



**OPENING UP THE EUROPEAN CONVENTION HUMAN RIGHTS SUBJECT:
AN INCLUSIVE MULTILAYERED FRAMEWORK FOR ADJUDICATING
RELIGIOUS AND CULTURAL CLAIMS**

Lourdes Peroni

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Promoter: Professor Dr. Eva Brems

Ghent University, Faculty of Law

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PREFACE

This doctoral dissertation has been written within the framework of the project ‘Strengthening the European Court of Human Rights: More Accountability through Better Legal Reasoning,’ which is funded by the European Research Council (ERC). Under the leadership of Professor Eva Brems, the project studies the European Court of Human Rights’ case law with the aim of proposing innovative solutions to strengthen the consistency and persuasiveness of the Court’s legal reasoning.

One of the project’s major themes is ‘Mainstreaming Diversity.’ Under this theme, the project seeks to include the concerns of non-dominant groups in the Court’s reasoning. This objective grew out of the realization that the Court’s record is at best mixed when it comes to taking into account the diversities of groups such as women, people with disabilities, and religious and cultural minorities. While references to the specificities of these groups are occasionally made in the Court’s reasoning, there is no consistent effort at mainstreaming them, nor a clear methodology or approach to do so. In line with the objective pursued under ‘Mainstreaming Diversity,’ this dissertation seeks to more fully and systematically integrate the concerns of members of non-dominant cultural and religious groups into the Court’s legal reasoning.

SUMMARY

Like many courts in Europe and elsewhere, the European Court of Human Rights (the ‘Court’ or the ‘Strasbourg Court’) has been grappling with the challenges posed by contemporary cultural and religious diversity. Applicants from a variety of cultural and religious backgrounds have increasingly brought longstanding conceptions underlying the Court’s legal reasoning under growing pressure: from Sikh men wanting to wear the turban to Roma members seeking to preserve their travelling lifestyle and Muslim women battling headscarf bans. Three provisions of the European Convention on Human Rights (‘ECHR’) have been the site where this pressure has been most vividly felt: non-discrimination (Article 14 ECHR), freedom of religion (Article 9 ECHR), and the right to respect for one’s cultural lifestyle (Article 8 ECHR). For the most part, however, the Court has failed to rise to the challenge. At times, these types of claims have been met with neglect; at others, with trivialization and even delegitimation. This dissertation addresses these shortcomings in the legal reasoning of the European Court of Human Rights.

The research is motivated by two sets of questions. At a descriptive level, the questions are: What are the assumptions or conceptions implicitly defining the European Convention human rights subject (‘ECHR subject’), against which religious and cultural claimants are judged? In particular, which experiences, features or views are regarded as essential or ‘universal’ in the construction of this subject and which ones are marginalized as invisible, negligible or ‘particular’? Moreover, what kinds of consequences do these assumptions carry for religious and cultural applicants and their groups? Do they create exclusions and hierarchies between them? If so, what forms or shapes do such exclusions and hierarchies take and at what levels do they occur (e.g., within groups, across groups)? At a normative level, the research questions are: Should the Court avoid these exclusions and hierarchies – or open up these ‘universals’? If so, on what basis and how exactly might the Court do this?

The dissertation proceeds in three major parts, each of which identifies ‘universals’ in the ECHR subject at a different level. First, it identifies exclusions and hierarchies *within* the abstract category of ‘human’. It argues that the Court has, to some extent, opened up the abstract universal human rights subject by acknowledging the constructed vulnerability of some groups. Yet traces of invulnerability foreclose fuller inclusion of cultural and religious group members. Second, the dissertation identifies exclusions and hierarchies within the religious and cultural ECHR subject, that is to say, across different religious and cultural groups. The dissertation argues that operating as one of the ‘universals’ of freedom of religion is a Protestant, belief-centered notion of religion, which favors internal and disembodied forms of religious subjectivity over external and embodied ones. The dissertation further unveils one of the ‘universals’ embedded in the right to respect for family life: the nuclear family idealized in some parts of Western Europe that disadvantages other forms of family life. Last, the dissertation identifies exclusions and hierarchies within sub-religious and sub-cultural ECHR subjects, namely *within* groups. It shows how such exclusions and hierarchies arise from elevating a

particular cultural or religious practice to the norm, as if it were the group paradigmatic practice. This practice is subsequently either fixed as the 'essence' of group identity or associated with negative stereotypes.

The dissertation puts forward two central arguments. The first argument is that, in articulating the ECHR subject, the Court endorses various 'universals' that hamper the full and equal inclusion of a range of religious and cultural 'others'. Though these 'universals' may manifest themselves in various forms and take place at different levels, they all respond to the same exclusionary logic: the experiences of some are confused with the experiences of all and posited as the yardstick against which everyone is judged. Indeed, the hidden (and not so hidden) workings of such 'universals' have not just led to the trivialization and marginalization of applicants' experiences. Most worryingly, these workings have sometimes led to the devaluation or delegitimation of these experiences. The second central argument of this dissertation is that the Court should redress the exclusionary and inegalitarian character of such 'universals'. To this end, the dissertation offers a multilayered framework aimed at opening up the ECHR subject at the three levels identified above: (i) within the abstract human rights subject; (ii) across religious and cultural groups; and (iii) within religious and cultural groups. In so doing, the framework intends to more fully realize religious and cultural equality in European Human Rights Convention Law.

