have not introduced same-sex marriage in their territory have the positive obligation to extend the same family reunification rights they grant to married couples to unmarried same-sex couples.

The different outcome in *Taddeucci and McCall v. Italy*, on the one hand, and *Gas and Dubois v. France* (seen in the previous sub-section), on the other, can be attributed to the difference in ‘sensitivity’ of the matters that were involved: *Gas and Dubois* involved the parenting rights of same-sex couples, which is a very controversial area,⁴⁷ whereas *Taddeucci and McCall* involved the family reunification rights of a same-sex couple: the latter,

38. *Schalk and Kopf v. Austria*, above n. 37, para. 58.

39. *Ibid.*, para. 62.

40. *Ibid.*, para. 101.

41. H. Fenwick and A. Hayward, ‘Rejecting Asymmetry of Access to Formal Relationship Statuses for Same and Different-Sex Couples at Strasbourg and Domestically’, 6 *European Human Rights Law Review* 544, at 552 (2017). As the ECtHR noted in *Schalk and Kopf v. Austria*, above n. 36, para. 108, ‘the applicants appear to argue that if a State chooses to provide same-sex couples with an alternative means of recognition, it is obliged to confer a status on them which – though carrying a different name – corresponds to marriage in each and every respect. The Court is not convinced by that argument. It considers on the contrary that States enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition’.

42. *E.B. v. France*, no. 43546/02, 22 January 2008.

43. *X and Others v. Austria*, no. 19010/07, 19 February 2013.

44. *Gas and Dubois v. France*, no. 25951/07, 15 March 2012.

45. *Pajic v. Croatia*, no. 68453/13, 23 February 2016.

46. *Taddeucci and McCall v. Italy*, no. 51362/09, 30 June 2016.

47. Dunne (2017), above n. 32, at 31 (and the references in footnote 13 of that article).

though, indeed, a rather sensitive area that touches on national immigration policies, is nowhere near as controversial as the parenting rights of same-sex couples or the requirement to introduce same-sex marriage. Accordingly, in this area the Court feels confident to proceed and impose positive obligations, namely, to extend family reunification rights to same-sex couples, without waiting, first, for hearts and minds to change.

2.2 Positive Obligations Towards Sexual Minorities Under EU Law: The Current Position

As explained earlier, the ECHR is a regional human rights Treaty that aims to impose human rights obligations on its signatory states that are given effect by the rulings of the ECtHR. The EU, on the other hand, comprises a more complex framework: not only does it impose obligations on its Member States in a number of different areas, but its Member States have limited their sovereign rights in specific fields and have given competence to the EU to take (legislative or other) action in those fields. Accordingly, unlike the ECHR, which only imposes obligations *on its signatory states*, the obligations arising from EU law are imposed at two different levels: the EU level (on the EU itself and, in particular, on its institutions) and the national level (on the EU Member States).

In the last couple of decades, the EU has taken some steps towards the protection of the rights of sexual minorities, although these have mostly been aimed at eradicating discrimination based on sexual orientation rather than imposing specific, positive obligations on the EU institutions or the Member States.⁴⁸

At the EU level, the EU Staff Regulations impose on EU institutions the negative obligation not to discriminate against their employees on the basis of their sexual orientation.⁴⁹ In addition, the EU Charter of Fundamental Rights (EUCFR),⁵⁰ which, according to its Article 51, is ‘addressed to the institutions, bodies, offices and agencies of the Union’, prohibits ‘any discrimination’ based on a number of grounds, which include sexual orientation,⁵¹ in this way imposing a general negative obligation on the EU institutions not to discriminate on the grounds of sexual orientation when exercising their powers. The aim of combating discrimination on the grounds of sexual orientation is, however, also, embodied in the positive obligation imposed on the EU institutions by Article 10 of the Treaty on the Functioning of the European Union (TFEU), which is a main-

streaming provision (and, as such, unenforceable before a court) that requires that

[i]n defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief disability, age or sexual orientation.

Despite the fact that this positive obligation is an important reminder that – at least on paper – discrimination against sexual minorities cannot be tolerated in the context of any of the EU’s policies, in reality, there has been no examination of whether the EU, indeed, takes this seriously when it engages in policy-making or other activities.

As regards the national level, EU law imposes some more concrete legal obligations towards sexual minorities on its Member States. Given that the EUCFR binds, also, Member States ‘when they are implementing Union law’,⁵² the negative obligation not to discriminate on the grounds of sexual orientation laid down in Article 21 EUCFR is, also, imposed on Member States in situations that fall within the scope of EU law.⁵³

And although the constituent EU Treaties do not impose any explicit positive obligations on EU Member States towards sexual minorities, a number of such obligations have been imposed by secondary EU legislation. The first instrument that was introduced for this purpose is Directive 2000/78,⁵⁴ which requires EU Member States to prohibit within their legal system discrimination on a number of grounds, including discrimination based on sexual orientation. The Directive has a limited material scope – it requires Member States to prohibit discrimination on the relevant grounds only in the area of employment and occupation – which is why there have been calls for the promulgation of another Directive that would prohibit discrimination on the same grounds but outside the context of employment.⁵⁵ The 2000 Directive imposes a positive obligation as its aim is to require Member States to protect individuals – as employees – from being discriminated against on a number of grounds (including sexual orientation) by their employer. The Directive does not, merely, require Member States to introduce legislation that prohibits discrimination on the above grounds in the area of

48. A. Tryfonidou, ‘Law and Sexual Minority Rights: Navigating a Political Minefield’, in P.J. Cardwell and M.-P. Granger (eds.), *Research Handbook on the Politics of EU Law* (Edward Elgar, 2020).

49. See Arts. 1d and 26 of Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community [1962] OJ P45/1385 (as amended), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01962R0031-20140501> (last visited 7 January 2020). See, also, F-86/09 W v. *European Commission* ECLI:EU:F:2010:125.

50. Charter of Fundamental Rights of the European Union, [2012] OJ C326/391.

51. Art. 21 EUCFR.

52. Art. 51 EUCFR.

53. For a case involving this, see *Léger*, above n. 4.

54. Directive 2000/78, OJ 2000 L 180/22. For an analysis of the prohibition of discrimination on the grounds of sexual orientation under the Directive, see A. Tryfonidou, ‘The Impact of the Framework Equality Directive on the Protection of LGB Persons and Same-Sex Couples from Discrimination under EU Law’, in U. Belavusau and K. Henrard (eds.), *EU Anti-Discrimination Law Beyond Gender* (Hart, 2018).

55. Commission, ‘Proposal for a Council Directive Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation’, (2008) COM 426 final (currently in legal limbo as the required unanimity in Council has failed to be achieved). This was accompanied by a Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions ‘Non-Discrimination and Equal Opportunities: A Renewed Commitment’, (2008) COM 420.

employment and occupation, but also to prohibit harassment that is based on the above grounds, as well as to ensure that judicial and/or administrative procedures for the enforcement of obligations under the Directive are available to all persons whose rights under this instrument have been violated.⁵⁶ The Directive – and, in particular, the requirement to prohibit discrimination on the grounds of sexual orientation – has been interpreted by the Court of Justice in a number of cases. However, through these rulings the Court has merely offered a clarification as to how the prohibition of discrimination on the grounds of sexual orientation should be interpreted⁵⁷ or regarding the temporal scope of application of the Directive,⁵⁸ without imposing any additional positive obligations on EU Member States.

Directive 2000/78 is the only EU legal instrument that *expressly* imposes a positive obligation on Member States aiming to protect the rights of sexual minorities. Nonetheless, this has not prevented the CJEU from deriving from other legal instruments, which are not specifically concerned with the rights of sexual minorities, positive obligations in order to guarantee the protection of the rights of the latter. In the remainder of this section, two such instruments will be considered: Directive 2004/38 and Directive 2011/95.

Directive 2004/38⁵⁹ elaborates the rights to free movement and residence that Union citizens and – through them – their family members enjoy under EU law. This instrument is not concerned, specifically, with the rights of sexual minorities, though its recital 31 provides that Member States should implement this Directive without discrimination between its beneficiaries on, *inter alia*, grounds of sexual orientation. Obviously, the rights laid down in the EU free movement of persons provisions in the TFEU and in this Directive are enjoyed by all Union citizens, irrespective of sexual orientation; thus LGB Union citizens should enjoy the rights to move and reside freely in the Member State of their choice in the same way that heterosexual Union citizens do.

Recognising the importance of family life and the need to ensure that Union citizens can continue the family life they established in one Member State after their movement to another Member State, the 2004 Directive grants so-called ‘family reunification rights’ to Union citizens: it provides that Union citizens who move to a Member State other than that of their nationality can be joined or accompanied in that Member State by their close family members (irrespective of the family member’s nationality). According to Article 2(2) of the Directive, one of the categories of family members in respect of whom the Union citizen can claim family

reunification rights is the spouse of the Union citizen. The CJEU was recently confronted with the question of whether the term ‘spouse’, for the purposes of the Directive, should be read as including the *same-sex* spouse of a Union citizen who exercises free movement rights. In *Coman*,⁶⁰ the Court answered this question affirmatively, in this way imposing a positive obligation on EU Member States to recognise the same-sex marriages of Union citizens *for the purpose of the grant of family reunification rights when they exercise their free movement rights under EU law*. As explained elsewhere,⁶¹ the ruling does not impose a general positive obligation on EU Member States to introduce same-sex marriage in their territory, nor does it even impose an obligation to recognise the same-sex marriages that Union citizens who move to their territory contracted elsewhere, *for all legal purposes*: it simply imposes on EU Member States the positive obligation to accept within their territory the same-sex spouse of a Union citizen, and the Court’s rationale for doing this is a purely functional one, seeking to ensure that (LGB) Union citizens will not be deterred from exercising their free movement rights, rather than a genuine wish to protect the rights of sexual minorities.

The second EU legislative instrument that imposes positive obligations on EU Member States, which in certain cases can (positively) affect the position of LGB persons, is Directive 2011/95.⁶² As a result of the powers granted to the EU by the Treaty of Amsterdam in 1999 in the areas of asylum and immigration,⁶³ the EU drafted legislation laying down minimum standards with which EU Member States must comply when determining whether a third-country national or a stateless person is a refugee. The first such instrument was Directive 2004/83,⁶⁴ which has been repealed and replaced by the currently applicable legislation, Directive 2011/95.⁶⁵ The latter instrument, like its predecessor, imposes a set of positive obligations on Member States with regard to asylum seekers. Most important for our purposes is Article 10 of the 2011 Directive, which provides that persons who seek asylum on the ground that they cannot return to their country of origin because they are in danger of being persecuted as a result of their sexual orientation can qualify as ‘members of a particular social group’ and, thus, as refugees, for the purposes of the Directive. Accordingly, EU Member States are under a positive obligation to provide asylum to LGB persons who satisfy the requirements laid down in the above instrument.⁶⁶

56. Art. 9 of Directive 2000/78, above n. 54.

57. See, for instance, Case C-267/06 *Maruko* EU:2008:179; Case C-147/08 *Römer* EU:C:2011:286; Case C-267/12 *Hay* ECLI:EU:C:2013:823; Case C-81/12 *Asociația Accept* EU:C:2013:275; Case C-507/18 *NH v. Associazione Avvocatura per i diritti LGBTI – Rete Lenford* EU:C:2020:289.

58. Case C-258/17 *E.B.* ECLI:EU:C:2019:17.

59. Directive 2004/38, OJ 2004 L 158/77.

60. Case C-673/16, *Coman* EU:C:2018:385.

61. A. Tryfonidou, ‘The ECJ Recognises the Right of Same-Sex Spouses to Move Freely between EU Member States: The *Coman* Ruling’, 44 *European Law Review* 662 (2019).

62. Directive 2011/95/EU, OJ 2011 L 337/9.

63. These are now found in Title V, Chapter 2 TFEU.

64. Council Directive 2004/83, OJ 2004 L 304/12 (repealed).

65. Above n. 62.

66. The CJEU has been given the opportunity to analyse these requirements in three cases that were referred to it for a preliminary ruling: Joined Cases C-199-201/12 *X, Y and Z* ECLI:EU:C:2013:720; C-148-150/13 *A, B and C* EU:C:2014:2406; C-473/16 *F* EU:C:2018:36. Owing to the

3 Should European Law Impose On European States Additional Positive Obligations Towards Sexual Minorities?

Although, as seen in the previous section, the EU and the ECtHR have imposed certain positive obligations towards sexual minorities, and although these are a good starting point on the road to substantive equality for sexual minorities, there is clearly scope for additional such obligations. This section will have a twofold aim: to consider the reasons behind the EU's and the ECtHR's reticence in imposing additional positive obligations towards sexual minorities and to suggest which such additional obligations should be imposed by European law.

3.1 Should the ECHR Impose on Signatory States More Positive Obligations Towards Sexual Minorities?

The ECHR and, in particular, the ECtHR as the interpreter of the former, have often been castigated for not doing enough for protecting LGB rights. However, when assessing the impact of the ECHR on the protection of LGB rights, it is important to remember the setting in which it is operating, which can, clearly, explain the ECtHR's reticence in many instances to impose additional obligations – especially *positive* obligations that can be perceived as more interventionist, as they require the signatory states to take positive measures to protect LGB persons or to introduce a legal framework that secures the extension of specific rights to sexual minorities.

Accordingly, in this first part of the sub-section, the possible reasons behind the imposition of only limited positive obligations towards sexual minorities by the ECtHR will be explored.

The first such reason is that the rights of sexual minorities constitute a sensitive and controversial area, which is closely intertwined with issues relating to religion, tradition, culture and morality. There is a clear divide in Europe with regard to matters touching on sexual minority rights, with some states being much more reluctant to recognise (m)any rights for LGB persons, often invoking the need to protect the family in the traditional sense and the traditional values and identity of the country. Accordingly, the ECtHR needs to be careful when selecting the steps it will take on the road that will lead to substantive equality for sexual minorities, in that those steps should be such as not to be greeted with hostility and resistance by the more 'backward' signatory States that are, often, reluctant to even accept that

the rights of sexual minorities are human rights, while ensuring that it gradually adds to the obligations that signatory states have towards sexual minorities. Therefore, the ECtHR seems to be choosing its battles by imposing obligations only when it feels that signatory states will be ready to accept them, in this way avoiding a direct conflict with some signatory states while ensuring that it will preserve its legitimacy as an authoritative Court whose judgments are not disregarded.⁶⁷

Secondly, it should be remembered that the ECtHR is a court of law and thus which obligations it imposes very much depend on what applications it receives and thus it is something that is done on an ad hoc and reactive manner rather than as part of an organised strategy on its part.⁶⁸ Accordingly, certain positive obligations may not have been imposed by the ECtHR simply because it has not yet had the chance to do so.

Finally, the ECtHR's approach is that when a matter falls within the 'social strategy' of signatory states, the latter maintain a wide margin of appreciation with regard to them.⁶⁹ Thus, because the issues concerning sexual minorities are considered to be such a matter, the ECtHR allows leeway to signatory states to exempt themselves from them.⁷⁰ Nonetheless, quite interestingly, in its judgments the ECtHR has also recognised that particularly weighty reasons must be relied on for justifying discrimination on the grounds of sexual orientation,⁷¹ in this way making it uncertain how this can be reconciled with the wide margin of appreciation left to the signatory states in such instances.⁷² Fenwick and Fenwick have, in fact, sought to provide a logical explanation behind this inconsistency in the Court's approach: they explain that it all boils down to the question of whether the Court perceives there to be a consensus among the signatory states with regard to an issue: if so (e.g. in situations involving hate speech) then a narrow margin of appreciation is left to signatory states, and, thus, it is very difficult to justify a difference in treatment that disadvantages sexual minorities, whereas if the Court feels there is no consensus among the signatory states (e.g. same-sex marriage), then it leaves a wide margin of appreciation.⁷³ Accordingly, and

67. See, *inter alia*, Fenwick and Fenwick, above n. 34; Fenwick, above n. 34, at 249; K. Henrard, 'How the ECtHR's Use of European Consensus Considerations Allows Legitimacy Concerns to Delimit its Mandate', in P. Kapotas and V. P. Tzevelekos (eds.), *Building Consensus on European Consensus* (CUP, 2019), at 159.

68. Of course, many of the cases that reach the Court are part of strategic litigation by LGBT+ advocacy groups such as ILGA Europe, Stonewall, and NELFA, which is designed to elicit a Court ruling on a particular issue.

69. *Gas and Dubois v. France*, above n. 44, para. 60.