Zoals vele rechtscolleges in Europa en daarbuiten worstelt het Europees Hof voor de Rechten van de Mens (het 'Hof') met de uitdagingen die de hedendaagse culturele en religieuze diversiteit met zich meebrengt. Steeds vaker stellen verzoekers de hardnekkige opvattingen die aan de basis liggen van de juridische redenering van het Hof onder toenemende druk: van Sikh mannen die de tulband willen dragen tot Roma die hun reizende levensstijl willen behouden en moslimvrouwen die hoofddoekenverboden bevechten. Drie artikels van het Europees Verdrag voor de Rechten van de Mens ('EVRM') vormen het strijdtoneel waarop de druk het meest nadrukkelijk gevoeld wordt: non-discriminatie (Artikel 14 EVRM), vrijheid van godsdienst (Artikel 9 EVRM), en het recht op eerbied voor culturele levensstijl (Artikel 8 EVRM). Echter, het Hof heeft grotendeels gefaald om aan de gestelde uitdagingen tegemoet te komen. Soms heeft het Hof de eisen van de aangehaalde verzoekers beantwoordt met veronachtzaming; op andere momenten heeft het ze getrivialiseerd. Het onderzoek dat in deze dissertatie gepresenteerd wordt behandelt deze tekortkomingen.

Het onderzoek is gemotiveerd door twee onderzoeksvragen. Op het vlak van beschrijving wordt de volgende vraag gesteld: Wat zijn de bijzondere veronderstellingen of opvattingen die

impliciet het Europees mensenrechtensubject definiëren en ten opzichte waarvan religieuze en culturele verzoekers beoordeeld worden? Meer bepaald, welke ervaringen, kenmerken of gezichtspunten worden beschouwd als essentieel of 'universeel' in de constructie van het Europees mensenrechtensubject en welke worden naar de marge verdrongen als onzichtbaar, verwaarloosbaar of 'particulier'? Bovendien wordt bevraagd welke gevolgen deze veronderstellingen met zich meedragen voor religieuze en culturele verzoekers en de groep waartoe ze behoren. Creëren de veronderstellingen uitsluitingen en hiërarchieën? Zo ja, welke vormen nemen dergelijke uitsluitingen en hiërarchieën aan en op welke niveaus vinden ze plaats (bvb. binnen groepen of tussen groepen)? De normatieve onderzoeksvragen zijn: Moet het Hof deze uitsluitingen en hiërarchieën vermijden - of moet het de beschreven 'universele' opvattingen openstellen? Zo ja, op welke basis en hoe kan het Hof dit precies doen?

Deze dissertatie bestaat uit drie grote delen. Elk deel identificeert 'universelen' in het Europees mensenrechtensubject op verschillende niveaus. De dissertatie identificeert eerst uitsluitingen en hiërarchieën *binnen* de abstracte categorie 'mens'. Er wordt geargumenteed dat, hoewel het Hof het abstracte universele mensenrechtensubject openstelt door de sociaal geconstrueerde kwetsbaarheid van sommige groepen te erkennen, sporen van onkwetsbaarheid meer volledige inclusie van culturele en religieuze groepsleden verhinderen. Ten tweede identificeert de dissertatie uitsluitingen en hiërarchieën binnen het religieuze en culturele Europees mensenrechtensubject, namelijk *tussen* verschillende religieuze en culturele groepen. Er wordt geargumenteed dat één van de operationele 'universelen' van godsdienstvrijheid een Protestantse, geloofsgeoriënteerde (i.p.v. geloofsuitingsgeoriënteerde) opvatting van godsdienst is die interne en van uiting losgemaakte vormen van religieuze subjectiviteit bevoordeelt over externe en aan uiting verbonden vormen. De dissertatie onthult verder één van de 'universelen' werkzaam binnen het recht op eerbied voor het familieleven: een opvatting van de kernfamilie die geïdealiseerd wordt in sommige delen van West Europa en die andere vormen van familieleven benadeelt. Tenslotte identificeert de dissertatie uitsluitingen en hiërarchieën binnen sub-religieuze en sub-culturele Europese mensenrechtensubjecten, namelijk *binnen* groepen. Er wordt aangetoond hoe dergelijke uitsluitingen en hiërarchieën ontstaan doordat bijzondere culturele of religieuze praktijken verheven worden tot de norm, alsof deze de paradigmatische groepspraktijk weerspiegelt. Deze praktijk wordt vervolgens ofwel beschouwd als de 'essentie' van groepsidentiteit ofwel verbonden met negatieve stereotypen.

De dissertatie stelt twee centrale argumenten voorop. Het eerste argument is dat het Hof, in zijn beschrijving van het Europees mensenrechtensubject, verschillende 'universelen' onderschrijft die in de weg staan aan de volledige en gelijkwaardige inclusie van een reeks religieuze en culturele 'anderen'. Hoewel deze 'universelen' zich in verscheidene vormen en op verschillende niveaus uiten, beantwoorden ze allemaal aan dezelfde logica van uitsluiting: de ervaringen van enkelen worden verward met de ervaringen van allen en vooropgesteld als de maatstaf waartegen iedereen wordt beoordeeld. Inderdaad, de verborgen (en niet zo verborgen) werkingen van dergelijke 'universelen' hebben niet alleen geleid tot de trivialisering en marginalisering van de ervaringen van verzoekers. Ze liggen ook, op zeer verontrustende wijze,

aan de basis van de onderwaardering en delegitimering van sommige van deze ervaringen. Het tweede centrale argument is dat het Hof het uitsluitende en inegalitaire karakter van de geïdentificeerde 'universelen' dient aan te pakken. Met dit doel voor ogen biedt de dissertatie een meerlagig kader aan voor het openstellen van het Europees mensenrechtensubject op de drie hierboven beschreven niveaus: (i) binnen het abstracte mensenrechtensubject, (ii) tussen verschillende religieuze en culturele groepen, en (iii) binnen religieuze en culturele groepen. Zodoende wordt beoogd een meer volwaardige inclusie en gelijkheid tot stand te brengen binnen het recht van de Europese mensenrechten.

PH.D. ON ARTICLES

This Ph.D. is based on Articles, as allowed by Chapter IV § 14 of Ghent University's 'Complementary Regulations Concerning the Doctorate for the Faculty of Law and Criminological Sciences.' According to this provision, the dissertation may consist of a series of related Articles in periodicals or books. The number of Articles can vary between three and five, the majority of which has to be approved for publication by the time the dissertation is submitted.

This dissertation comprises six Chapters. Except for Chapter II, the rest is based on published (Chapters I, III, IV and V) or forthcoming (Chapter VI) Journal Articles/Book Chapters. Chapter I reproduces a co-authored Journal Article: Peroni, Lourdes and Timmer, Alexandra, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law', 11(4) *International Journal of Constitutional Law* I•CON (2013) 1056-1085. Chapters III, IV and V, on the other hand, are modified versions of the published pieces.

Thus, Chapter III is based on Peroni, Lourdes, 'Erasing Q, W and X, Erasing Cultural Differences' in Eva Brems (ed.) *DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR* (Cambridge University Press, 2012) 445-469. I have made some modifications to the version appearing in this edited volume. The most substantial additions are reflected in the first seven paragraphs of the Introduction of this Chapter. They are aimed at situating the issues within the Court's broader language-related case law.

Chapter IV is based on Peroni, Lourdes, 'Deconstructing "Legal" Religion in Strasbourg', *Oxford Journal of Law and Religion* (2013) 1-23. I have made some changes to the version appearing in this Journal. The most substantive additions appear in paragraphs 4-7 of the Introduction. These additions have been made to better situate the issues within the broader academic debates on freedom of religion in the ECHR.

Chapter V is based on Peroni, Lourdes, 'Challenging Culturally Dominant Conceptions in Human Rights Law: The Cases of Property and Family', 4 *Human Rights and International Legal Discourse* (2010) 241-264. Since the Article on which this Chapter is based was written at the beginning of my Ph.D., I have substantially updated it in order to include an analysis of the relevant family life cases decided by the Court over the past three years. These additions are mostly reflected in Part I. Moreover, this Chapter has dropped the parts of the Article dealing with the right to property in the Inter-American System, as I consider them irrelevant for the general points made in my Ph.D. The introduction and conclusion of this Chapter have been rewritten accordingly. The main arguments made in the published Article remain the same.

Chapter VI is a reproduction of a manuscript accepted for publication in the *International Journal of Law in Context* (forthcoming 2014).

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GENERAL INTRODUCTION

Hope lies, perhaps, in the idea that international human rights law has not yet exhausted the critical energy of human rights as an endlessly recursive interaction concerning inclusions and exclusions in which every inclusion necessarily creates new, unforeseen exclusions, and in which every lived exclusion births new claims for inclusion.

-- Anna Grear¹

Plurality is ‘an inescapable characteristic of contemporary societies’² and European societies are obviously no exception. The phenomenon is of course far from new – Europe has always been linguistically, religiously and culturally diverse.³ Diversity, however, has deepened and broadened over the past few decades, following post-World-War-II migration and refugee movements. Migration, in particular, has most recently diversified⁴ in forms and levels that have sometimes led to ‘super-diversity’.⁵ The novelty, for some, does not lie in the phenomenon of cultural and religious diversity as such but rather in ‘the unfamiliar – the extra-European, and above all, the extra-Judeo Christian’ dimension.⁶ The ‘Rest,’ once ‘geographically distant,’⁷ is

¹ Grear, Anna, “‘Framing the Project’ of International Human Rights Law: Reflections on the Dysfunctional “Family” of the Universal Declaration’ in Conor Gearty and Costas Douzinas (eds.) *THE CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW* (Cambridge University Press, 2012) at 34.

² Ballard, Roger et al. ‘Cultural Diversity: Challenge and Accommodation’ in Ralph Grillo et al. (eds.) *LEGAL PRACTICE AND CULTURAL DIVERSITY* (Ashgate, 2009) at 11.

³ See, e.g., Group of Eminent Persons of the Council of Europe, ‘Living Together: Combining Diversity and Freedom in 21st-century Europe’ (Council of Europe, 2011) at 9 (recalling that Europe has always been diverse). See also Malik, Maleiha, ‘The “Other” Citizens: Religion in a Multicultural Europe’ in Camil Ungureanu and Lorenzo Zucca (eds.) *LAW, STATE AND RELIGION IN THE NEW EUROPE: DEBATES AND DILEMMAS* (Cambridge University Press, 2012) at 95 (arguing that assuming that ‘the presence of non-Christian minorities in Europe is a “new” phenomenon, ignores the presence –and precedent – of religious minorities such as Jews.’).

⁴ Shah, Prakash, ‘Transnational Family Relations in Migration Contexts: British Variations on European Themes’, *RELIGARE Working Paper No. 7* (March 2011) at 1.