70. Johnson, above n. 17, at 136. For a defence of the margin of appreciation doctrine, see J.A. Sweeney, 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era', 54 *International and Comparative Law Quarterly* 459 (2005).

71. *Gas and Dubois v. France*, above n. 44, para. 59.

72. For an analysis of the uncertainty that arises as a result of the relationship between consensus-based analysis and the margin of appreciation doctrine, see Fenwick, above n. 34, at 251-52.

73. Fenwick and Fenwick, above n. 34. For a similar argument with regard to the freedom of religion, see K. Henrard, 'How the European Court of Human Rights' Concern Regarding European Consensus Tempers the

technical – and specific – nature of these rulings, their analysis will not add anything to the argument made in this article and, thus, they will not be analysed here.

as seen in the previous section, the Court seems to have chosen to first impose on signatory states obligations towards sexual minorities in areas that are less controversial and in which a certain level of consensus has been reached, leaving the more ‘difficult’ issues to be tackled – if at all – at a later time.

Having considered the reasons that seem to be lying behind the ECtHR’s perceived reticence to impose more positive obligations on signatory states in this context, the next question will be which additional positive obligations towards sexual minorities should be considered as deriving from the ECHR?

The first obligation that the ECtHR should impose is to extend the right to marry to same-sex couples. As we saw in the previous section, at the moment, the ECtHR merely requires (as a result of *Oliari*⁷⁴) signatory states to allow same-sex couples to formalise their relationship (without it being required to allow same-sex marriage), and this is only when their social and legal setting requires this. From the obligation to introduce same-sex marriage it would, also, follow that when a same-sex couple has contracted a marriage in another country, this should be recognised *as a marriage* in all signatory states (in this way building on *Orlandi*⁷⁵), in situations where this is the case for opposite-sex couples: in other words, signatory States will only be able to refuse to recognise same-sex marriages contracted abroad on the same bases as they do for opposite-sex married couples *and irrespective of whether the marriage is between members of the same or opposite sex*.

The fact that same-sex couples would have the option of contracting a marriage would, automatically, also mean that they would enjoy the same rights and benefits that opposite-sex (married) couples enjoy. In other words, the current division (which exists in some European States) between married couples and everyone else would no longer legitimately result in the automatic exclusion of same-sex couples from rights and benefits reserved for married couples, as same-sex couples would, now, be able to join the ‘club’ of married couples. For the foregoing developments, the Court would have to depart from its ruling in *Schalk and Kopf v. Austria*, where, as we saw, it held that currently there is no consensus among a sufficient number of signatory states on holding that there is a positive obligation under the ECHR to open marriage to same-sex couples.⁷⁶

But what would be the rationale behind the introduction of the above obligations? If the ECtHR indeed recognises (as it does, given that it prohibits discrimination on the grounds of sexual orientation) that all persons – irrespective of sexual orientation – are of equal moral worth, and that LGB persons, like everyone else, should be able to freely exercise their choices for a good life, then it cannot be accepted that one of the fundamental human rights laid down in the ECHR – namely, the

right to marry – can be refused to them simply because of their sexual orientation. Same-sex couples should not be subjected to the indignity of denial of public affirmation of their relationship and, more practically, to the denial of civil benefits that are otherwise available to couples that have *chosen* to formalise their relationship. Denial of access to a formalised relationship status on grounds of sexual orientation ‘can also strongly reinforce a general cultural acceptance of homophobia, and furthers the notion that homophobia should be accorded legal recognition’.⁷⁷ The right to human dignity has, in fact, been the basis for the extension, in other legal systems, of the right to marry to LGB persons and can, also, be used in the ECHR context for arguing that a positive obligation should be imposed on signatory states, not, merely, to enable same-sex couples to formalise their relationship but, more broadly, to marry.⁷⁸ As explained by the Inter-American Court of Human Rights in its Advisory Opinion OC-24/17:

there would be no point in creating an institution that produces equal effects and gives rise to the same rights as marriage, but is not called marriage, except to draw attention to same-sex couples by the use of a label that indicates a stigmatising difference or that, at the very least, belittles them. On that basis, marriage would be reserved for those who, according to the stereotype of heteronormativity, were considered “normal”, while another institution with identical effects but under a different name would exist for those who do not fit this stereotype.⁷⁹

Accordingly, Article 12 ECHR should be read as granting the right to marry also to same-sex couples. Waiting for hearts, minds and the majority of national laws to change, before such an obligation is imposed, demonstrates that the ECtHR is not taking LGB equality seriously.

The same can be argued for the parenting rights of same-sex couples. As already seen in the previous section, another gap in the positive obligations imposed by the ECHR is in relation to parenting rights. At the moment, the ECtHR has made it clear that the ECHR does not impose specific positive obligations as to who can ‘found a family’ and under what circumstances. Accordingly, the signatory states can create their own framework determining who can become a de facto parent and who can be legally recognised as a parent, while the ECHR has not been read, for instance, as

77. Fenwick and Fenwick, above n. 34, at 261.

78. P.J. Laverack, ‘The Indignity of Exclusion: LGBT Rights, Human Dignity and the Living Tree of Human Rights’, 2 *European Human Rights Law Review* 172 (2019).

79. Inter-American Court of Human Rights Advisory Opinion OC-24/17, 24 November 2017. Series A No. 24. Non-Official Brief, www.corteidh.or.cr/cf/Jurisprudencia2/overview.cfm?doc=1884&lang=en (last visited 17 February 2020). See, also, the US Supreme Court’s judgment in *Obergefell v. Hodges*, 576 US (2015); and the Constitutional Court of South Africa judgment in *Minister of Home Affairs v. Fourie, Lesbian and Gay Equality Project v. Minister of Home Affairs* (2005) ZACC 19, www.saflii.org.za/za/cases/ZACC/2005/19.html (last visited 18 February 2020).

Effective Protection of Freedom of Religion’, 4 *Oxford Journal of Law and Religion* 398 (2015), at 415.

74. *Oliari and Others v. Italy*, above n. 31.

75. *Orlandi and Others v. Italy*, above n. 11.

76. *Schalk and Kopf v. Austria*, above n. 37, para. 58.

imposing an obligation on signatory states to enable same-sex couples to become the de facto joint parents of a child *and* to be legally recognised as such. However,

a State which creates a right going beyond its obligations under Article 8 of the Convention may not apply that right in a manner which is discriminatory within the meaning of Article 14,⁸⁰

which is the reason that in its case law the Court has found, for instance, that if single persons are allowed to adopt, then refusing to allow a single person to adopt simply on the grounds of his sexual orientation is not allowed.⁸¹ This rationale should be extended to situations where a signatory state that allows same-sex couples to enter into a registered partnership that is, also, available to opposite-sex couples, refuses the right to jointly parent a child to the former but not to the latter.⁸² In such instances, the ECtHR should hold that there is discrimination on the grounds of sexual orientation as regards the right to found a family that is contrary to Article 8 ECHR read in conjunction with Article 14 ECHR.

On the other hand, as seen earlier, the Court continues to allow the signatory states to draw a distinction as to who can create a family and be recognised as a parent, which is based on marriage: if the choice of a signatory state is to allow only married couples to become parents and to be legally recognised as the joint parents of their child, and in that State same-sex couples cannot marry, this means that same-sex couples are automatically excluded from being legally recognised as the joint parents of their children. Accordingly, as it held in the case of *Tadeucci and McCall v. Italy*,⁸³ the Court in this context should, also, find that a difference in treatment based on marriage in a signatory state that does not allow same-sex couples to marry amounts to discrimination on the grounds of sexual orientation. The ECtHR should, therefore, impose a positive obligation on signatory states that do not provide for same-sex marriage and do not allow unmarried couples to become the joint (legal) parents of a child, to nonetheless allow unmarried same-sex couples to become the joint (legal) parents of a child as, otherwise, they will be discriminated against on the grounds of their sexual orientation. The argument, in particular, is that in such cases unmarried same-sex couples are treated in the same way as unmarried opposite-sex couples, even though these two categories of couples are differently situated in that the latter can formalise their relationship by getting married, whereas the former do not have this option.⁸⁴

As the Court noted in *Tadeucci and McCall*, ‘in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach’ of Article 14 ECHR.⁸⁵ Accordingly, when these differently situated categories of couples are treated in the same way, this should be found to amount to discrimination on the grounds of sexual orientation, and, hence, in practice, what is required is that if the signatory state reserves parenting rights for married couples and does not allow same-sex couples to marry, it should make an exception and allow unmarried *same-sex* couples to become the joint parents of a child.⁸⁶

Finally, at the moment, homophobic treatment does not appear in itself to amount to a breach of any of the rights protected under the ECHR. However, as Johnson has suggested, it should be considered to amount to degrading treatment under Article 3 ECHR, and, thus, negative and positive obligations to this effect should be imposed.⁸⁷ After all, discrimination based on race has been classified as degrading treatment contrary to Article 3 ECHR,⁸⁸ and, thus, there is no reason why this should not also be the case for discrimination based on sexual orientation. Moreover, the Court has, already, derived negative (*X v. Turkey*)⁸⁹ and positive (*Identoba v. Georgia*)⁹⁰ and *M.C. and A.C. v. Romania*)⁹¹ obligations from Article 3 ECHR, in cases involving LGB persons.

As noted by Johnson and Falcetta,

art. 3 provides the means to develop Convention jurisprudence in ways that more holistically and comprehensively address sexual orientation discrimination in contemporary societies. ... Article 3 can, for example, be used as a framework for conceptualising how certain forms of discrimination on the grounds of sexual orientation diminishes the social status of sexual minorities, as both individuals and as a group, in ways that might incubate forms of ill-treatment against them.⁹²

Accordingly, the ECtHR should read Article 3 ECHR as imposing on signatory states the positive obligation to protect LGB persons from homophobic treatment effected by other individuals. In this way it will send a strong

80. *X and Others v. Austria*, above n. 43, para. 135.

81. See *E.B. v. France*, above n. 42.

82. This is, for instance, the position in Cyprus – see Civil Partnership Law 184(I)/2015 (Ο περί Πολιτικής Συμβίωσης Νόμος του 2015) – see A. Tryfonidou, ‘The Legal Position of LGBT Persons and Same-Sex Couples in Cyprus’, 29 *The Cyprus Review* 183, at 208 (2018).

83. *Tadeucci and McCall v. Italy*, no. 51362/09, 30 June 2016, esp. paras. 82–86 and 94–95.

84. In *Thlimmenos v. Greece*, no. 34369/97, 6 April 2000, para. 44, the ECtHR held that discrimination in the ECHR context should be read as

encompassing both differential treatment of categories of persons similarly situated and the same treatment of categories of persons differently situated.

85. *Tadeucci and McCall*, above n. 83, para. 81.

86. To be pragmatic, it is, of course, recognised that given how controversial the parenting rights of same-sex couples are – which are, even, more controversial than the right of same-sex couples to marry – it is very unlikely that the ECtHR would any time soon impose such an obligation on signatory states.

87. Johnson, above n. 17, at 209. For a detailed analysis of this argument see P. Johnson and S. Falcetta, ‘Sexual Orientation Discrimination and Article 3 of the European Convention on Human Rights: Developing the Protection of Sexual Minorities’, 43 *European Law Review* 167 (2018).

88. *Moldovan and Others v. Romania* (No. 2), nos. 41138/98 and 64320/01, 12 July 2005.

89. *X v. Turkey*, no. 24626/09, 9 October 2012.

90. *Identoba and Others v. Georgia*, above n. 19.

91. *M.C. and A.C. v. Romania*, above n. 20.

92. Johnson and Falcetta, above n. 87, at 168.

signal to everyone that homophobia cannot be tolerated under any circumstances. Such a move would, then, be expected to, initially, diminish the general feeling in certain societies that homophobia is acceptable or even – as part of machismo culture – a necessary trait that must be demonstrated by ‘real men’; and perhaps it might eventually lead to a change in hearts and minds.

3.2 Should the EU Impose on Signatory States More Positive Obligations Towards Sexual Minorities?

As argued elsewhere,⁹³ there are a number of reasons why the EU institutions have been somewhat reticent in their approach towards protecting the rights of sexual minorities under EU law. Some of these reasons are very similar to those that have prevented the ECtHR from adopting a more coherent and expansive policy towards the protection of the rights of sexual minorities. Hence, like the ECtHR, the EU institutions are also choosing their battles by imposing obligations towards sexual minorities only when they feel that EU Member States will be ready to implement them.

A more pragmatic reason, nonetheless, why the EU institutions have not imposed – and are unlikely to impose – a long list of positive obligations towards sexual minorities on EU Member States is, simply, that the EU does not have the competence to act in the relevant areas. After all, unlike the ECHR, which is a human rights Treaty, the EU started off as mainly an economic organisation, and any human rights protection offered by it has been incidental to the achievement of its (mainly) economic objectives. The EU, therefore, does not have competence in the area of human rights, and thus the EU legislature cannot make legislation that simply aims to protect human rights. Nor can the EU take any action that aims to protect human rights if this is not in some way connected to its areas of competence or, at least, to situations that fall within the scope of EU law.⁹⁴ Hence, the rights of sexual minorities under EU law are protected only when this is deemed necessary in order to ensure that the rights granted by it (such as free movement rights) are not violated or when this is deemed necessary for achieving the EU’s objectives. There is no doubt that the EU does not have the competence to impose a positive obligation on its Member States to open marriage or, even, registered partnerships to same-sex couples in their territory. This is not only a human rights issue with respect to which the EU does not have competence, but also an issue that falls within the area of family law, which, likewise, is an area that falls within exclusive Member State competence. Nonetheless, if the EU Member States’ failure to allow or, even, recognise same-sex marriages and registered part-

nerships interferes with the enjoyment of rights deriving from EU law, then EU law *can* intervene by imposing specific positive obligations on the Member States. The clearest example of this is the *Coman* case seen in the previous section,⁹⁵ where, in order to remove obstacles to free movement, the CJEU held that EU Member States are obliged to recognise same-sex marriages contracted in other EU Member States in situations that involve the exercise of EU free movement rights. However, in this case the CJEU – taking into account the sensitive nature of this matter and the possible negative reaction of some Member States to a ruling that would impose broader obligations – was careful to limit the effect of its judgment by noting that EU Member States are only required to recognise same-sex marriages *contracted in an EU Member State*, that they are required to recognise such marriages *only for the purpose of determining the existence of family reunification rights* deriving from EU law, and only in situations where an EU citizen moves with his/her same-sex spouse to that Member State *with the aim of settling there*. It is clear, nonetheless, that – even if such a purely functional (free movement-based) approach is taken – the obligation to recognise same-sex marriages contracted elsewhere should be imposed in a broader range of circumstances (in cases where the marriage was contracted outside the EU; in cases involving temporary, short-term, movements between EU Member States; and for a wider range of legal purposes (i.e. not just for family reunification purposes)). The same (free movement) rationale can be used to require *in all instances*⁹⁶ the cross-border legal recognition of same-sex relationships and, as argued elsewhere,⁹⁷ more broadly, the cross-border legal recognition of the familial ties among the members of rainbow families.

Finally, in situations falling within the scope of EU law, the same, broad, approach to discrimination on the grounds of sexual orientation should be adopted, as has been followed towards discrimination on the grounds of nationality in the context of free movement and Union citizenship. In *Garcia Avello*,⁹⁸ the CJEU noted that in situations where Union citizens who are nationals of two EU Member States and Union citizens who hold the nationality of only one EU Member State are not similarly situated for a specific purpose, the two categories of Union citizens must not be treated in the same way: if they are, this amounts to discrimination on the grounds of nationality and is contrary to EU law and, in particular, Article 20 TFEU (which provides that Union citizens shall enjoy the rights provided for in the EU Treaties) read in conjunction with Article 18 TFEU (which

93. Above n. 48.

94. These reasons have been cited by Wintemute as possible reasons behind the CJEU’s less ‘brave’ approach in cases involving LGBT persons – see R. Wintemute, ‘In Extending Human Rights, Which European Court is Substantively “Braver” and Procedurally “Fitter”? The Example of Sexual Orientation and Gender Identity Discrimination’, in S. Morano-Foadi and L. Vickers (eds.), *Fundamental Rights in the EU: A Matter for Two Courts* (Hart, 2015), at 192-94.

95. Above n. 60.

96. At the moment, Directive 2004/38 only imposes an obligation on the host Member State to recognise registered partnerships (whether same-sex or opposite-sex) if in its legislation it recognises them as equivalent to marriage – see Art. 2(2)(b) of Directive 2004/38.