⁵ Steven Vertovec has coined the term ‘super-diversity’ to underline unprecedented levels and kinds of complexity. Vertovec, Steven, ‘Super-diversity and Its Implications’, 30(6) *Ethnic and Racial Studies* (2007) 1024-1054.

⁶ Ballard, Roger, ‘When, Why and How Far Should Legal Systems Take Cognisance of Cultural Diversity’, Presentation prepared for delivery at an International Congress on Justice and Human Values in Europe, Karlsruhe, 9th – 11th May 2007 at 2, available at <<http://www.casas.org.uk/papers/pdfpapers/karlsruhe.pdf>> accessed 2 February 2014.

⁷ Malik, Maleiha, ‘The “Other” Citizens: Religion in a Multicultural Europe’ in Camil Ungureanu and Lorenzo Zucca (eds.) *LAW, STATE AND RELIGION IN THE NEW EUROPE: DEBATES AND DILEMMAS* (Cambridge University Press, 2012) at 95 (referring to ‘non-European cultures with whom colonial states had contact in the past.’).

now *in* the ‘West’ sharing ‘the same geographical, temporal, and spatial sphere’⁸ and, by all accounts, is here to stay.⁹

Law, including human rights law, is certainly one of the sites where the challenges brought by this *de facto* plurality have been most vividly felt.¹⁰ Individuals from different religious and cultural backgrounds have turned to courts in search of protection of aspects of their religion or cultures, putting under increasing pressure dominant legal conceptions and traditional background assumptions.¹¹ As new issues enter the legal arena, scholars strive to come to grips with ‘the *already-there* factual heterogeneity’,¹² with a reality where religious and cultural variations abound not only *across* but also *within* groups. One of the major questions dominating legal academic debates is whether law should take account of this diverse reality, and if so, how, on what basis, and to what extent.¹³ For some, it is not even a matter of whether law *should* attend to this reality but, rather, whether it *can* do so.¹⁴

Like many courts in Europe and elsewhere, the European Court of Human Rights (the ‘Court’ or the ‘Strasbourg Court’) has been grappling with the challenges posed by contemporary cultural and religious diversity, mostly in the context of non-discrimination, freedom of religion and the right to respect for one’s cultural lifestyle. Claims have come from Sikh applicants looking to wear their turban,¹⁵ Roma claimants seeking protection of their travelling lifestyle,¹⁶ Muslim students battling headscarf bans,¹⁷ and Kurdish applicants

⁸ *Ibid.*: ‘Now, both Europeans and their “others” from non-Western cultures inhabit the same geographical, temporal and spatial sphere’.

⁹ See, e.g., Group of Eminent Persons of the Council of Europe, ‘Living Together: Combining Diversity and Freedom in 21st-century Europe’ (Council of Europe, 2011) at 9 (highlighting that ‘most of those who have come to Europe in recent decades, and their descendants, are here to stay’).

¹⁰ For an insightful discussion on how human rights law is used ‘to frame multicultural issues’ see Special Issue of the *Netherlands Quarterly of Human Rights* 30(4) 2012.

¹¹ For an illuminating list of the types of legal demands and challenges that this pluralization has brought, see Ballard, Roger et al. ‘Cultural Diversity: Challenge and Accommodation’ in Ralph Grillo et al. (eds.) *LEGAL PRACTICE AND CULTURAL DIVERSITY* (Ashgate, 2009) at 10. See also, Bader, Veit, Alidadi, Katayoun and Vermeulen, Floris, ‘Religious Diversity and Reasonable Accommodation in the Workplace in Six European Countries: An Introduction’, 13(2-3) *International Journal of Discrimination and the Law* (2013) at 55 (arguing that ‘[I]liberal democratic states in Europe are increasingly confronted with claims to accommodate a wide variety of religious beliefs and practices, and this puts pressure on entrenched institutional arrangements . . .’).

¹² Alidadi, Katayoun and Foblets, Marie-Claire, ‘Framing Multicultural Challenges in Freedom of Religion Terms: Limitations of Minimal Human Rights for Managing Religious Diversity in Europe’, 30(4) *Netherlands Quarterly of Human Rights* (2012) at 389.

¹³ See, e.g., Ringelheim, Julie, ‘Le Droit et la Diversité Culturelle: Cartographie d’un Champ en Construction’ in *LE DROIT ET LA DIVERSITÉ CULTURELLE* (Sous la direction de Julie Ringelheim) at 3 (arguing, however, that the problem is rather which diversity should law take into account); Ballard, Roger, ‘When, Why and How Far Should Legal Systems Take Cognisance of Cultural Diversity’, Presentation prepared for delivery at an International Congress on Justice and Human Values in Europe, Karlsruhe, 9th – 11th May 2007 at 2 available at <<http://www.casas.org.uk/papers/pdfpapers/karlsruhe.pdf>> accessed 2 February 2014; and Ballard, Roger et al. ‘Cultural Diversity: Challenge and Accommodation’ in Ralph Grillo et al. (eds.) *LEGAL PRACTICE AND CULTURAL DIVERSITY* (Ashgate, 2009) at 11.

¹⁴ For instance, in a notable study, legal and religious scholar, Winnifred Fallers Sullivan, has claimed: ‘Legally encompassing the religious ways of people in an intensely pluralist society is most likely impossible’. Sullivan, Winnifred Fallers, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* (Princeton University Press, 2005) at 138.

¹⁵ See, e.g., ECtHR, *Ranjit Singh v. France*, 30 June 2009 and ECtHR, *Jasvir Singh v. France*, 30 June 2009.

¹⁶ See, e.g., ECtHR (GC) *Chapman v. the United Kingdom*, 18 January 2001.

demanding protection of their language.¹⁸ Similarly, albeit rather obliquely, demands have come from migrants in search of protection of forms of family life that, over and over, have fallen outside the nuclear model of parents and minor children.¹⁹

The European Convention on Human Rights ('ECHR') offers explicit bases for some of these claims. For example, Article 9 ECHR (freedom of religion),²⁰ Article 14 ECHR (prohibition of discrimination on the basis of religion)²¹ and, more tangentially, Article 2 of Protocol 1 (the right of parents to ensure that their children's education is in conformity with their religious convictions)²² explicitly enable religious claims. Yet, as a classic individual human rights instrument, the ECHR does not provide an express basis for cultural claims (e.g., right to respect for one's traditions or customs) or language claims (e.g., language rights) apart from Article 14 ECHR (which prohibits discrimination on the basis of language)²³ and Articles 5 § 2²⁴ and 6 § 3 (a) and (e) ECHR²⁵ (which guarantee the right to be informed in one's language as part of the protection against arbitrary arrest and the right to a fair trial, respectively).

The absence of express provisions guaranteeing respect for language and cultural rights has not however prevented the Court from deriving language and cultural implications from various ECHR provisions. For instance, in a path-breaking interpretation of the ECHR, the Court has inserted the right to respect for one's cultural lifestyle as part of Article 8 ECHR (right to respect for private and family life).²⁶ It has also drawn language implications in the context of

¹⁷ See, e.g., ECtHR, *Dogru v. France*, 4 December 2008 and ECtHR, *Kervanci v. France*, 4 December 2008.

¹⁸ See, e.g., ECtHR, *Kemal Taşkın and Others v. Turkey*, 2 February 2010.

¹⁹ See, e.g., ECtHR, *Konstatinov v. the Netherlands*, 26 April 2007.

²⁰ Article 9 ECHR provides: 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'.

²¹ Article 14 ECHR states: 'The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, *religion*, political or other opinion, national or social origin, association with a national minority, property, birth or other status. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1'. Emphasis added.

²² Article 2 of Protocol 1 provides: '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 religious and philosophical convictions*'. Emphasis added.

²³ Article 14 ECHR states: 'The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, *language*, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1'. Emphasis added.

²⁴ Article 5 § 2 ECHR states: 'Everyone who is arrested shall be informed promptly, in a *language* which he understands, of the reasons for his arrest and of any charge against him'. Emphasis added.

²⁵ Article 6 § 3 (a) ECHR provides: 'Everyone charged with a criminal offence has the following minimum rights: to be informed promptly, in a *language* which he understands and in detail, of the nature and cause of the accusation against him'. Article 6 § 3 (e) ECHR adds: 'to have the free assistance of an *interpreter if he cannot understand or speak the language* used in court'. Emphasis added.

²⁶ See, e.g., ECtHR (GC) *Chapman v. the United Kingdom*, 18 January 2001. See discussion in Chapter II. Article 8 ECHR states: 'Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the

Article 10 ECHR (freedom of expression) as well as in the context of Article 2 of Protocol 1 (the right to education) and Article 3 of Protocol 1 (the right to free elections).²⁷ What is more, over the past decade or so, there have been several doctrinal openings in the Court's jurisprudence towards a more inclusive and diverse protection of applicants' religious and cultural practices.²⁸

Yet, so far, these openings have not resulted in actual, definitive and profound shifts in the Court's case law.²⁹ In fact, a considerable part of the scholarship seems to agree that the overall picture when it comes to the ECHR protection of religious and cultural diversity remains, at best, mixed.³⁰ For instance, while the Court has been said to play 'an increasingly positive role' in some areas of its freedom of religion jurisprudence (i.e., religious groups' rights)³¹ in other areas, it has been widely criticized for inadequately protecting³² and even marginalizing some groups.³³ One leading law and religion scholar has tellingly spoken of the '(un)protection of individual religious identity in the Strasbourg case law.'³⁴ Another scholar has pointed to the 'cracks in the intellectual architecture'³⁵ of the Court's Article 9 ECHR jurisprudence.³⁶ This is

economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

²⁷ Moreover, several ECHR provisions – in particular Article 10 ECHR (freedom of expression), Article 11 ECHR (freedom of assembly and association) and Article 3 of Protocol 1 (the right to free elections) – offer a basis to protect (political) expression, organization, and participation in defense of group members' traditions, language or religion. For an analysis of the role of these three ECHR provisions in the protection of minority groups, see Peroni, Lourdes, 'Religious and Ethnic Minorities in the European Court of Human Rights: Democratic Pluralism Unfolded' in Jane Boulden and Will Kymlicka (eds.) *INTERNATIONAL APPROACHES TO GOVERNING ETHNIC DIVERSITY* (Oxford University Press, forthcoming 2014).

²⁸ See discussion in the Introduction to Part I, and especially, Chapters I and II.

²⁹ See discussion in Chapter II.

³⁰ See *infra* Section II and, especially, Chapters II and IV.

³¹ Evans, Carolyn, 'Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture', 26 *Journal of Law and Religion* (2010-2011) at 322.