97. A. Tryfonidou, ‘EU Free Movement Law and the Children of Rainbow Families: Children of a Lesser God?’, 38 *Yearbook of European Law* 220 (2019).

98. Case C-148/02, *Garcia Avello* EU:C:2003:539.

prohibits discrimination on the grounds of nationality in situations falling within the scope of application of the Treaties). In other words, the principle of non-discrimination requires – classically – that similar situations be treated in the same way but, also, that different situations must be treated differently.

Nonetheless, when the CJEU was presented with the opportunity to follow this approach in a case involving sexual orientation discrimination, it failed to do so. In *Parris*,⁹⁹ at issue was the compatibility with Directive 2000/78¹⁰⁰ of the requirement of an Irish pension scheme that in order for a member of that scheme to be able to designate his (same-sex or opposite-sex) spouse or registered partner as the person entitled to receive a survivor's pension in the event of the member's death, their marriage or registered partnership should have been concluded before the latter turned 60. Ireland has allowed same-sex couples to enter into a registered partnership only from 1 January 2011, and same-sex registered partnerships contracted abroad can only be recognised from that date; same-sex marriage was introduced in Ireland in 2015, though the facts of the case arose before that date. The contested pension scheme requirement was, indeed, a universal condition that was applicable to both opposite-sex and same-sex couples. However, the legal disability for LGB persons in Ireland to enter into a same-sex registered partnership until 2011, combined with the universal age condition for designating someone's registered partner or spouse as the person entitled to a survivor's pension, meant that a specific group of LGB persons (i.e. those born before 1951) would be disadvantaged by being unable under any circumstances to provide for their same-sex registered partners in case they pre-deceased them. Same-sex couples were under a legal disability as they could not formalise their relationship in Ireland until a specific date; hence, this placed them in a *different* position from their heterosexual peers who did not face a similar legal disability. By treating these two – differently situated – categories of persons in the same way, the contested requirement, therefore, led to discrimination against same-sex couples who suffered a disadvantage as a result of the fact that their legal disability was not taken into account when formulating the rules of the relevant pension scheme. In its ruling, nonetheless, the CJEU dismissed the claim, noting that EU Member States are

free to provide or not to provide for marriage for persons of the same sex, or an alternative form of legal recognition of their relationship, and, if they do so provide, to lay down the date from which such a marriage or alternative form is to have effect.¹⁰¹

Hence, the Court chose to avoid dealing with the matter, allowing the perpetuation of discrimination on the grounds of sexual orientation caused by a pension scheme that did not take into account the different posi-

tions between opposite-sex and same-sex couples, when regulating the financial consequences ensuing from the legal recognition of relationships.¹⁰²

Accordingly, if the CJEU is faced with a scenario in the future whereby LGB persons or same-sex couples are in a different situation from heterosexual persons or opposite-sex couples, it needs to take a pragmatic approach and look behind form in order to determine – first – whether for a specific legal purpose these two different categories are differently situated, and if they are, then it should treat them differently, taking into account the difference in their position. This will, particularly, be the case in situations where a benefit or entitlement is reserved for married couples and marriage is not open to same-sex couples in the Member State concerned.

4 Should European Law Wait for 'Hearts and Minds' to Change Before It Imposes More Positive Obligations?

This section will examine whether European law should wait for 'hearts and minds' to change before it imposes on States additional positive obligations towards sexual minorities or whether it should impose such obligations without waiting for this, *exactly* in order to contribute to changing 'hearts and minds'.

The EU and the ECHR already, *on paper*, recognise that persons who have a minority sexual orientation have the same moral value as heterosexuals. This is obvious from the fact that they both prohibit discrimination on the grounds of sexual orientation, and – as regards the EU – there is the requirement, seen earlier, laid down in Article 10 TFEU to combat discrimination based on sexual orientation 'in defining and implementing its policies and activities'.

However, in practice, the ECtHR and – at least for matters that fall within its competence – the EU do not conform to this. This is obvious from the fact that not all rights available to heterosexual persons and the traditional 'nuclear family' are available to LGB persons and rainbow families: in a number of areas, States are permitted to continue discriminating against sexual minorities. This is possibly because the ECtHR (and, perhaps, by extension the EU¹⁰³) have viewed homosexual/bisex-

99. Case C-443/15, *Parris* EU:C:2016:897.

100. Directive 2000/78, OJ 2000 L 180/22, above n. 54.

101. *Parris*, above n. 99, para. 59.

102. For a more detailed analysis of the case, see A. Tryfonidou, 'Another Failed Opportunity for the Effective Protection of the Rights of Same-Sex Couples Under EU Law: *Parris v Trinity College Dublin and Others*', 2(2) *Anti-Discrimination Law Review* 83 (2017).

103. Although the ECHR is *not* an EU instrument, it has, nonetheless, always had a significant impact on the development of EU fundamental human rights protection, being recognised as a source of 'guidelines' for the CJEU when determining which fundamental human rights form part of the general principles of EU law and how these must be interpreted (Case 4/73, *Nold* EU:C:1974:51). In addition, the ECHR plays a crucial role in the interpretation of the EUCFR, as Art. 52(3) EUCFR provides that

ual sexual orientation as an ‘essentially private manifestation of human personality’, which in turn has created severe limitations in the development of full rights for LGB persons: the latter enjoy the rights associated with the domestic sphere (e.g. to be able to have consensual sexual relationships with persons of the same sex *in private*) but are (still) deprived of the rights associated with social, public and institutional participation, such as the right to marry a person of the same sex and to be legally recognised – together with their same-sex partner/spouse – as the joint legal parents of their child(ren). However, as has been rightly noted by another commentator, ‘targeting on the ground of sexual orientation does not merely touch what is done in private; it taints the character of the LGBT person in the public sphere’,¹⁰⁴ as it sends out a message that LGBT persons can be discriminated against, which implies that sexual minorities are inferior, which is the root cause of homophobia. In addition, there is still considerable resistance among many people, organisations and governments to discussing the need for full enjoyment of human and other rights by LGB persons.

The main justification for not extending to LGB persons all the rights granted to their heterosexual peers is that there is no consensus among European states with regard to the enjoyment of those particular rights and, for this reason, the ECtHR and – where applicable – the EU cannot impose a positive obligation on signatory states with regard to these. This implies that the ECtHR and EU approach is that European law should wait for ‘hearts and minds’ – or, perhaps, more accurately, for the *national legislatures*’ ‘hearts and minds’ – to change before additional positive obligations are imposed.

Nonetheless, the foregoing is not a good enough reason for absolving the ECtHR and – where applicable – the EU institutions from the need to protect the rights of sexual minorities in European States where these are not yet sufficiently protected. In particular, stereotypical perceptions about sexual minorities and the relationships of same-sex couples should not be perpetuated by the EU and the ECtHR and, most importantly, should not form the basis for the refusal of rights to which – as human beings (ECHR) or Union citizens (EU) – they should be entitled. As noted by Fenwick and Fenwick,

reliance on consensus analysis as linked to the width or narrowness of the margin of appreciation conceded to a state has the capacity to allow popular opinion in a number of Member States to affect the protection offered to sexual minorities adversely.¹⁰⁵

In other words, by using consensus analysis, European law is allowing majoritarianism across European states

that deprives sexual minorities of certain of their most basic fundamental rights. However, the ECtHR and the EU institutions should not take part in the perpetuation of majoritarian oppression but should, in fact, lead the way in the fight against the oppression of LGB persons, by requiring changes in the (national) law that will demonstrate, exactly, that sexual minorities deserve the same respect – and are entitled to the same rights – as everyone else.

Reserving certain rights (such as the right to marry) only for heterosexual persons sends, exactly, the message that LGB persons are not worthy of the same treatment as is granted to their heterosexual peers, which implies that they constitute an inferior class of persons. Extending all rights to same-sex couples and LGB persons will send out a clear signal that discrimination against sexual minorities is not acceptable under any circumstances, which in turn will contribute to a diminution in the social acceptance of homophobia. After all, as the ECtHR noted in *Bayev*,

It is true that popular sentiment may play an important role in the Court’s assessment when it comes to the justification on the grounds of morals. However, there is an important difference between giving way to popular support in favour of extending the scope of the Convention guarantees and a situation where that support is relied on in order to narrow the scope of the substantive protection. The Court reiterates that it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were this so, a minority group’s rights to freedom of religion, expression and assembly would become merely theoretical rather than practical and effective as required by the Convention.¹⁰⁶

Accordingly, the EU institutions and the ECtHR should not wait for ‘hearts and minds’ to be changed before they can recognise the need for full enjoyment of human and other rights by LGB persons. Rather, they should impose additional positive obligations on States towards sexual minorities exactly in order to contribute to the fight for changing ‘hearts and minds’ with regard to this issue.¹⁰⁷ It is true that awareness-raising and other educational activities are important in order to change ‘hearts and minds’ and the perception of sexual minorities by the broader society.¹⁰⁸ Nonetheless, instead of waiting for societal (and national legal) approval of a certain minority before endorsing this approval at the European level, the EU institutions and the ECtHR

“[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”

104. Laverack, above n. 78, at 178.

105. Fenwick and Fenwick, above n. 34, at 270.

106. *Bayev and others v. Russia*, nos. 67667/09, 44092/12 and 56717/12, 20 June 2017, para. 70. *Alekseyev v. Russia*, nos. 4916/07, 25924/08 and 14599/09, 21 October 2010, para. 81.

107. For an article considering whether legal developments can change hearts and minds see A. Böcker, ‘Can Non-discrimination Law Change Hearts and Minds?’, *Erasmus Law Review* 3, (2020).

108. D. McGoldrick, ‘The Development and Status of Sexual Orientation Discrimination under International Human Rights Law’, 16 *Human Rights Law Review* 613, at 667 (2016).

should, exactly, require and push for such approval by demonstrating that discrimination against sexual minorities and other violations of their rights cannot be tolerated under any circumstances.¹⁰⁹

5 Conclusion

This article set out to explore the positive obligations towards sexual minorities that European law imposes on European states. It is clear that the law should respect and protect all sexualities and diverse intimate relationships without discrimination and that for this purpose it needs to ensure that not only can sexual minorities be free from state interference when expressing their sexuality in private but that they should be given the right to express their sexuality in public and to have their intimate relationships legally recognised. In addition, sexual minorities should be protected from the actions of other individuals when these violate their legal and fundamental human rights.

It has been seen that, to date, European law has imposed on European states a number of positive obligations towards sexual minorities. Nonetheless, it has been shown that there is definitely still scope for more, if the ECtHR and the EU institutions are serious in their commitment to respect and protect the rights of sexual minorities.

It is true that when it comes to sexual minorities and the respect and protection of their rights under the law, Europe is a divided continent. Moreover, societal attitudes towards sexual minorities differ among European States, and these tend to go hand in hand with the approach adopted by the law: the more homophobic the population is in a State, the fewer (if any) rights LGB persons enjoy under the law.

One of the main questions explored in this article was, exactly, whether the EU and the ECtHR, should strive to achieve diversity *within* European States, by *requiring* all European States to fully respect the rights of sexual minorities, irrespective of the views of their population and of their lawmakers. In other words, should, for instance, all European states be required by European law to introduce same-sex marriage, irrespective of whether the society (and the lawmakers) in some of them do not appear ready to accept this? Or should European law continue to respect the diversity *between* European States as regards the rights of sexual minorities and allow a wide margin of appreciation – at least as regards some, more controversial, issues such as same-sex marriage – in order to ensure that a change in the law is not forced upon the population and lawmakers of any European state, before it is felt that they are ready

for this?¹¹⁰ In other words, should European law impose changes in the law in order to change ‘hearts and minds’, or should it first wait for a change of (all) ‘hearts and minds’ in Europe in order to make it a European law requirement to extend to LGB persons the full gamut of rights that are currently enjoyed by their heterosexual peers?

The article has suggested that European law must protect vulnerable minorities who fail to receive protection for their rights domestically. In other words, European law should not wait for ‘hearts and minds’ to change before imposing additional obligations towards sexual minorities on European States, especially since this gives the impression that the EU and the ECtHR are condoning or disregarding persistent discrimination against sexual minorities.

109. For an argument that it is legitimate for the State to practise soft paternalism towards changing hearts and minds in order to prevent behaviour which is discriminatory on the basis of protected characteristics see Tourkochoiriti in this special edition.

110. This distinction between ‘diversity within’ States and ‘diversity between’ States has been borrowed from G.N. Toggenburg, ‘Diversity Before the European Court of Justice: The Case of Lesbian, Gay, Bisexual, and Transgender Rights’, in E. Prügl and M. Thiel (eds.), *Diversity in the European Union* (Palgrave Macmillan, 2009), at 136.

Transforming Hearts and Minds Concerning People with Disabilities: Viewing the UN Treaty Bodies and the Strasbourg Court through the Lens of Inclusive Equality

Andrea Broderick*

Abstract

The entry into force of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) pushed state obligations to counter prejudice and stereotypes concerning people with disabilities to the forefront of international human rights law. The CRPD is underpinned by a model of inclusive equality, which views disability as a social construct that results from the interaction between persons with impairments and barriers, including attitudinal barriers, that hinder their participation in society. The recognition dimension of inclusive equality, together with the CRPD's provisions on awareness raising, mandates that states parties target prejudice and stereotypes about the capabilities and contributions of persons with disabilities to society. Certain human rights treaty bodies, including the Committee on the Rights of Persons with Disabilities and, to a much lesser extent, the Committee on the Elimination of Discrimination against Women, require states to eradicate harmful stereotypes and prejudice about people with disabilities in various forms of interpersonal relationships. This trend is also reflected, to a certain extent, in the jurisprudence of the European Court of Human Rights. This article assesses the extent to which the aforementioned human rights bodies have elaborated positive obligations requiring states to endeavour to change 'hearts and minds' about the inherent capabilities and contributions of people with disabilities. It analyses whether these bodies have struck the right balance in elaborating positive obligations to eliminate prejudice and stereotypes in interpersonal relationships. Furthermore, it highlights the convergences or divergences that are evident in the bodies' approaches to those obligations.

Keywords: CRPD, Disability Discrimination, ECHR, Stereotypes, Interpersonal Relations

1 Introduction

Ensuring effective protection against discrimination, including combating ingrained prejudice and stereotypes, is at the core of the quest to guarantee respect for

human dignity. Adopting the lens of stereotyping enables one to look beyond 'intentional, negative behaviours' that underpin different forms of prejudice 'towards the (often) unintentional beliefs, assignment of certain roles and hierarchical orderings that structure our societies along different lines', according to Möschel.¹

People with disabilities not only face countless disabling barriers in the built environment, but they also face disablist attitudes in both private and public life, hindering their ability to participate in mainstream society. Miller *et al.* define disablism as 'discriminatory, oppressive, or abusive behavior arising from the belief that disabled people are inferior to others'.² Discrimination against people with disabilities often results from ignorance and false assumptions and can manifest in 'aversive disablism' – subtle, unintentional prejudice – according to Deal.³

Prejudices and stereotyping often arise in the context of interpersonal relationships. These relationships can be classified as connections between private parties with varying degrees of proximity, arising, *inter alia*, in the family and social spheres, in the educational and employment spheres or in the field of healthcare.

International and regional human rights law has long paid attention to 'prejudice' and 'stereotypes'. The first reference to both of those terms in binding United Nations (UN) law is in Article 5(a) of the UN Convention on the Elimination of All Forms of Discrimination

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1. M. Möschel, 'Racial Stereotypes and Human Rights', in E. Brems and A. Timmer (eds.), *Stereotypes and Human Rights Law* (2016) 119, at 120. For similar definitions of 'stereotypes' and 'prejudice', see J.F. Dovidio, M. Hewstone, P. Glick & V.M. Esses, 'Prejudice, Stereotyping and Discrimination: Theoretical and Empirical Overview', in John F. Dovidio *et al.* (eds.), *The SAGE Handbook of Prejudice, Stereotyping and Discrimination* (2010) 3, at 5-9.
2. P. Miller, S. Parker & S. Gillinson, *Disablism: How to Tackle the Last Prejudice* (2004), at 9; see also F. Campbell, *Frontiers of Ablism* (2009); and P. Harpur, 'Sexism and Racism, Why Not Ablism?: Calling for a Cultural Shift in the Approach to Disability Discrimination', 35(3) *Alternative Law Journal* 163 (2009). 'Ablism' is a preferred term by certain researchers, as it focuses not only on disability but the formation of abledness, which is always in relationship with disability: www.coe.int/en/web/compass/disability-and-disablism#19 (last visited 1 April 2020).
3. M. Deal, 'Aversive Disablism: Subtle Prejudice Toward Disabled People', 22(1) *Disability & Society* 93, at 93 (2007).