³² *Ibid.* (arguing that this positive jurisprudence has not translated into greater protection for religious individuals in many instances'). For a critique of the Court's approach to facially neutral laws that disproportionately burden religious practitioners, see Evans, Carolyn, *FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (Oxford University Press, 2001) at 198-199; for a critique of the Court's case law on religious discrimination, see Henrard, Kristin, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' 5(1) *Erasmus Law Review* (2012) 59-77; and for a critique of the long upheld but recently abandoned 'freedom to resign' doctrine, see Ouald Chaib, Saila, 'Religious Accommodation in the Workplace: Improving the Legal Reasoning of the ECtHR' in Katayoun Alidadi, Marie-Claire Foblets and Jogchum Vrielink (eds.) *A TEST OF FAITH? : RELIGIOUS DIVERSITY AND ACCOMMODATION IN THE EUROPEAN WORKPLACE* (Aldershot, Ashgate, 2012) 33-58 and Vickers, Lucy, *RELIGIOUS FREEDOM, RELIGIOUS DISCRIMINATION AND THE WORKPLACE* (Hart Publishing, 2008).

³³ Danchin, Peter G., 'Islam in the Secular *Nomos* of the European Court of Human Rights', 32 *Michigan Journal of International Law* (2011) 663-747.

³⁴ Martínez-Torrón, Javier, 'The (Un)Protection of Individual Religious Identity in the Strasbourg Case Law', *Oxford Journal of Law and Religion* (2012) 1-25.

³⁵ Evans, Carolyn, 'Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture', 26 *Journal of Law and Religion* (2010-2011) 321-343.

³⁶ It is not uncommon to read ECHR scholars arguing that the Court has failed to take freedom of religion seriously. See, e.g., Evans, Carolyn, *FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (Oxford University Press, 2001) at 201.

an unfortunate state of affairs for a Court that is largely thought – and rightly so – to be one of the most established and robust regimes of human rights protection.³⁷

The study that follows is an attempt to give deeper scrutiny to this state of affairs. It exposes and challenges the religious and cultural exclusions and inequalities created by several assumptions and notions underpinning the Strasbourg Court’s legal reasoning. In so doing, it aims to encourage re-thinking of unstated norms that all too often pass for natural and universal but in fact hinder fuller equal protection of religious and cultural diversity in today’s Europe.

I. Aims and Scope of the Study

A. Aims

The aim of this study is two-fold. The first aim is to uncover some of the most fundamental closures along religious and cultural lines in the European Convention Human Rights Subject (‘ECHR subject’). The second aim is to suggest ways in which this subject may be opened up to diversity so as to more fully realize religious and cultural inclusion and equality in Strasbourg. For the purposes of this Ph.D., by ‘ECHR subject’, I mean how the Strasbourg Court paradigmatically imagines, understands and represents the human beings who turn to it for protection.³⁸ Similarly, by ‘ECHR cultural and religious subject’, I understand how the Court paradigmatically imagines, understands and represents the human beings who come before it in search of protection of specific aspects of their religion and culture.³⁹ Moreover, for current purposes, ‘closures’ is understood as the assumptions, notions and concepts underpinning the Court’s construction of the ECHR subject and the ECHR cultural and religious subject that operate to exclude a wide range of ‘others’.⁴⁰

³⁷ See, e.g., Danchin, Peter G. and Forman, Lisa, ‘The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities’ in Peter Danchin and Elizabeth Cole (eds.), *PROTECTING THE HUMAN RIGHTS OF RELIGIOUS MINORITIES IN EASTERN EUROPE* (Columbia University Press, 2002) at 192 (arguing that the Court ‘has established itself as the most effective regional system for the protection of human rights in the world’).

³⁸ I, follow, to a basic extent, Kathryn Abrams’ understanding of the legal subject in the U.S. context. Abrams, Kathryn, ‘The Legal Subject in Exile’, 51 *Duke Law Journal* (2001) 21-74.

³⁹ Most of the time, the Court does not describe its conceptions of these subjects in explicit terms, which means that these conceptions usually have to be inferred or drawn ‘from the interstices of judicial argument’. *Ibid.* at 30 (making this point about American courts’ conception of the legal subject).

⁴⁰ I borrow the term ‘closures’ and its understanding from Anna Gear. Gear uses the term mostly to refer to the privileging of certain characteristics of the ‘human’ in international human rights law – those traditionally associated with the liberal, male template – that operate to exclude a wide range of ‘others’ who do not exhibit such characteristics. See Gear, Anna, *REDIRECTING HUMAN RIGHTS: FACING THE CHALLENGE OF CORPORATE LEGAL HUMANITY* (Palgrave Macmillan, 2010) at 96-113.

B. Scope

This study examines claims seeking protection of particular aspects of applicants' culture or religion (hereinafter, 'cultural and religious claims' or 'claims of culture and religion').⁴¹ For present purposes – and especially for the purpose of identifying the relevant claims to be included in the study – culture is understood in an anthropological sense as 'the way of life of individuals and communities, as reflected in shared *beliefs, language, traditions and customs*'.⁴² My focus is therefore on claims requiring the Court to take into account and give weight to these specificities – either alone or on a par with the protection of those of others – rather than on claims asking these specificities to be ignored.

The study is careful to avoid – and in fact explicitly critiques⁴³ – the now largely condemned 'essentialist' view of culture: a conception once dominant but contested in anthropology claiming that 'group[s] [are] defined by a distinctive culture and that cultures are discrete, clearly bounded and internally homogenous'.⁴⁴ In fact, as I attempt to make clear later on in this study,⁴⁵ I object to conceiving of 'religion' and 'culture' – and of applicants' religious and cultural practices/traditions/ways of life – as 'natural' or 'brute timeless facts of nature',⁴⁶ dissociated from specific historical and social contexts and processes.⁴⁷ Anthropologists have rejected this view in favor of 'an understanding of culture as historically produced, globally interconnected, internally contested, and marked with ambiguous boundaries of identity and practice'.⁴⁸ I am aware that grasping such a complex and changing conception of culture may be

⁴¹ This Ph.D. does not examine cases in which Respondent States justify interferences with applicants' rights in order to protect cultural or religious aspects of the majority or minorities within their territories.

⁴² Donders, Yvonne, 'Do Cultural Diversity and Human Rights Make a Good Match?' 199 *International Social Science Journal* (2010) at 18. Emphasis added.

⁴³ See especially Chapters IV and VI.

⁴⁴ Cowan, Jane K., Dembour, Marie-Bénédicte and Wilson, Richard A., 'Introduction' in Jane K. Cowan et al. (eds.) *CULTURE AND RIGHTS: ANTHROPOLOGICAL PERSPECTIVES* (Cambridge University Press, 2001) at 3. Several legal scholars have explicitly rejected essentialist notions of culture and religion. See, e.g., Sunder, Madhavi, 'Cultural Dissent', 54 *Stanford Law Review* (2001) 495-567. In the ECHR context, see, e.g., Farget, Doris, 'Defining Roma Identity in the European Court of Human Rights', 19 *International Journal on Minority and Group Rights* (2012) 291-316 and Hoffmann, Florian and Ringelheim, Julie, 'Par-delà l'Universalisme et le Relativisme: La Cour Européenne des Droits de l'Homme et les Dilemmes de la Diversité Culturelle', 52 *Revue Interdisciplinaire d'Etudes Juridiques* (2004) 109-142.

⁴⁵ See especially Chapters IV and VI.

⁴⁶ Preis, Ann-Belinda S., 'Human Rights as Cultural Practice: An Anthropological Critique', 18(2) *Human Rights Quarterly* (1996) at 313 (quoting Rosaldo, Renato, *CULTURE AND TRUTH: THE REMAKING OF SOCIAL ANALYSIS* [Beacon Press, 1989] at 39).

⁴⁷ *Ibid.*

⁴⁸ Merry, Sally Engle, 'Changing Rights, Changing Culture' in Jane K. Cowan et al. (eds.) *CULTURE AND RIGHTS: ANTHROPOLOGICAL PERSPECTIVES* (Cambridge University Press, 2001) at 41. See also, Steedly, Mary Margaret, 'What Is Culture? Does It Matter?' in Marjorie Garber, Paul B. Franklin and Rebecca L. Walkowitz (eds.), *FIELD WORK: SITES IN LITERARY AND CULTURAL STUDIES* (Routledge, 1996) 18-25: '[A]nthropological conceptualizations of culture are much more complicated these days than they once were. With postmodernism and post-structuralism, diaspora and transnationalism . . . our notions of culture have gotten much more fluid, conflictual, disorderly, blurry, mobile, and generally unstable and uncertain'. *Ibid.* at 23.

all the more challenging for the law⁴⁹ – even in the more concrete context of adjudication – but I will argue that the effort is nonetheless vital to eschew hierarchies and exclusions both *across* and *within* groups.

Traditionally, human rights debates and studies on cultural and religious diversity are framed in terms of respect and protection of linguistic, religious and ethno-cultural minorities.⁵⁰ The object of my study, however, is not defined by the (minority) status of the group in question; rather, it is determined by the nature and content of the claims brought before the Court.⁵¹ In other words, I do not approach the study from the angle of minority protection but from the angle of protection of cultural or religious aspects.⁵² There are several reasons for choosing this approach.

In the first place, there are serious definitional difficulties surrounding the term ‘minority’. Crucially, there is no internationally agreed definition of minority.⁵³ One telling example is the case of the Council of Europe Framework Convention for the Protection of National Minorities (‘FCNM’). Admitting that at that stage it was impossible to arrive at a definition capable of gaining support of all Member States, the FCNM opted for a ‘pragmatic approach’ and offered no definition of ‘national minority’.⁵⁴ Unsurprisingly, the Strasbourg Court has not attempted to define it either.⁵⁵ An influential definition offered in international law has been that of Francesco Capotorti, Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities. His definition emphasizes several elements, in particular, inferior number with respect to the population of a State, nationality, and non-dominant position.⁵⁶ While the third element remains important, the first two have been

⁴⁹ Law tends to essentialize and fix culture and religion as part of its task of ‘developing general principles to include, ideally, all possible cases’. Cowan, Jane K., Dembour, Marie-Bénédicte and Wilson, Richard A., ‘Introduction’ in Jane K. Cowan et al. (eds.) *CULTURE AND RIGHTS: ANTHROPOLOGICAL PERSPECTIVES* (Cambridge University Press, 2001) at 21. For an examination and critique of law’s essentialist conception of culture, *see, e.g.*, Sunder, Madhavi, ‘Cultural Dissent’ 54 *Stanford Law Review* (2001) 495-567.

⁵⁰ See Ringelheim, Julie, *DIVERSITÉ CULTURELLE ET DROITS DE L’HOMME: LA PROTECTION DES MINORITÉS PAR LA CONVENTION EUROPÉENNE DES DROITS DE L’HOMME* (Bruylant, 2006) at 3.