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against Women (CEDAW).⁴ In addition, Article 7 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)⁵ requires that states parties combat prejudice.

It was not until the entry into force of the UN Convention on the Rights of Persons with Disabilities (CRPD),⁶ and the mandate of the Committee on the Rights of Persons with Disabilities (CRPD Committee), that state obligations to counter prejudice and stereotypes against people with disabilities were pushed to the forefront of international human rights law, becoming 'a growing area of interest within the UN'.⁷ Other UN bodies, such as the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee), have acknowledged the existence of compounded disability stereotyping.⁸ Moreover, regional bodies, such as the European Court of Human Rights (ECtHR), have increasingly taken note of disability as a human rights issue.

While much has been written about prejudice and stereotypes in the disability context,⁹ and some attention has been paid in the legal literature to the issue of disability prejudice and stereotypes in interpersonal relationships,¹⁰ these issues have not yet been analysed from the perspective of the jurisprudence of the UN treaty bodies and the ECtHR in the context of the CRPD's model of inclusive equality. That model of equality views disability as a social construct that results from the interaction between persons with impairments and barriers, including attitudinal barriers, that hinder their participation in society.

Against the backdrop of the CRPD's model of inclusive equality, this article assesses the extent to which the aforementioned bodies have elaborated positive obligations to protect and fulfil disability rights, requiring states to endeavour to change 'hearts and minds'¹¹ about

the inherent capabilities and contributions to society of people with disabilities. It analyses whether the relevant bodies have struck the right balance or overstepped the mark and whether any fragmentation¹² or convergence¹³ is evident in their respective approaches. In terms of its scope, this article primarily addresses jurisprudence which relates to prejudice and stereotypes that occur in relations between private parties, but it also discusses disablism, which – directly or indirectly – affects the exercise of the rights of people with disabilities in the aforementioned interpersonal spheres.

This article is rooted in legal doctrinal methodology.¹⁴ In that regard, it is 'descriptive, evaluative and critical'¹⁵ of the most relevant legal sources. The selection of jurisprudence was made by inputting the terms 'stereo*', 'prejudice' and 'disability' in the databases of the Office of the High Commissioner for Human Rights, the Universal Human Rights Index and Human Rights Documentation (HUDOC).¹⁶ In addition, the article takes account of other jurisprudence related to disability discrimination and associated legal literature.

Following the introductory remarks, Section 2 of this article discusses horizontal positive obligations in international and regional law. Section 3 addresses the CRPD's theoretical framework – that of inclusive equality – and its distinctive features related to prejudice and stereotyping. That section also analyses the extent to which the issues of prejudice and stereotyping related to disability have been mainstreamed in other UN treaty bodies. Section 4 then examines the relevant case law decided under the European Convention on Human Rights (ECHR),¹⁷ while Section 5 highlights the fragmentation or convergence that is evident in the respective approaches of the bodies examined. Finally, Section 6 contains concluding remarks.

2 Horizontal Positive Obligations in International and Regional Law

Since much of this article analyses jurisprudence which relates to prejudice and stereotypes that occur in relations between private parties, this section sets out the

4. Convention on the Elimination of All Forms of Discrimination against Women, adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979.
5. International Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965.
6. UN Convention on the Rights of Persons with Disabilities, 13 December 2006, UN Doc. A/RES/61/106, Annex I.
7. S. Cusack, 'Building Momentum Towards Change: How the UN's Response to Stereotyping is Evolving', in E. Brems and A. Timmer, above n. 1, at 19.
8. See, for instance, Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee), General Recommendation 25, UN Doc. A/59/38, Annex I (2004), para. 12.
9. See, for instance, P. Hunt, *Stigma: The Experience of Disability* (1996). See also M.L. Perlin, *The Hidden Prejudice: Mental Disability on Trial* (2000). See also J. Morris, *Pride Against Prejudice: Transforming Attitudes to Disability: A Personal Politics of Disability* (1991); and C. Friedman, 'The Relationship between Disability Prejudice and Disability Employment Rates', 65(3) *Work* 591 (2020).
10. See, among others, R.J. Bonnie and J. Monahan (eds.), *Mental Disorder, Work Disability, and the Law* (1997); See also P.D. Blanck (ed.), *Employment, Disability and the Americans with Disabilities Act: Issues in Law, Public Policy and Research* (2000).
11. See Chief Justice Warren's opinion in *Brown v. Board of Education of Topeka*. See also M. Perlin, 'My Sense of Humanity Has Gone Down the Drain: Stereotypes, Stigma and Sanism', in E. Brems and A. Timmer, above n. 1, at 104.

12. See UN General Assembly, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*. Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682 (2016), at 245.
13. See generally M. Andenas and E. Bjorge (eds.), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (2015).
14. H.T. Emerson and F.B. Cross, 'What is Legal Doctrine', 100(1) *Northwestern University Law Review* 517, at 518 (2005).
15. A. Broderick, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities* (2015), at 14.
16. Searches were updated to 26 February 2020.
17. Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950.

horizontal positive obligations that are incumbent on states under international and regional law.

2.1 Regulating Discrimination in the Private Sphere in International Human Rights Law

As highlighted elsewhere,

[w]hile enforcement mechanisms for international human rights law¹⁸ address themselves solely to States, the doctrine of horizontal application of human rights law has developed,¹⁹

acknowledging state party responsibility for discrimination perpetrated by non-state actors. Nowak contends that

the primary significance of protection against discrimination lies in the obligation on States Parties to provide effective protection against discrimination by private parties to those subject to their laws.²⁰

Article 4(1)(e) CRPD is modelled closely on Article 2(e) CEDAW,²¹ in that it requires states parties to the CRPD to ‘take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise’. The CRPD also contains explicit references to action to be taken by private actors in Articles 9(2)(b), on accessibility; 21(c), on freedom of information and expression; 25(d), on health and 27(1)(h), on employment.

It is evident that the foregoing treaties prohibit discriminatory conduct in market-based private relationships, such as in access to employment or goods and services. Notwithstanding this, one cannot automatically assume that this extension of state responsibility to private actors also applies to interactions in the sphere of intimacy – pertaining (among others) to private, social and family life.

Henrard submits that the CERD does not impose positive obligations ‘to prevent and eradicate private discrimination in a comprehensive way that would reach every interaction between private persons’.²² This contention needs to be considered in light of the CRPD, which has taken a step further into the sphere of intimacy than previous international human rights law. In that regard, Article 23 CRPD (on respect for the home and family) requires states parties to ‘take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships’.²³

18. With the exception of international criminal law.

19. See generally P. Alston, *Non-State Actors and Human Rights* (2004).

20. M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2005), at 632.

21. See also Art. 2(1)(d) CERD.

22. K. Henrard, ‘Non Discrimination and Full and Effective Equality’, in M. Weller (ed.), *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (2007), at 143.

23. See also Committee on the Rights of Persons with Disabilities (CRPD Committee), *Bacher v. Austria*, UN Doc. CRPD/C/19/D/26/2014, para. 9.2.

2.2 The Troubled Relationship of the Strasbourg Court with Horizontal State Responsibility

The drafters of the ECHR did not intend the Convention to extend to relationships between private individuals.²⁴ Notwithstanding this, the Strasbourg Court has affirmed the existence of horizontal positive obligations,²⁵ with a view to giving ‘practical’ effect to certain provisions of the Convention.²⁶ By means of the well-established margin of appreciation doctrine, however, the Court leaves wide discretion to national authorities with regard to positive duties. It is ‘conscious of the limits of its mandate and endeavours to respect national resource allocation policies’.²⁷ As de Schutter points out, the difficulty in interpreting the socio-economic dimensions of ECHR rights lies in identifying ‘the precise scope of the positive obligations which may be imposed on the State’.²⁸ In particular, when positive obligations are substantive (rather than procedural) in nature, there is a particular need to balance colliding rights and freedoms and to respect the restrictions or limitations applying to ECHR rights.²⁹

It is indisputable that the ECHR diverges significantly from UN treaties, and particularly from the CRPD, in terms of the *ratione materiae* of the rights and obligations contained therein. While the CRPD is a group-specific treaty that ‘contains widespread positive duties [spanning] both civil and political as well as economic, social and cultural rights’, the ‘fundamental aim of the ECHR is to protect civil and political rights’.³⁰ Moreover, the ECHR places ‘primarily negative restraints on governmental action and does not contain any specific provisions for the protection of the rights of persons with disabilities’,³¹ although it has been interpreted as covering disability.³²

24. See generally L. Urbaite, ‘Judicial Activism in the Approach of the European Court of Human Rights to Positive Obligations of the State’, 11 *Baltic Yearbook of International Law* 214 (2011).

25. See generally A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004).

26. M. Florczak-Wator, ‘The Role of the European Court of Human Rights in Promoting Horizontal Positive Obligations of the State’, 17(2) *International and Comparative Law Review* 39, at 40 (2017). See generally L. Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (2016), at 50-53.

27. A. Broderick, ‘The Convention on the Rights of Persons with Disabilities and the European Convention on Human Rights: A Tale of Two Halves or a Potentially Unified Vision of Human Rights?’, 7(2) *Cambridge International Law Journal* 199, at 206 (2018). See generally D. Xenos, *The Positive Obligations of the State under the European Convention on Human Rights* (2012).

28. O. de Schutter, ‘Reasonable Accommodation and Positive Obligations in the European Convention on Human Rights’, in A. Lawson and C. Gooding (eds.), *Disability Rights in Europe: From Theory to Practice* (2005), at 45.

29. See generally J. Gerards, *General Principles of the European Convention on Human Rights* (2019).

30. With the exception of the First Protocol to the ECHR (concerning the right to property and the right to education). Broderick (2018), above n. 27, at 202.

31. Broderick (2018), above n. 27, at 202-3. See Art. 5(1)(e) ECHR, concerning the lawful detention of ‘persons of unsound mind’.

32. *Glor v. Switzerland*, ECHR (2009), Application no. 13444/04.

In recent years, the Strasbourg Court has elaborated a ‘burgeoning disability jurisprudence on the non-discrimination norm’.³³ However, in the sphere of relationships between private parties, the Court wavers in terms of imposing positive obligations on states. Furthermore, the ECtHR has recognised that state obligations are not absolute, particularly concerning the extent to which human rights are to be respected in relations between private parties. In that regard, the Court often resorts to the ‘fair balance’ test.³⁴ In other words, in determining whether a positive obligation exists, the Court holds that a fair balance must be struck between the interests of the community on the whole and the interests of the individual.³⁵

Overall, one must question how far the international and regional treaty-monitoring bodies are prepared to reach into the sphere of interpersonal relations, both in instances involving prejudice and stereotypes perpetrated by private actors and those perpetrated by professionals (such as psychiatrists) or individuals linked to the state (such as judges) that affect the interpersonal relations of people with disabilities. Furthermore, the question remains as to what types of measures can be effective in changing hearts and minds towards people with disabilities and in ensuring inclusive equality. The following sections reflect on these questions.

3 The UN Treaty Bodies: Addressing Prejudice and Stereotypes

3.1 The UN CRPD: A Treaty of Paradigm Shifts

The adoption of the CRPD on 13 December 2006, and its entry into force on 3 May 2008, represents the ‘high-water mark’³⁶ concerning the protection of the rights of persons with disabilities in international human rights law. O’Cinneide argues that the CRPD adopts ‘a particular conceptual view’ of the state’s role, whereby states parties bear various positive obligations spanning all human rights, designed to ensure the provision of a minimum level of support to persons with disabilities that is compatible with their inherent dignity.³⁷ Stein notes that the CRPD challenges the traditional gap between civil and political rights, and socio-economic

rights.³⁸ Moreover, scholars claim that by blurring the distinction between these traditional categories of rights, the CRPD has resulted in increasing the range of positive obligations that reach into both the public and private spheres.³⁹ In that connection, de Beco confirms that the CRPD ‘has generated a new understanding of the indivisibility of human rights’.⁴⁰

3.1.1 The Theoretical Framework of the UN CRPD

The CRPD endorses the paradigm shift from the outdated medical model of disability – which perceives of the inability of people with disabilities to participate in society as the ‘inevitable result of their own impairment rather than as a consequence of any disabling and discriminatory barriers in society’⁴¹ – to the ‘social-contextual model’ of disability.⁴² The CRPD’s version of the social model⁴³ views disability as an *interaction* between persons with impairments and widespread barriers in society (physical barriers, as well as legal and attitudinal barriers, among others) and has been described as ‘a bulwark against disablism’.⁴⁴ The primary focus of the CRPD is on the elimination of barriers through positive measures such as individualised reasonable accommodations⁴⁵ – modifications that are needed or requested by a particular individual in a specific case, such as extra time in an examination or the adjustment of working facilities – and generalised (group-based) anticipatory accessibility measures.⁴⁶

Article 2 CRPD sets out a wide definition of discrimination on the basis of disability, highlighting that such discrimination includes the denial of a reasonable accommodation. The accommodation duty is subject to a defence or limitation, whereby the duty bearer is not required to provide an accommodation where to do so would impose a disproportionate or an undue burden.

Degener suggests that while a social model approach to disability explains how disability arises and sheds light on the marginalisation of people with disabilities, it does not offer adequate solutions to overcome it.⁴⁷ The substantive provisions of the CRPD go beyond the social-contextual model, to endorse the human rights model of

33. D. Ferri and A. Broderick, ‘The European Court of Human Rights and the “Human Rights Model of Disability”: Convergence, Fragmentation and Future Perspectives’, *European Yearbook on Human Rights* (2019), at 276.

34. Gerards, above n. 29, at 154 *et seq.*

35. See, among many others, *Hatton v. United Kingdom*, ECHR (2003), Application no. 36022/97.

36. A. Broderick and D. Ferri, *International and European Disability Law and Policy: Text, Cases and Materials* (2019), at 311.

37. C. O’Cinneide, ‘Extracting Protection for the Rights of Persons with Disabilities from Human Rights Frameworks: Established Limits and New Possibilities’, in O.M. Arnardóttir and G. Quinn (eds.), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (2009), at 164.

38. M.A. Stein, ‘Disability Human Rights’, 95 *California Law Review* 75, at 75 (2007).

39. Broderick (2018), above n. 27, at 207.

40. G. de Beco, ‘The Indivisibility of Human Rights in Light of the Convention on the Rights of Persons with Disabilities’, 68(1) *International and Comparative Law Quarterly* 141, at 160 (2019).

41. Broderick (2015), above n. 15, at 1.

42. *Ibid.*, at 77.

43. Several authors claim that the ‘pure’ social model focuses on societal barriers and neglects the role of impairment in disabling individuals: see T. Shakespeare and N. Watson, ‘The Social Model of Disability: An Outdated Ideology?’, 2 *Research in Social Science and Disability* 9 (2001).

44. A. Dimopolous, ‘An Enabling Interpretation of the Refugee Convention: Determination of Refugee Status in Light of the Convention on the Rights of Persons with Disabilities’, in B. Burson and David J. Cantor (eds.), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (2016) 253, at 258.

45. See Arts. 2 and 5(3) CRPD.

46. See Art. 9 CRPD.

47. T. Degener, ‘A New Human Rights Model of Disability’, in V. Della Fina, R. Cera & G. Palmisano, (eds.), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (2017) 41, at 41.

disability.⁴⁸ The latter model lays emphasis on the human dignity of persons with disabilities and values impairments as part of human diversity.⁴⁹ The human rights model also conceives of disability as ‘one of several layers of identity’, requiring states parties to address intersectional disadvantage.⁵⁰ Quinn and Degener clarify that the end goal of the human rights model ‘is to build societies that are genuinely inclusive, societies that value difference and respect the dignity and equality of all human beings regardless of difference’.⁵¹

3.1.2 *Peering through the Lens of Inclusive Equality: Recognising Inherent Abilities*

The human rights model is mirrored in the CRPD’s mandate of inclusive equality,⁵² which has been defined by the CRPD Committee as a ‘new’ model of equality developed through the CRPD’s provisions.⁵³ According to the Committee, the inclusive equality model goes beyond a substantive model of equality, by embracing four intertwined dimensions:

- i. An accommodating dimension: to make space for difference as a matter of human dignity
- ii. A fair redistributive dimension: to address socio-economic disadvantage
- iii. A participative dimension: to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society
- iv. A recognition dimension: to combat stigma, stereotyping, prejudice and violence and to adequately take into account the dignity of human beings and their intersectionality.⁵⁴

The recognition dimension of inclusive equality is reflected in the transversal provision on awareness raising in Article 8 CRPD, termed an obligation of ‘social engineering’.⁵⁵ Article 8 CRPD requires that states parties adopt immediate,⁵⁶ effective and appropriate measures to raise awareness, including at the family level, regarding persons with disabilities.⁵⁷ It also requires states parties to combat stereotypes, prejudices and harmful practices related to persons with disabilities, including those based on sex and age, in all areas of life.⁵⁸ Measures envisaged by the CRPD to foster

respect for the rights of people with disabilities include promoting recognition of their skills, merits and abilities and their contribution to the workplace;⁵⁹ fostering an attitude of respect at all levels of the education system, including in all children from an early age;⁶⁰ encouraging all organs of the media to portray persons with disabilities in a manner consistent with the CRPD⁶¹ and promoting training programmes.⁶²

Education is an important tool in countering intolerance and fostering understanding. In that connection, Article 8(2)(b) CRPD echoes the requirement under Article 24 CRPD to ensure an inclusive educational system, which is targeted, inter alia, towards the ‘the full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity’.⁶³ By ensuring inclusion of individuals with various types of impairments in educational systems, disability becomes part and parcel of human diversity, and that, in turn, can be reflected in educational curricula.

Article 8 CRPD is also closely intertwined with the non-discrimination norm (in Arts. 2 and 5 CRPD), which has been described as the ‘leitmotif’ of the CRPD.⁶⁴ The non-discrimination principle cuts across both civil and political rights, and economic, social and cultural rights, as do its corresponding obligations. Moreover, the CRPD prohibits multiple and intersectional discrimination, in Article 6 thereof.

Overall, the CRPD embraces a model of equality which seeks to target deep-rooted structural inequalities by advocating legal tools, including individualised support measures for people with disabilities, to enable them to live independently in their communities,⁶⁵ to participate in mainstream education⁶⁶ and on the open labour market⁶⁷ – thereby normalising disability in everyday life and targeting all forms of disablism.

Another recognition duty is found in Article 12 CRPD, which accords individuals with disabilities equal recognition before the law (legal capacity), meaning that they have the right to legal standing and legal agency.⁶⁸ Perceived or actual deficits in mental capacity (‘unsoundness of mind’ or other discriminatory labels) cannot be employed to justify a denial of legal capacity, according to the CRPD Committee.⁶⁹ Article 12 CRPD envisages the shift from the substitute decision-making paradigm (guardianship or other) to one that is based on supported decision-making.⁷⁰ This means that all forms of

48. CRPD Committee, General Comment 6, UN Doc. CRPD/C/GC/6 (2018), para. 9. See also Broderick (2015), above n. 15, at 26-28.

49. Degener, above n. 47, at 47.

50. CRPD Committee, above n. 48, para. 9.

51. G. Quinn and T. Degener, *Human Rights and Disability*, Human Rights and Disability (2002), at 14. See also General Principle 3(d) CRPD.

52. CRPD Committee, above n. 48, para. 11.

53. *Ibid.* In connection with the CRPD Committee’s model of inclusive equality, see the parallels with the analysis of equality in Broderick (2015), above n. 15, and with Sandra Fredman’s four-dimensional model of transformative equality: S. Fredman, *Discrimination Law* (2011).

54. CRPD Committee, above n. 48, para. 11.

55. C. Tobler, *The Limits and Potential of the Concept of Indirect Discrimination* (2008).

56. Interestingly, Art. 8 is the only CRPD provision to require the adoption of ‘immediate’ measures.

57. Art. 8(1)(a) CRPD.

58. Art. 8(1)(b) CRPD.

59. Art. 8(2)(a)(iii) CRPD.

60. Art. 8(2)(b) CRPD.

61. Art. 8(2)(c) CRPD.

62. Art. 8(2)(d) CRPD.

63. Art. 24(1)(a) CRPD.

64. O.M. Arnardóttir, ‘A Future of Multidimensional Disadvantage Equality’, in O.M. Arnardóttir and G. Quinn, above n. 37, at 41.

65. Art. 19 CRPD.

66. Art. 24 CRPD.

67. Art. 27 CRPD.

68. CRPD Committee, General Comment 1, UN Doc. CRPD/C/GC/1 (2014), para. 12.

69. *Ibid.*, para. 13.

70. *Ibid.* On the ‘best interests standard’ and its compatibility with the CRPD, see generally P. Gooding, *A New Era for Mental Health Law and*

guardianship are outlawed under the CRPD, and the best interests standard – which is inherently paternalistic⁷¹ and based on prejudice and stereotypes that people with disabilities are incapable – can no longer be used as a justification for depriving them of their decision-making abilities. In fact, the CRPD Committee is of the view that all individuals, no matter how severe their impairment, have ‘universal legal capacity’.⁷² Moreover, Article 12(3) CRPD requires states parties to provide persons with disabilities with the necessary supports to make decisions and exercise their legal capacity in accordance with their will and preferences.⁷³ Arstein-Kerslake and Flynn note that

an individual’s ‘will’ is used to describe the person’s long-term vision of what constitutes a ‘good life’ for them.⁷⁴ The term ‘preferences’, on the other hand, tends to refer to likes and dislikes, or ways in which a person prioritises different options available to them.⁷⁵

Notably, the CRPD Committee’s interpretation of certain provisions, particularly that on legal capacity, has not been without controversy.⁷⁶ The Committee’s interpretation of the right to legal capacity has been considered contentious by some scholars, who argue that it seems to go ‘further than recommending governments end guardianship’ and ‘calls on countries to abolish mental health laws’.⁷⁷ Other scholars seem to imply that support may not be a feasible option for certain individuals with disabilities.⁷⁸

3.1.3 *The CRPD Committee: Hitting the Right Target or Aiming Wide of the Mark in Ruling on Prejudice and Stereotypes?*

This subsection examines the decisions, concluding observations and general comments of the CRPD Committee that pertain to prejudice and stereotyping in interpersonal relationships, with a view to delineating the trends that are evident in the Committee’s jurisprudence from the perspective of positive duties.

Policy: Supported Decision-Making and the UN Convention on the Rights of Persons with Disabilities (2017), at 129 *et seq.*

71. M. Donnelly, ‘Decision Making for Mentally Incompetent People: The Empty Formula of Best Interests?’, 20 *Medical Law Journal* 405 (2001).
72. CRPD Committee, above n. 68, para. 25.
73. *Ibid.*, para. 17.
74. A. Arstein-Kerslake and E. Flynn, ‘The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: A Roadmap For Equality Before the Law’, 20(4) *The International Journal of Human Rights* 471, at 471 (2016). CRPD Committee, above n. 68, para. 21. See also Art. 12(4) CRPD.
75. Arstein-Kerslake and Flynn, above n. 74, at 471.
76. See the comments at www.ohchr.org/en/hrbodies/crpd/pages/dgcarticles12and9.aspx (last visited 1 April 2020).
77. See J. Craigie, M. Bach, S. Gurbai, A. Kanter, S.Y.H. Kim, O. Lewis & G. Morgan, ‘Legal Capacity, Mental Capacity and Supported Decision-Making: Report from a Panel Event’, 62 *International Journal of Law and Psychiatry* 160, at 160 (2019).
78. M. Browning, C. Bigby & J. Douglas, ‘Supported Decision Making: Understanding How Its Conceptual Link to Legal Capacity Is Influencing the Development of Practice’, 1(1) *Research and Practice in Intellectual and Developmental Disabilities* 34 (2014).

Using the search terms indicated in Section 1, three relevant individual communications were identified.

One example of a decision in which the CRPD Committee reached into the interpersonal sphere is *X v. Tanzania*, decided in 2017.⁷⁹ The author of that individual communication, Mr. X, had his left arm cut off by two strangers at the age of 41 due to his condition of albinism.

The CRPD Committee considered that the domestic authorities had not acted with due diligence, having failed to take the necessary measures to ensure ‘an effective, complete and impartial investigation and prosecution of the perpetrators’.⁸⁰ Accordingly, the Committee found that the state party had violated Articles 5 (on non-discrimination); 15 (on freedom from torture, cruel, inhuman and degrading treatment) and 17 CRPD (on respect for integrity).⁸¹

A parallel finding of discrimination was made by the CRPD Committee a year later in *Y v. Tanzania*,⁸² in circumstances that were largely similar to those in the decision of *X*.

The authors of both communications alleged disability-based discrimination because i) the violence in question was a generalised practice in the state party that only affects people with albinism and ii) the impunity connected to the acts

characterises most cases of violence perpetrated against persons with albinism, as the State party’s authorities considered that such violence is linked to witchcraft, which is a generally accepted cultural practice with regard to which a lot of prejudice still prevails in society.⁸³

In both decisions, the CRPD Committee prescribed both training and awareness-raising measures designed to address ‘harmful practices and rampant myths’ affecting the rights of individuals with albinism,⁸⁴ and also called for the criminalisation of such practices⁸⁵ and the adaptation of legal frameworks ‘to ensure that they encompass *all* aspects of attacks against persons with albinism’.⁸⁶ This reflects, perhaps, the Committee’s awareness of the limitations of educational measures alone and the view that some coercive measures are necessary in this context.

Endeavouring to change hearts and minds by invoking the tool of criminal law is a solution that is open to question.⁸⁷ Not only is persistent harassment at the interpersonal level difficult to police, necessitating

79. CRPD Committee, *X v. Tanzania*, Communication No. 22/2014, UN Doc. CRPD/C/18/D/22/2014 (2017).

80. *Ibid.*, para. 8.2.

81. *Ibid.*, para. 8.6.

82. CRPD Committee, *Y v. Tanzania*, Communication No. 23/2014, UN Doc. CRPD/C/18/D/23/2014 (2018).

83. See paras. 8.2 of *X v. Tanzania* and *Y v. Tanzania*.

84. See paras. 9(b)(iv) of *X v. Tanzania* and *Y v. Tanzania*.

85. See paras. 9(b)(iii) of *X v. Tanzania* and *Y v. Tanzania*.

86. See paras. 9(b)(i) of *X v. Tanzania* and *Y v. Tanzania*. Emphasis added.

87. See, among others, L. Piggott, ‘Prosecuting Disability Hate Crime: A Disabling Solution’, 5(1) *People, Place & Policy Online* 25 (2011).

coordinated action at various levels of government, but institutional prejudices that are already embedded in a given culture are extremely difficult to overcome. In that regard, law can serve to pull hearts and minds in one direction, but embedded cultural traditions or religion can influence one's affective and cognitive faculties to such an extent that they essentially pull hearts and minds in the opposite direction. Moreover, criminalisation can suppress minds to the reality of the experience of disability (albinism in this case), rather than opening minds to becoming more tolerant. In addition, legislation targeting hate crime underlines the problem 'as caused by the individual who goes out in public',⁸⁸ thereby reinforcing culturally embedded ideas of normality and disability.⁸⁹ This can lead to institutionalised stigmatisation and 'othering' and may also entrench aversive disablism. Furthermore, prescribing a criminal law remedy ignores the manifold barriers that people with disabilities face in the criminal justice system generally,⁹⁰ and especially in one that is probably also steeped in cultural prejudices.

Another area in which people with disabilities are greatly stigmatised concerns the exercise of their legal capacity. Legal capacity considerations relate closely to the interpersonal sphere, since many important decisions taken by, or in respect of, people with disabilities are adopted in that sphere. In 2013, the CRPD Committee handed down an individual communication on legal capacity, in which it deliberated indirectly on prejudices stemming from private individuals (professionals) deciding on the issue of guardianship. While the substance of the case of *Bujdosó and others*⁹¹ did not relate to the interpersonal sphere itself – concerning instead the placement of individuals with intellectual disabilities under partial or plenary guardianship regimes pursuant to various judicial decisions, and the ensuing denial of their right to vote – certain aspects of the case are nonetheless noteworthy in the context of prejudice and stereotyping, and those aspects will be elaborated on in a later section of this article.⁹²

The third-party interveners in *Bujdosó* emphasised that restricting the right to vote on the basis of disability constitutes direct discrimination and is 'predicated on the unacceptable and empirically unfounded stereotype that all persons with disabilities are incapable'.⁹³ In rendering its decision, the CRPD Committee took note of the interveners' claims that 'the professionals who participate in the assessment process, such as judges, psychologists, psychiatrists and social workers, are not immune to such prejudice'.⁹⁴ Taking into account these arguments, the Committee made clear that no individual

with a disability should be forced to undergo an assessment of voting capacity by social workers, psychologists or others as a precondition for participating in elections and that states parties should put in place all requisite positive measures of support.⁹⁵

In terms of the CRPD Committee's concluding observations,⁹⁶ Cusack notes that, between 2011 and 2014, there were a 'small but growing number' of concluding observations issued by the Committee in relation to prejudice and stereotypes.⁹⁷ Up until that point, the Committee had emphasised the importance of states adopting education and training measures (the obligation to fulfil/promote human rights), as well as implementing policies to combat stereotypes and prejudices and to promote the dignity, capabilities and contributions of people with disabilities.⁹⁸ Cusack notes that the inclusion of recommendations related to policy initiatives

demonstrates an awareness of the broad-ranging and holistic measures needed to challenge stereotyping and, in this, reflects lessons learned from the CEDAW Committee's evolving jurisprudence on stereotyping.⁹⁹

The CRPD Committee has also paid particular attention to the need to challenge the stereotypical view of individuals with disabilities as being vulnerable or 'objects of charity' and, therefore, in 'need of protection'.¹⁰⁰

Since 2014, an ever-increasing number¹⁰¹ of concluding observations issued by the CRPD Committee urge states parties to 'promote positive perceptions' about people with disabilities through campaigns targeting the general population, the private sector and educational institutions.¹⁰² The Committee also recommends that states parties include organisations of persons with disabilities 'when developing and delivering nationwide campaigns, awareness-raising programmes or training on the human rights model of disability'.¹⁰³ Further-

88. *Ibid.*, at 28-29.

89. *Ibid.*, at 25.

90. See generally E. Flynn, *Disabled Justice?: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (2017).

91. CRPD Committee, *Zsolt Bujdosó and Others v. Hungary*, Communication No. 4/2011, UN Doc. CRPD/C/10/D/4/2011 (2013).

92. See Subsection 4.4.

93. CRPD Committee, *Zsolt Bujdosó and Others v. Hungary*, above n. 91, para. 5.4.

94. *Ibid.*, para. 5.11.

95. *Ibid.*, para. 10(b)(2). The Committee also seems to have (implicitly) rejected the ECtHR's finding in *Alajos Kiss v. Hungary* (*Alajos Kiss v. Hungary*, ECHR (2010), Application no. 38832/06) that disenfranchisement could be acceptable if an individualised assessment of voting capacity is carried out: CRPD Committee, *Zsolt Bujdosó and Others v. Hungary*, above n. 91, para. 5.4.

96. See a similar analysis of States' concluding observations in Henrard, in this volume, in the context of Islamophobia.

97. Cusack, above n. 7, at 20.

98. *Ibid.*, citing, among several others, CRPD Committee, Concluding Observations: Peru, UN Doc. CRPD/C/PER/CO/1 (2012), para. 19.

99. Cusack, above n. 7, at 20.

100. *Ibid.* citing, among others, CRPD Committee, Concluding Observations: Austria, UN Doc. CRPD/C/AUT/CO/1 (2013), para. 22.

101. From the beginning of 2011 to the end of 2014, the term stereotype (search term 'stereo*') was mentioned 9 times in Concluding Observations. From the beginning of 2015 to the end of 2019, it was mentioned 58 times. From the beginning of 2011 to the end of 2014, the term prejudice (search term 'prejudice') was mentioned once in Concluding Observations. From the beginning of 2015 to the end of 2019, it was mentioned 8 times.

102. CRPD Committee, Concluding Observations: Turkey, UN Doc. CRPD/C/TUR/CO/1 (2019), para. 18(d).

103. CRPD Committee, Concluding Observations: Poland, UN Doc. CRPD/C/POL/CO/1 (2018), para. 14(b).

more, the Committee suggests that states parties implement ‘innovative’ public awareness-raising and educational programmes¹⁰⁴ for all relevant actors, including the media, judges and lawyers, the police, social workers and the general public, with the aim (inter alia) of addressing the language used in connection with people with disabilities, including women with disabilities.¹⁰⁵ As outlined above, Article 8 CRPD acknowledges that the media plays a significant role in awareness raising.¹⁰⁶ Bariffi asserts that the requirement in Article 8 CRPD ‘includes not only the use of the media to broadcast specific disability-centred campaigns but also the way the whole media content portrays persons with disabilities’.¹⁰⁷ The media plays a fundamental role in challenging both direct and aversive disablism, by increasing representation of people with disabilities in all aspects of society. However, Bariffi contends that an analysis of state party reports shows

a clear trend, namely, that there are no general, nor mainstreamed, policies effectively implemented at domestic level, but rather isolated and disconnected initiatives or actions to raise social awareness as provided by article 8.¹⁰⁸

In terms of the CRPD Committee’s general comments, it has been asserted that the Committee missed ‘key opportunities’ to address issues of stereotyping in its early general comments.¹⁰⁹ By its third general comment on women and girls with disabilities in 2016, however, the Committee deliberated quite extensively on compounded stereotyping.¹¹⁰ Later general comments urge states parties to put in place

specific rules relating to evidence and proof to ensure that stereotyped attitudes about the capacity of persons with disabilities do not result in victims of discrimination being inhibited in obtaining redress.¹¹¹

This reflects, perhaps, the Committee’s implicit acknowledgement of the limitations of educational measures alone and the requirement for states parties to adopt a wide range of measures aimed at changing hearts and minds.

3.1.4 Evidence of Disability Mainstreaming in the UN Treaty Bodies?

Degener claims that ‘it would be contrary to the harmonization of international human rights law as well as to the mainstreaming¹¹² of disability’ in human rights law if the CRPD’s model of inclusive equality were not applied broadly across the other UN bodies when dealing with disability claims.¹¹³

An advanced search conducted on the Universal Human Rights Index database revealed two decisions on disability stereotyping – one issued by the CEDAW Committee¹¹⁴ and one by the CERD Committee¹¹⁵ – after the entry into force of the CRPD. It is noteworthy that neither of these decisions concerned prejudice and stereotyping between private parties, but the decision of *R.P.B. v. Philippines*¹¹⁶ nonetheless reveals important lessons regarding the extent to which the UN treaty bodies (should) ensure consistency in ruling on the rights of persons with disabilities in general, and specifically the right to non-discrimination.

R.P.B. related to a complaint brought before the CEDAW Committee by a Deaf girl who was raped by her neighbour. The applicant complained that the decision of the domestic court constituted discrimination under Article 1 CEDAW (the non-discrimination norm) and also under the CEDAW Committee’s General Recommendations 18 and 19, related to women with disabilities and violence against women, respectively.¹¹⁷ The applicant alleged a failure of the state party to comply with its obligation to effectively protect women against discrimination in line with Article 2(c), (d) and (f) CEDAW. In that regard, it was claimed that the trial court ‘relied on gender-based myths and stereotypes’,¹¹⁸ failing ‘to consider the rape in the context of her vulnerability as a [D]eaf girl’.¹¹⁹

The CEDAW Committee appeared to (implicitly) concur with the author of the communication, namely, that the domestic court had reasoned with ‘manifest prejudice’ against her as a Deaf minor victim.¹²⁰ The Committee ruled that the judges viewed the author as an incredible witness and applied notions of how an ‘ordinary Filipina female rape victim’ should behave in the circumstances.¹²¹ Similarly to the obligations prescribed

104. CRPD Committee, Concluding Observations: Norway, UN Doc. CRPD/C/NOR/CO/1 (2019), para. 14.

105. *Ibid.*

106. On the role of the media, see also Art. 17 of the Convention on the Rights of the Child.

107. F. Bariffi, ‘Analysis and Commentary of Article 8 on Awareness-Raising of the UN-CRPD’, in M.A. Stein, I. Bantekas & D. Anastasiou (eds.), *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (2018), at 254.

108. *Ibid.*, at 242.

109. Cusack, above n. 7, citing CRPD Committee, above n. 68, in which the terms ‘stereotypes’ and ‘prejudice’ are not mentioned.

110. CRPD Committee, General Comment 3, UN Doc. CRPD/C/GC/3 (2016), paras. 8, 17(e), 30, 38, 46 and 47.

111. CRPD Committee, General Comment 6, above n. 48, para. 31(e).

112. See K. Skarstad and M.A. Stein, ‘Mainstreaming Disability in the United Nations Treaty Bodies’, 17(1) *Journal of Human Rights* 1 (2018).

113. T. Degener, General Comment No. 6 of the United Nations Committee on the Rights of Persons with Disabilities, 16 May 2018, Berkeley Comparative Disability Rights – webinar, cited in L. Waddington and A. Broderick, *Combating Disability and Realising Equality: A Comparison of the UN Convention on the Rights of Persons with Disabilities and EU Equality and Non-Discrimination Law* (2018), at 45.

114. CEDAW Committee, *R.P.B. v. Philippines*, Communication No. 34/2011, UN Doc. CEDAW/C/57/D/34/2011 (2014).

115. Committee on the Elimination of Racial Discrimination, *Pjetri v. Switzerland*, Communication No. 53/2013 UN Doc. CERD/C/91/D/53/2013 (2017).

116. CEDAW Committee, *R.P.B. v. Philippines*, above n. 114.

117. *Ibid.*, para. 3.1.

118. *Ibid.*

119. *Ibid.*

120. *Ibid.*, paras. 3.8 and 8.9.

121. *Ibid.*, para. 8.9.

by the CRPD Committee, the CEDAW Committee prescribed a review of legislation surrounding rape,¹²² as well as the provision of ‘adequate and regular training’ to the judiciary and legal professionals, so as to ensure that stereotypes and gender bias do not affect court proceedings and decision-making.¹²³

Atrey remarks that *R.P.B.* provides a useful example of how the CEDAW Committee’s evaluative work ‘can be channeled towards understanding and responding to [the] intersectional nature of gender violence with the perspective of intersectional integrity’.¹²⁴ However, despite the petitioner’s invocation of the CRPD, the CEDAW Committee did not mention the CRPD in its decision. Notably, in finding that there was ‘double discrimination’ (rather than specifying whether it related to intersectional or multiple discrimination specifically), the CEDAW Committee referred to its own General Recommendation No. 18, which describes women with disabilities as a ‘vulnerable group’.¹²⁵ This is a term that the CRPD Committee (mostly) avoids¹²⁶ and, as will be demonstrated in Section 4, the issue of language used by courts and treaty-monitoring bodies is an important one in seeking to avoid the perpetuation of stereotypes and prejudice.

4 The ECtHR: Treading Lightly through Uncharted Waters?

Since the entry into force of the CRPD, disability has featured increasingly as a human rights issue in Strasbourg. In the wake of *Glor v. Switzerland*,¹²⁷ in which the Court stated that national authorities have a considerably reduced margin of appreciation with regard to disability discrimination, the ECtHR confirmed explicitly for the first time in *Alajos Kiss v. Hungary*¹²⁸ the application of a standard of ‘strict scrutiny’¹²⁹ in the context of disability.

Article 14 and Protocol 12 to the ECHR protect against discrimination, inter alia, on the basis of disability. It is well established that Article 14 ECHR cannot be invoked independently; rather, it is accessory to substantive ECHR rights.¹³⁰ According to Arnardóttir, ‘the key milestones in the development towards a more

robust substantive equality guarantee’ are recognising indirect discrimination, the right to reasonable accommodation and positive obligations to protect and fulfil rights.¹³¹ Some of those aspects of protection from discrimination are evident in the ECtHR’s case law. In the sphere of education, for instance, the Strasbourg Court has been increasingly willing to impose reasonable accommodation duties on contracting states to the ECHR, as will be demonstrated below. With regard to positive obligations to protect and fulfil disability rights across a range of ECHR provisions, the Strasbourg Court has wavered in its approach, as will be illustrated by analysing several post-CRPD cases that are relevant to disability discrimination, and particularly to prejudice and stereotypes in the interpersonal sphere.

4.1 The Duty of Reasonable Accommodation and Ensuring Access to Inclusive Education

Inclusive education is one way in which intergroup contact can be stimulated in the interpersonal sphere, and it provides a setting in which the (wrongful) assumptions underlying aversive disablism can be counteracted. Much has been written about stimulating affective ties between members of the dominant group and the minority ‘outgroup’¹³² through creating intergroup contact, particularly in the sphere of race relations.¹³³ However, it must be acknowledged that while increasing intergroup contact can serve to strengthen affective ties, it may not always have an impact on cognitive processes related to prejudice and stereotypes.¹³⁴ Nonetheless, as Bariffi asserts:

[T]he right to inclusive education not only allows persons with disabilities to fulfil their right to education but it also allows other children without disabilities to raise awareness and understanding of disability as part of diversity in a natural inclusive environment.¹³⁵

Certain cases of the Strasbourg Court acknowledge the benefits of inclusive education and deliberate on the obligations of contracting states to facilitate inclusion through providing reasonable accommodations.

In the 2016 decision of *Çam v. Turkey*,¹³⁶ the Court found a violation of both Article 14 and Article 2 of Protocol No. 1 to the ECHR (on the right to education) following the refusal of the Turkish National Music Academy to enrol the applicant due to her visual impairment. The ECtHR focused on the importance of positive measures to ensure that students with disabilities enjoy education on a non-discriminatory basis and considered

122. *Ibid.*, para. 9(b)(i).

123. *Ibid.* para. 9(b)(iv).

124. S. Atrey, ‘Lifting as We Climb: Recognizing Intersectional Gender Violence in Law’, 5 *Oñati Socio-legal Series* 1512, at 1525 (2015).

125. CEDAW Committee, *R.P.B. v. Philippines*, above n. 114, para. 8.3.

126. The only mention of vulnerability by the CRPD Committee is in the cases of *X v. Tanzania*, at para. 8.4 and in *Y v. Tanzania*, at paras. 8.4 and 8.5. The notion of ‘vulnerability’ is used to describe the vulnerability of the authors of the communications as a result of the attacks and the failure to punish those, rather than describing people with disabilities themselves as vulnerable.

127. See, among others, *Glor v. Switzerland*, above n. 32.

128. *Alajos Kiss v. Hungary*, ECHR (2010), Application no. 38832/06.

129. *Ibid.*, para. 44.

130. *Inze v. Austria*, ECHR (1987), Application no. 8695/79, para. 36.

131. O.M. Arnardóttir, ‘Vulnerability under Article 14 of the European Convention on Human Rights Innovation or Business as Usual?’, 4(4) *Oslo Law Review* 150 (2017).

132. See generally T.F. Pettigrew and L.R. Tropp, *When Groups Meet: The Dynamics of Intergroup Contact* (2011).

133. W.C. Byrd, *Poison in the Ivy: Race Relations and the Reproduction of Inequality on Elite College Campuses* (2017), at 12.

134. See generally Pettigrew and Tropp, above n. 132.

135. Bariffi, above n. 107, at 253.

136. *Çam v. Turkey*, ECHR (2016), Application no. 51500/08.

that discrimination on the ground of disability extends to the refusal to provide a reasonable accommodation, in line with the CRPD.¹³⁷ This was despite the fact that the applicant had not requested a reasonable accommodation from the domestic authorities.¹³⁸ In essence, the ECtHR held that by refusing to enrol the applicant without accommodating her disability, the domestic authorities had prevented her, without any objective justification, from exercising her right to education.¹³⁹ In a later case, *Enver Şahin v. Turkey*,¹⁴⁰ the Strasbourg Court went even further than it had done in *Çam* to assess the suitability of the accommodation measures proposed to the applicant with a disability,¹⁴¹ who – following an accident – was unable to access the building of Firat University on account of the lack of adapted facilities. In finding a violation of both Article 14 and Article 2 of Protocol No. 1 to the ECHR,¹⁴² the Court noted that ensuring inclusive education forms part of the international responsibility of states.¹⁴³ The ECtHR furthermore confirmed that Article 14 ECHR must be read in light of the CRPD's reasonable accommodation duty.¹⁴⁴ In that regard, the Strasbourg Court held that the university in question had failed to look for alternative solutions that would have enabled the applicant to study under conditions as close as possible to those provided to students without disabilities, without imposing an undue or disproportionate burden on the entity concerned.¹⁴⁵

While the *Şahin* judgment has been deemed to constitute 'a strong endorsement of the right to inclusive education' contained in the CRPD,¹⁴⁶ in the more recent case of *Stoian v. Romania*¹⁴⁷ the ECtHR demonstrated a more cautious approach in terms of enunciating the positive obligations of the state to facilitate access for individuals with disabilities to mainstream education, resorting instead to the state's margin of appreciation. In that connection, the ECtHR ruled that national authorities are 'better placed than an international court to evaluate local needs and conditions in this regard'.¹⁴⁸

137. *Ibid.*, para. 67. See J. Damamme, 'Disability Discrimination because of Denial of "Reasonable Accommodations": A Very Positive Connection between the ECHR and the UNCRPD in *Çam v. Turkey*', *Strasbourg Observers*, 01 April 2016, <https://strasbourgobservers.com/category/cases/cam-v-turkey/> (last visited 1 April 2020).

138. J. Damamme, 'Disability and University (Pragmatic) Activism: The Pros and Cons of *Enver Şahin v. Turkey*', *Strasbourg Observers*, 09 March 2018.

139. *Çam v. Turkey*, above n. 136, para. 69.

140. *Enver Şahin v. Turkey*, ECHR (2018), Application no. 23065/12.

141. A. Broderick, Case Note: *Enver v. Şahin*, Verbot op discriminatie op grond van handicap, Recht op onderwijs, VN-Gehandicaptenverdrag, 'Doeltreffende aanpassingen', European Human Rights Cases EHRC 2018/106, EHRM 30-01-2018.

142. See *Enver Şahin v. Turkey*, above n. 140, para. 75.

143. *Ibid.*, para. 62.

144. *Ibid.*, para. 67.

145. *Ibid.*, para. 72.

146. O. Lewis, 'Strasbourg Case: Disabled Student Excluded from University Education', *Doughty Street Chambers*, 02 February 2018, <https://insights.doughtystreet.co.uk/post/102epfy/strasbourg-case-disabled-student-excluded-from-university-education> (last visited 1 April 2020).

147. *Stoian v. Romania*, ECHR (2019), Application no. 289/14.

148. *Ibid.*, para. 109. See also *Çam v. Turkey*, above n. 136, para. 66.

Referring to the 'fair balance' test,¹⁴⁹ the Court ruled that the domestic authorities had complied with their obligation to provide reasonable accommodation and had acted within the applicable margin of appreciation,¹⁵⁰ despite indications by the domestic courts that the authorities had not taken adequate measures to facilitate the applicant's access to education.

A similarly reticent approach was demonstrated by the ECtHR in the 2019 case of *Dupin v. France*,¹⁵¹ where the Strasbourg Court took another step back from the more positive trends regarding inclusive education that were evidenced in *Çam* and *Enver Şahin*. Importantly, in *Dupin*, the CRPD¹⁵² was deemed 'notable by its absence' – at least there was no real engagement with the UN Convention.¹⁵³

The more recent case law on education of the Strasbourg Court is therefore less encouraging in terms of facilitating intergroup contact in line with the CRPD's inclusive education provisions and provides less hope in terms of tackling the root causes of the aversive, and other forms of, disablism that pervade society. Indeed, as Deal points out, not endorsing inclusion can result in the fact that

well-meaning social policies that reduce the possibility of meaningful interactions between disabled people and others are therefore likely to be supported by aversive disablism, for instance: supporting segregated schooling due to the belief that it can offer a higher quality education to disabled children.¹⁵⁴

4.2 The Stance of the Strasbourg Court on Disability Hate Crime

Another area in which the issue of disability prejudice and stereotypes has come before the Strasbourg Court is in relation to hate crime. At the end of 2012, the ECtHR decided for the first time, in *Dordević v. Croatia*,¹⁵⁵ that the state's failure to protect against long-term, persistent harassment on the basis of disability and ethnic origin violated the ECHR.

Dordević concerned two Croatian nationals of Serbian origin. The second applicant was the mother of, and full-time carer for, a man – Dalibor (the first applicant) – who was severely mentally and physically disabled. The applicants complained that they had been harassed, both physically and verbally, over a period of four years by children living in their neighbourhood, who committed 'a number of brutal acts' against the first applicant.¹⁵⁶ The second applicant brought the matter to the

149. See *Stoian v. Romania*, above n. 147, para. 97.

150. *Ibid.*, para. 110.

151. *Dupin v. France*, ECHR (2019), Application no. 2282/17.

152. For reference to the CRPD, see para. 12 of the judgment.

153. J. Lievens and M. Spinoy, 'Dupin v. France: The ECtHR Going Old School in Its Appraisal of Inclusive Education?', *Strasbourg Observers*, 11 February 2019, <https://strasbourgobservers.com/2019/02/11/dupin-v-france-the-ecthr-going-old-school-in-its-appraisal-of-inclusive-education/#more-4304> (last visited 1 April 2020).

154. Deal, above n. 3, at 96.

155. ECtHR, *Dordević v. Croatia*, ECHR (2012), Application no. 41526/10.

156. *Ibid.*, para. 24.

attention of the police (among other authorities), who interviewed the children concerned,¹⁵⁷ but concluded that they were too young to be held criminally responsible.¹⁵⁸

The Strasbourg Court considered the first applicant's complaint under Article 3 ECHR (the prohibition of torture and inhuman and degrading treatment), recognising that positive obligations under that Article are not absolute and that they must 'be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities'.¹⁵⁹ The Court balanced the obligations inherent in Article 3 with the guarantees in other ECHR articles, which 'legitimately place restraints on the scope of [state] action to investigate crime and bring offenders to justice'.¹⁶⁰ Balancing all considerations, the ECtHR denounced the Croatian authorities for having taken 'no relevant action of a general nature to combat the underlying problem' in spite of the fact that they knew that the first applicant had been 'systematically targeted and that future abuse was very likely to follow'.¹⁶¹ The Court paid specific attention to the lack of policy decisions and monitoring mechanisms to prevent further harassment, and the lack of counselling put in place for the benefit of the first applicant,¹⁶² (seemingly) implying that these types of positive measures are required under the obligation to protect human (disability) rights.

In addition, the ECtHR held that the level of disruption caused to the second applicant's private life and 'acts of ongoing harassment'¹⁶³ directed towards her son triggered the application of Article 8 ECHR (the right to respect for private and family life), under which contracting states have a positive obligation to 'ensure respect for human dignity'.¹⁶⁴ This is similar to what Liebenberg terms 'treatment as an equal'¹⁶⁵ and demonstrates a substantive model of equality in action within the ECtHR's jurisprudence.

Notably, even though the ECtHR had cited Article 5 CRPD (on non-discrimination) and Article 8 CRPD (on awareness raising) as relevant UN legal materials,¹⁶⁶ the complaint under Article 14 ECHR was dismissed, since the applicants had not exhausted domestic remedies. It is unfortunate that the Strasbourg Court did not have the opportunity to consider the application of the non-discrimination norm in *Dordević* and to elaborate on positive measures in that context, particularly in light of the later judgment in *Skorjanec v. Croatia*,¹⁶⁷ in which the Court found racist hate crime (leading to discrimi-

nation by association) to be in breach of Article 14 ECHR.

It is noteworthy that, in *Dordević*, the third-party intervenor – the European Disability Forum – claimed that fear of difference is 'nourished' only when the potential victim is perceived as 'vulnerable'.¹⁶⁸ Vulnerability (or perceived vulnerability) is often at the root of hate speech and hate crime, and it is acknowledged by some scholars¹⁶⁹ that the construction of individuals with disabilities as vulnerable subjects has 'weakened the impetus'¹⁷⁰ for the introduction of hate crime legislation and prevents courts and law enforcement authorities from identifying crimes as hate crimes per se. According to Roche, it also leads to the risk of facilitating the types of arguments advanced by the government in *Dordević*, namely, 'that Dalibor had engaged in risky behaviour in light of his own vulnerability'¹⁷¹ by going outside on his own or that his mother had failed in caring for him by allowing him to go outside on his own.¹⁷²

The vulnerable groups approach¹⁷³ has rightly been viewed by some authors as a means of addressing structural inequalities. Peroni and Timmer argue that the ECtHR's use of the concept of 'group vulnerability'

represents a crucial step towards an enhanced anti-discrimination case law The Court's use of the term 'vulnerable groups'... does something: it addresses and redresses different aspects of inequality in a more substantive manner.¹⁷⁴

While this contention has considerable merit, it must be acknowledged that the concept of 'vulnerability' does 'not sit particularly well with the disability rights agenda'.¹⁷⁵ The Strasbourg Court has applied vulnerability analysis in several disability cases, beginning with *Alajos Kiss*,¹⁷⁶ linking it to the 'considerable discrimination'¹⁷⁷ that individuals with (certain types of) disabilities – psy-

157. *Ibid.*, paras. 14–15.

158. *Ibid.*, para. 20.

159. *Ibid.*, para. 139.

160. *Ibid.*

161. *Ibid.*, para. 148.

162. *Ibid.*

163. *Ibid.*, para. 153.

164. *Ibid.*, para. 152.

165. S. Liebenberg, 'The Value of Human Dignity in Interpreting Socio-Economic Rights', 21 *South African Journal on Human Rights* 1, at 14 (2005).

166. *Dordević v. Croatia*, above n. 155, para. 79.

167. *Skorjanec v. Croatia*, ECHR (2017), Application no. 25536/14.

168. *Dordević v. Croatia*, above n. 155, para. 133.

169. See A. Roulstone and H. Mason-Bish, 'Between Hate and Vulnerability: Unpacking the British Criminal Justice System's Construction of Disablist Hate Crime', 26(3) *Disability and Society* 351 (2012). See also the arguments made in *Dordević v. Croatia*, above n. 155, para. 131.

170. See Roulstone and Mason-Bish, above n. 169, at 351.

171. M. Roche, 'Failure to Stop Disability Harassment', 9 October 2012, www.localgovernmentlawyer.co.uk/adult-social-care/307-adult-care-features/11934-failure-to-stop-disability-harassment (last visited 1 April 2020).

172. See Roche, above n. 171. See also *Dordević v. Croatia*, above n. 155, para. 130.

173. See generally A. Timmer, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights', 11(4) *Human Rights Law Review* 707 (2011).

174. L. Peroni and A. Timmer, 'Vulnerable Groups: The Promise of an Emergent Concept in European Human Rights Convention Law', 11 *International Journal of Constitutional Law* 1056 (2013). Emphasis in original.

175. Broderick (2015), above n. 15, at 320. See also the arguments by Maria Roche, who points out that, "to assume 'vulnerability' is an inherent and unchanging characteristic of disabled people is to discriminate against them, is disempowering and sails close to a flawed conceptualisation of disability as weakness": Roche, above n. 171.

176. *Alajos Kiss v. Hungary*, above n. 128, para. 42.

177. *Ibid.*

chosocial (mental) disabilities – have encountered in the past. The Court has even invoked the idea of group vulnerability in some cases to read positive obligations into ECHR rights, which is positive in itself.¹⁷⁸ However, while the Court only made one reference to vulnerability in *Dordević*,¹⁷⁹ it is arguable that employing the language of vulnerability can be a double-edged sword in the disability context: on the one hand, (potentially) increasing protection for the individual concerned, and, on the other hand, running the risk of leading to further stigmatisation regarding the perceived inabilities of people with disabilities.¹⁸⁰ Moreover, the notion of ‘group vulnerability’ is at odds with the fact that the CRPD adopts an empowering approach, focusing on individual abilities and capabilities.

On the whole, *Dordević* has been deemed an ‘important and welcome’ judgment.¹⁸¹ It demonstrates that the ECtHR will step in when no concrete or integrated action to stop abusive behaviour is taken by domestic authorities, and it underlines the proactive role that state authorities should play to effectively counter hate crimes against people with disabilities. As mentioned above, however, harassment at the interpersonal level – occurring in relations between private parties – will require coordinated action from a variety of domestic agencies, something which the Croatian authorities themselves did not manage to do in this context.

4.3 Positive Duties in Strasbourg to Tackle Employment-Based Discrimination?

The Strasbourg Court has also ruled on the severe effects of prejudice and stereotypes at work in *IB v. Greece*,¹⁸² which concerned the dismissal from employment of a man who had contracted the HIV virus, following a letter penned by 33 of his fellow employees demanding his dismissal in order ‘to preserve their health and their right to work’.¹⁸³

Before the Strasbourg Court, the applicant claimed that he had been the subject of stigmatisation on the part of his colleagues, in that he ‘had been treated like a pariah who should no longer be entitled to work’.¹⁸⁴ He alleged a violation of his right to private life under Article 8 ECHR, on account of the Court of Cassation’s ruling that his dismissal on the ground of his HIV status was lawful. The applicant also alleged discriminatory treatment contrary to Article 14 ECHR on account of the dismissal itself and the domestic Court’s reasoning that it had been justified by the need to preserve a good working environment.¹⁸⁵

In finding a violation of both Articles 8 and 14 ECHR, the Strasbourg Court once again adopted the group vulnerability approach. It ruled that, by virtue of the fact that people living with HIV are a

vulnerable group with a history of prejudice and stigmatisation, States should only be afforded a narrow margin of appreciation in choosing measures that [single] out that group for differential treatment on the basis of their HIV status.¹⁸⁶

The Court thereby extended its ruling in *Kiyutin*¹⁸⁷ to a dispute between private parties in *I.B.*

The Court failed to mention the CRPD in *I.B.*, although it had ‘obvious relevance’ to the decision.¹⁸⁸ Nonetheless, it is evident, as argued elsewhere,¹⁸⁹ that the CRPD’s social model approach to disability infiltrated the Court’s analysis of the material scope of Article 8 ECHR. The Strasbourg Court ruled that the treatment in question resulted in the applicant’s stigmatisation and had ‘serious repercussions’ on his ‘personality rights, the respect owed to him and, ultimately, his private life’.¹⁹⁰ Furthermore, in deciding that there was no objective and reasonable justification for the treatment in question, the ECtHR adopted a CRPD-compliant approach (without drawing explicitly on the CRPD).¹⁹¹ This led the Court to narrow the margin of appreciation¹⁹² and resulted in a finding of discrimination on account of the applicant’s health status, which the Court held should be covered, either as a form of disability or in the same way as a disability, under the term ‘other status’ in Article 14 ECHR.¹⁹³

Interestingly, the applicant claimed that ‘the circumstances of his dismissal’ did not render the principle of positive obligations inapplicable per se.¹⁹⁴ The Greek government argued, however, that

neither Article 8, whether taken alone or in conjunction with Article 14, nor even Protocol No. 12 required member States to introduce legislation outlawing the dismissal of HIV-positive employees from a post in the private sector.¹⁹⁵

The Strasbourg Court sidestepped the issue of positive obligations, noting that even if not all Council of Europe member states have enacted specific legislation in favour

178. See *ZH v. Hungary*, ECHR (2012), Application no. 28973/11, para. 31. See also para. 138 of *Dordević v. Croatia*, above n. 155, where the Court used similar language.

179. *Dordević v. Croatia*, above n. 155, para. 138.

180. *Ibid.*, for the Government’s submissions at para. 130, in contrast with the Court’s approach at para. 138.

181. Roche, above n. 171.

182. *IB v. Greece*, ECHR (2013), Application no. 552/10.

183. *Ibid.*, para. 10.

184. *Ibid.*, para. 59.

185. *Ibid.*, para. 48.

186. *Ibid.*, paras. 79 and 81.

187. *Kiyutin v. Russia*, ECHR (2011), Application no. 2700/10, paras. 63–64. See also *Novruk and Others v. Russia*, ECHR (2016), Applications no. 31039/11, 48511/11, 76810/12, 14618/13 and 13817/14.

188. Broderick (2015), above n. 15, at 331.

189. See A. Timmer, ‘HIV-based Employment Discrimination: The ECtHR Takes a Strong Stance in *I.B. v. Greece*’, 21 October 2013, <http://strasbourgobservers.com/2013/10/21/hiv-based-employment-discrimination-the-ecthr-takes-a-strong-stance-in-i-b-v-greece/> (last visited 1 April 2020). See also Broderick (2015), above n. 15, at 331–332.

190. *IB v. Greece*, above n. 182, para. 72.

191. *Ibid.*

192. *Ibid.*, para. 81.

193. *Ibid.*, para. 73.

194. *Ibid.*, para. 59.

195. *Ibid.*, para. 56.

of persons living with HIV, there is a ‘clear general tendency towards protecting such persons from any discrimination in the workplace by means of more general statutory provisions’.¹⁹⁶

On the whole, Timmer is of the view that the *I.B.* judgment ‘does not contain major innovations in the Court’s Article 14 analysis’,¹⁹⁷ and she points to the fact that the legal reasoning does not provide much support for positive measures in the form of the duty to reasonably accommodate the applicant if his health status had actually diminished his ability to work.¹⁹⁸

While the finding of disability-based discrimination, as a result of stigmatisation, is an important finding by the Strasbourg Court – in the sense that it seems to counteract (among others) a form of ‘direct psycho-emotional’ disablism¹⁹⁹ that arises from various ‘acts of invalidation’²⁰⁰ – the Court’s apparent lack of support for positive measures is indeed noteworthy. Those measures have been deemed to constitute an essential component in targeting aversive disablism. That form of disablism may arise, according to Deal, in situations ‘whereby an employer, through good intentions could decide not to put a disabled employee under additional pressure by exposing them to a new function or requiring them to attend a stressful training event’, thereby placing the employee ‘in a more vulnerable position with respect to his/her career’.²⁰¹

4.4 The Strasbourg Court and the Thorny Issue of Legal Capacity: Adjudicating According to ‘Best Interests’?

Another area in which the Strasbourg Court has been confronted with disability prejudice and stereotyping that can affect interpersonal relations is the field of legal capacity. Three particularly recent and relevant cases in that field are analysed below.²⁰²

*A.-M.V. v. Finland*²⁰³ concerned the complaint brought before the ECtHR by a man with an intellectual disability regarding the refusal of the domestic courts to replace his guardian, who had prevented him from deciding where, and with whom, he would live. The applicant alleged, in particular, a violation of Article 8 ECHR. The Strasbourg Court referred to Article 12 CRPD and the CRPD Committee’s General Comment No. 1, both of which relate to legal capacity. Notably, the ECtHR remarked on the positive obligation of states parties to the CRPD to ‘take action to develop laws and policies to replace regimes of substitute decision-making

by supported decision-making, which respects the person’s autonomy, will and preferences’.²⁰⁴ Notwithstanding this, the Strasbourg Court held that there had been no violation of Article 8 ECHR, since the applicant was unable to understand the implications of the matter in question. The Court implicitly applied a best interests standard, which is based on prejudice and stereotypes that people with disabilities are incapable, and is incompatible with Articles 12 and 23 CRPD. Moreover, Cojocariu is of the view that the Court extended the scope of the concept of ‘protection of health’ in Article 8(2) to

cover the woolly notion of “well-being”, in order to accommodate interferences with the right to respect for private life in the “best interests” of the person concerned, beyond traditional concerns with harm to self or others.²⁰⁵

A similar approach by the ECtHR was evidenced in the later, 2018, case of *Delecalle v. France*.²⁰⁶ That case concerned a wealthy elderly man who had been placed under partial guardianship (*curatelle renforcée*) at the request of his adoptive daughter and who was refused permission to marry, since it was adjudged by the domestic authorities that he (apparently) could not understand the financial implications of this decision. In his complaint to the ECtHR, the applicant argued that his right to marry (contained in Article 12 ECHR) had been infringed. The Strasbourg Court invoked the permitted restrictions on that right – those of ‘generally recognised public interest considerations’ – to rule that the applicant was not ‘deprived’ of his right to marry, but was merely required to obtain his guardian’s permission to do so.²⁰⁷ The Court afforded the state a wide margin of appreciation, reasoning that sufficient safeguards had been put in place and, ironically, that the impugned measure was intended to promote his autonomy.²⁰⁸ In that regard, Cojocariu argues that the Strasbourg Court did not engage with the facts of the case; rather, it focused on the procedural safeguards available to the applicant.²⁰⁹

Cojocariu rightly notes that the reasoning endorsed by the Strasbourg Court was ‘impregnated with prejudice against and paternalism towards elderly people and people with disabilities’.²¹⁰ What is particularly worrying is the fact that the applicant’s adoptive daughter,

196. *Ibid.*, para. 83.

197. Timmer (2013), above n. 189.

198. *Ibid.*

199. See generally D. Reeve, ‘Psycho-emotional Disablism and Internalised Oppression’, in J. Swain, S. French, C. Barnes & C. Thomas (eds.), *Disabling Barriers – Enabling Environments* (2014), at 92–98.

200. *Ibid.*, at 93.

201. Deal, above n. 3, at 100.

202. See, in addition to the cases in this section, *Shtukatur v. Russia*, ECHR (2008), Application no. 44009/05; *DD v. Lithuania*, ECHR (2012), Application no. 13469/06; *Lashin v. Russia*, ECHR (2013), Application no. 33117/02; *Stanev v. Bulgaria*, ECHR (2012), Application no. 36760/06.

203. *A.-M.V. v. Finland*, ECHR (2017), Application no. 53251/13.

204. *Ibid.*, paras. 42 *et seq.*

205. C. Cojocariu, ‘A.-M.V. v Finland. Independent Living: A Bridge Too Far for the European Court of Human Rights’, *Strasbourg Observers*, 10 May 2017, <https://strasbourgobservers.com/2017/05/10/a-m-v-v-finland-independent-living-a-bridge-too-far-for-the-european-court-of-human-rights/> (last visited 1 April 2020).

206. *Delecalle v. France*, ECHR (2018), Application no. 37646/13.

207. *Ibid.*, paras. 54, 60 and 62.

208. *Ibid.*, para. 60.

209. C. Cojocariu, ‘Loneliness that is Good for you: The European Court Addresses the Right to Marry of People with Disabilities’, *Strasbourg Observers*, 3 December 2018, <https://strasbourgobservers.com/2018/12/03/loneliness-that-is-good-for-you-the-european-court-addresses-the-right-to-marry-of-people-with-disabilities/> (last visited 1 April 2020).

210. *Ibid.*

who initiated the partial guardianship procedure, was apparently in the middle of a family conflict concerning financial interests in the applicant's property.²¹¹ Furthermore, the guardianship regime was put in place based on medical certificates that seemed to indicate 'slight cognitive disorder', 'psychological fragilities' and 'some degree of vulnerability',²¹² giving rise to the question as to whether guardianship was a necessary measure at all in this instance. Indeed, a medical report sought during the domestic court proceedings stated that, although he had an intellectual disability and was unable to manage his property and finances, the applicant was capable of consenting to marriage.²¹³ Viewed in that light, the Strasbourg Court's judgment displays overtly disablist reasoning. In her strong dissenting opinion, Judge Nußberger cogently argued that the right to marry was disproportionately restricted in this case.²¹⁴

There is no doubt that the Strasbourg Court's standard of review in *Delecalle* perpetuates the types of prejudices and stereotypes that were evident at the national level. By granting the state a wide margin of appreciation and assuming that the domestic decisions were robust, without applying a substantive standard of review, the ECtHR did nothing to push states towards changing hearts and minds.

By way of contrast to the findings in the aforementioned cases, in the very recent case of *Cînta v. Romania*,²¹⁵ the ECtHR held that there had been a violation of Article 8 and Article 14 ECHR in the context of court-ordered restrictions on the applicant's contact with his daughter. The Court found, in particular, that the domestic authorities' decisions to restrict the applicant's contact had been based partly on the fact that he had a psychosocial disability ('mental illness'). While the ECtHR ruled that the fact that the applicant's mental health featured in the courts' assessment did not, in itself, raise an issue under Article 14 ECHR, relying on mental illness as the decisive element or even as one element among others may amount to discrimination when, in the specific circumstances of the case, the mental illness does not have a bearing on the individual's ability to take care of the child.²¹⁶

Notably, the Court cited Article 12 CRPD (on legal capacity) and even the CRPD's human rights model of disability and its model of inclusive equality.²¹⁷ On the whole, however, the Court's decision, while positive in its outcome, would not appear to be compatible with the pronouncements of the CRPD Committee. According to the Committee, 'mental illness' should not be a relevant consideration at all in restricting an applicant's rights.

Furthermore, and in contrast to the CRPD Committee, the Strasbourg Court once again invoked the language of vulnerability to justify 'special consideration' for the rights of 'mentally-ill persons'.²¹⁸ By using the language of vulnerability and that of mental illness (rather than psychosocial disability, as the CRPD Committee²¹⁹ does, representing the social construction of disability), there is potential for further entrenchment of disablist notions and behaviour in society. It is arguable that ensuring CRPD-compliant language in court decisions and, by extension, among the general public is something that only educational and training measures can target.

5 Trends towards Convergence or Fragmentation in the Approaches of the UN Bodies and the Strasbourg Court

Scrutiny of disability prejudice and stereotyping is in its 'embryonic stages'.²²⁰ Nonetheless, preliminary remarks concerning trends towards convergence or fragmentation in the approaches of the international and regional bodies analysed can be made.

As this article has demonstrated, the CRPD Committee has increased its references to the issues of prejudice and stereotyping in its concluding observations; and has proposed a mixed basket of legislative, funding and educational measures to tackle those issues. The Committee maintains a particular focus on awareness-raising and training measures, to be undertaken in conjunction with people with disabilities (through their representative organisations); and it also pushes states towards adopting legislative and individualised support measures. At times, however, the CRPD Committee has been criticised for its elaboration of 'somewhat aspirational'²²¹ (positive) state obligations in seeking to ensure the fulfilment of certain rights, such as the right to legal capacity.²²²

It cannot be ascertained whether the CRPD's model of inclusive equality has travelled across the gamut of the international human rights treaty bodies. The data available is currently not robust enough to be able to detect definitive trends. Drawing on the one case of particular relevance in the context of this contribution –

211. *Delecalle v. France*, above n. 206, paras. 11-12.

212. *Ibid.* Dissenting Opinion of Judge Nußberger, referring to para. 9 of the judgment.

213. *Ibid.* para. 9.

214. *Delecalle v. France*, above n. 206, Dissenting Opinion of Judge Nußberger.

215. *Cînta v. Romania*, ECHR (2019), Application no. 3891/19.

216. *Ibid.*, para. 68.

217. *Ibid.*, paras. 31-32.

218. *Ibid.*, para. 77.

219. See CRPD Committee, above n. 68.

220. Cusack, above n. 7, at 23.

221. Cojocariu (2018), above n. 209.

222. See also O. Lewis, 'Council of Europe', in L. Waddington and A. Lawson (eds.), *The UN Convention on the Rights of Persons with Disabilities in Practice. A Comparative Analysis of the Role of Courts* (2018) 89, at 89.

R.B.P. v. the Philippines – there appears to be a lack of coherence and an inconsistent use of concepts between the CRPD Committee and the CEDAW Committee when it comes to intersectionality and vulnerability analysis.

In relation to stereotyping, Cusack highlights that more work is needed

to ensure that, wherever possible, UN mechanisms seize opportunities to scrutinise disability stereotyping, and articulate the nature and scope of state obligations to address such stereotyping, including its compounded forms.²²³

He opines that the ‘leadership of the CRPD Committee will be critical in this regard’.²²⁴

With regard to the CRPD and ECHR, ‘growing synergies’ have emerged in the Strasbourg Court’s jurisprudence.²²⁵ The ECtHR has affirmed that it views the CRPD as embracing ‘a European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment’.²²⁶ As Lewis asserts, this signals the Court’s view that the CRPD is ‘a globally important direction-setting treaty’.²²⁷ The ECtHR has increasingly drawn on the CRPD as an interpretive tool to ECHR rights, and it has outlined a duty of reasonable accommodation for contracting states in certain cases concerning access to education. However, as scholars point out, the Strasbourg Court has, to date, failed to fully engage with the CRPD, particularly in the field of legal capacity.²²⁸

By way of contrast with the UN treaty bodies, the Strasbourg Court has wavered in its approach to positive state duties to tackle prejudice and stereotypes. In certain judgments, such as *Dordević*, the Court lays emphasis on the importance of the obligation to protect, and pays specific attention to the lack of policy decisions and monitoring mechanisms to prevent further harassment. This strong stance may be on account of the serious nature of the acts in question and the extreme impunity evident in the case. In other judgments, such as *I.B.*, the Court is less willing to step in to push states towards changing hearts and minds, and seems to agree with the domestic authorities that the ECHR does not require member states to introduce legislation outlawing the dismissal of HIV-positive employees in the private sector. The ECtHR has also retreated into the shadows in other cases that raised the thorny issue of legal capacity, such as *A.-M.V.* and *Delecolle*, according contracting states a wide margin of appreciation and resorting to limitation clauses on ECHR rights. This is not entirely surprising since, as Lewis confirms, the Strasbourg Court ‘departs significantly from the CRPD Committee’s insistence on legal capacity in all areas of life irre-

spective of [the] nature or degree of disability or legal capacity status’.²²⁹ This presumably stems from the ECtHR’s concern regarding the degree of legitimacy that it has vis-à-vis contracting states, a point which Henrard has elaborated on in connection with the Court’s use of ‘consensus analysis’ as a means of justifying the appropriate level of scrutiny of restrictions.²³⁰

On the whole, Waddington affirms that the Strasbourg Court seems to run ‘hot and cold’²³¹ in its case law on disability rights. In *Delecolle*, by way of contrast with *A.-M.V.*, for instance, the Court did not mention the CRPD. According to Cojocariu,

with the *Delecolle* judgment, the Court reverts to an uncertain trajectory in the area of disability, characterised by a palpable inability to develop, and apply consistently, a coherent set of principles on difficult subjects such as legal capacity.²³²

Finally, a further area of fragmentation – not only between the UN bodies themselves, but also between the CRPD Committee and the ECtHR – relates to the use of language. As pointed out in this article, the ECtHR uses the language of vulnerability, in contrast to the CRPD Committee, which uses, instead, empowering language that emphasises capabilities. As argued above, the ECtHR’s approach, while potentially increasing the protection afforded to individual applicants, arguably does not facilitate a change in hearts and minds towards viewing persons with disabilities as empowered individuals whose inherent capabilities should be the focus of analysis. Moreover, it would appear to run the risk of further entrenching aversive disablism.

6 Conclusion

Timmer maintains that stereotypes are both a ‘cause and manifestation’ of ‘structural disadvantage and discrimination’ against certain groups.²³³ This assertion rings particularly true in the context of people with disabilities, since deeply rooted systemic discrimination and stereotypical attitudes about their capabilities and contributions to society result in ‘barriers to being’ and ‘barriers to doing’.²³⁴

223. Cusack, above n. 7, at 23.

224. *Ibid.*

225. Ferri and Broderick, above n. 33, at 264.

226. *Glor v. Switzerland*, above n. 32, para. 53.

227. Lewis (2018), above n. 222, at 108.

228. *Ibid.* Ferri and Broderick, above n. 33.

229. Lewis (2018), above n. 222, at 128. Ferri and Broderick, above n. 33, at 187.

230. K. Henrard, ‘How the ECtHR’s use of European Consensus Modulates the Effective Protection of Fundamental Rights: Balancing Mandate, Legitimacy Concerns and Epistemological Uncertainty’, in P. Kapotas and V. Tsevelekos (eds.), *Building Consensus on European Consensus* (2019), at 141–66.

231. L. Waddington, ‘Handicap, Discrimination by Association, Indirect Onderscheid, Toegankelijkheid, VN-gehandicaptenverdrag’, 130 *European Human Rights Cases* (2016), para. 18.

232. Cojocariu (2018), above n. 209.

233. Timmer (2011), above n. 173, at 708.

234. C. Thomas, ‘How is Disability Understood? An Examination of Sociological Approaches’, 16 *Disability and Society* 569 (2004).

Mégret claims that state involvement in preventing negative encroachments occurring in the private sphere covers an ‘important dimension of the experience of persons with disabilities’.²³⁵ The CRPD propelled the issue of disability discrimination, including in the interpersonal domain, into international human rights law. By endorsing the human rights model of disability and the inclusive model of equality, the CRPD requires states to ‘delve deeper into the realm of equality law to grant disabled citizens a right of equal access to all areas of life’.²³⁶ Since attitudinal barriers are one of the most difficult barriers to eradicate,²³⁷ the CRPD imposes numerous positive obligations on states parties targeted at removing attitudinal barriers that are at the core of the marginalisation of people with disabilities.

This article has, to borrow the words of Perlin, analysed how far states should (and can) go to capture the hearts and minds of the public, in order to ensure that the rights of people with disabilities ‘are incorporated – freely and willingly – into the day-to-day fabric and psyche of society’.²³⁸ As noted in the introduction, this article primarily addresses jurisprudence which relates to prejudice and stereotypes that occur in relations between private parties, but it also discusses disablism, which – directly or indirectly – affects the exercise of the rights of people with disabilities in the interpersonal sphere.

As demonstrated throughout this article, the international human rights treaty bodies are like brave older siblings, stepping out into the unknown – without constraints – to pronounce a range of positive measures to be adopted by states parties, with a view to engaging in ‘social engineering’. On the other hand, the Strasbourg Court imposes self-restraint and has recourse to the limits of its mandate whenever it is confronted with particularly contentious issues.

A mixture of positive duties, including legislative measures, have been considered appropriate by the UN treaty bodies to eliminate prejudice and stereotypes. However, as demonstrated above, discrimination that affects interpersonal relations – particularly discrimination that occurs between private parties – can be difficult to regulate. Furthermore, while effective safeguards can, and should, be adopted – ranging from a review of state policies and legal frameworks, to a review of the capacity available to monitor violations – wholesale reliance on the law is not desirable. This is because legislation, policies and institutional structures often mirror value-laden (disabling) social conventions and attitudes that emerge in a particular society. Moreover, while law can serve as an important tool in compelling individuals and groups to change their behaviour (and can sometimes lead to

changes in hearts and minds over time), there is often a backlash against coercive measures.

Beyond legal measures, awareness raising and training (including in relation to language that potentially inflames prejudice and stereotypes) is required. These measures must target all relevant societal actors, particularly those involved in rights adjudication, including judges and prosecutors. It must be noted, however, that such measures have their limitations, as addressed throughout this article. In addition, as Bariffi acknowledges,

governmental commitment to conduct effective awareness raising policies to promote a positive image of persons with disabilities is scarce and generally guided by the prevalence of the medical model of disability.²³⁹

To result in genuine changes to hearts and minds, Solstad Vedeler *et al.* are of the view that ‘transformative strategies’²⁴⁰ are more appropriate. The authors argue that awareness-raising activities are not sufficient; rather, drawing on Fraser’s theories of social justice, they affirm that there ‘continues to be a profound need to increase the redistribution of resources in order to facilitate an increase in educational achievement and employment participation’.²⁴¹ Steadily increasing the level of participation and inclusion of people with disabilities in mainstream structures in society – education, employment, political and cultural life, among others – facilitates intergroup contact. Thus, societal structures need to be changed. In turn, affective ties can be built and strengthened. This should, at the very least, result in changing hearts, although the cognitive dimension of prejudice may take longer to tackle.

Ultimately, states cannot be ‘forced’ to change hearts and minds, but a desire to effect change can seep into the collective conscience (and into political will), in particular through the efforts of civil society. Essentially, more inclusion and participation of people with disabilities themselves and their representative organisations is needed in policy processes.²⁴² Their inclusion at all levels is necessary, among other reasons, to challenge the depictions of disability that are contained in popular culture, certain religions and in historical and medical accounts of disability. As Bariffi points out, ‘the system of values, beliefs, traditions, and the social image about disability which is built at individual, community, and media levels sets the groundwork for any possible social change’.²⁴³

In its 2018 general comment on equality, the CRPD Committee affirmed that the efforts by states parties ‘to overcome attitudinal barriers to disability have been

235. F. Mégret, ‘The Disabilities Convention: Towards a Holistic Concept of Rights’, 12 *The International Journal of Human Rights* 261, at 266 (2008).

236. Broderick (2015), above n. 15, at 139.

237. Bariffi, above n. 107, at 230.

238. M.L. Perlin, ‘The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?’, 8 *Journal of Law and Health* 15, at 22 (1993-1994).

239. Bariffi, above n. 107, at 244.

240. J. Solstad Vedeler, T. Olsen & J. Eriksen, ‘Hate Speech Harms: A Social Justice Discussion of Disabled Norwegians’ Experiences’, 34(3) *Disability and Society* 368, at 380 (2019).

241. *Ibid.*

242. CRPD Committee, General Comment 7 on Participation, UN Doc. CRPD/C/GC/7 (2018).

243. Bariffi, above n. 107, at 230.

insufficient', and that 'enduring and humiliating stereotypes, and stigma of and prejudices against persons with disabilities as being a burden on society' remain.²⁴⁴ Courts and quasi-adjudicatory bodies can play a role in pushing states towards facilitating change in this regard. The international and regional treaty bodies and courts need to develop a coherent body of jurisprudence that can be translated into concrete action at the domestic level. Ultimately, however, it is only by increasing the participation and inclusion of people with disabilities in every aspect of society that states can target the root causes of prejudice, stereotypes and 'othering' that persist. This is wholly in line with the CRPD's model of inclusive equality.

244. General Comment 6, above n. 48, para. 2.