⁵¹ I follow Julie Ringelheim in the adoption of this approach for reasons similar to hers. *Ibid.* at 3-6.

⁵² *Ibid.*

⁵³ There is for example no definition in the International Covenant on Civil and Political Rights or the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. The Parliamentary Assembly of the Council of Europe suggested a definition in its Recommendation 1201 (1993) on an Additional Protocol on the Rights of National Minorities to the European Convention on Human Rights, adopted on 1 February 1993. For an analysis of the minority concept in international law, *see e.g.*, Ringelheim, Julie, ‘Minority Rights in a Time of Multiculturalism – The Evolving Scope of the Framework Convention on the Protection of National Minorities,’ 10(1) *Human Rights Law Review* (2010) 99-128.

⁵⁴ See Explanatory Report, Framework Convention for the Protection of National Minorities, 15 February 1995, paragraph 12 available at

[http://www.coe.int/t/dghl/monitoring/minorities/1_AtGlance/PDF_H\(95\)10_FCNM_ExplanReport_en.pdf](http://www.coe.int/t/dghl/monitoring/minorities/1_AtGlance/PDF_H(95)10_FCNM_ExplanReport_en.pdf)

accessed 2 February 2014.

⁵⁵ See Tulkens, Françoise and Piedimonte, Stefano, ‘The Protection of National Minorities in the Case-law of the European Court of Human Rights’, 7th Meeting, Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN), Strasbourg, 12-13 March, 2008. The Strasbourg Court grapples with the issue most notably in ECtHR (GC), *Gorzelik and Others v. Poland*, 17 February 2004, §§§ 46, 68 and 69.

⁵⁶ Capotorti, Study on the Rights of Persons Belonging to Ethnic, Religious or Linguistic Minorities (1979) E/CN.4/Sub.2/384/Rev.1 at 96: ‘A group numerically inferior to the rest of the population of a State, in a non-

challenged.⁵⁷ The numerical element reveals the relative (and, therefore, uncertain) character of the term: minority vis-à-vis whom?⁵⁸ Do group members numerically inferior regionally but not nationally ‘count’ as minorities?⁵⁹ What is more, some may be part of the majority linguistically but not religiously⁶⁰ while others may identify with the religious majority but still belong to ethnic and cultural minorities.⁶¹ Sometimes, a numerical majority may be in a non-dominant position.⁶²

In the second place, and in connection with all of the above, there are serious analytical limitations of adopting an approach based on the notion of minority for the analysis of the areas of the Court’s case law I am interested in. Indeed, if one were to follow this approach despite the above-mentioned difficulties, one will soon realize that, while a large number of religious and cultural claims involve minority group members, many others do not. Take the freedom of religion cases. One of the most telling examples involves cases brought by Muslim applicants against Turkey, where Islam is the majority religion. Islam may be the dominant religion in Turkey but certainly not in Europe.⁶³ Moreover, a considerable number of religious freedom claims are brought by Christians, including Coptic Christians,⁶⁴ Pentecostal Christians⁶⁵ and Seventh Day Adventists.⁶⁶ As Christians, these applicants may be part of the religious majority in a particular State but remain minorities within their religious tradition. As I will show in Chapter IV, the lines of exclusion and inequality do not necessarily run along religious traditions

dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language’.

⁵⁷ See, e.g., Office of the United Nations High Commissioner for Human Rights, ‘Minority Rights: International Standards and Guidance for Implementation’ (2010) at 2-3 available at <http://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf> accessed 2 February 2014. With respect to the nationality condition, the Advisory Committee on the Framework Convention for the Protection of National Minorities has established that ‘citizenship should not be an *a priori* requirement for the enjoyment of minority rights’. See Ringelheim, Julie, ‘Minority Rights in a Time of Multiculturalism – The Evolving Scope of the Framework Convention on the Protection of National Minorities,’ 10(1) *Human Rights Law Review* (2010) at 114. Ringelheim argues that the approach of the Advisory Committee ‘is more inclusive than the traditional international law stance on the issue’. *Ibid.* at 115. For a discussion of the problems arising from minority definitions, see, e.g., Gilbert, Geoff, ‘Religious Minorities and Their Rights: A Problem of Approach,’ 5 *International Journal on Minority and Group Rights* (1997) 97-134.

⁵⁸ See Minow, Martha, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* (Cornell University Press, 1990) at 22 (footnote 5).

⁵⁹ See, e.g., Ringelheim, Julie, *DIVERSITÉ CULTURELLE ET DROITS DE L’HOMME: LA PROTECTION DES MINORITÉS PAR LA CONVENTION EUROPÉENNE DES DROITS DE L’HOMME* (Bruylant, 2006) at 5.

⁶⁰ *Ibid.* at 6.

⁶¹ See Malik, Maleiha, ‘The “Other” Citizens: Religion in a Multicultural Europe’ in Camil Ungureanu and Lorenzo Zucca (eds.) *LAW, STATE AND RELIGION IN THE NEW EUROPE: DEBATES AND DILEMMAS* (Cambridge University Press, 2012) at 95 (arguing that ‘even Christians who are from racial, ethnic and cultural minorities will face forms of exclusion from the European public space’).

⁶² The well-known example is the case of the apartheid regime in South Africa.

⁶³ See, e.g., ECtHR (GC), *Leyla Şahin v. Turkey*, 10 November 2005.

⁶⁴ See, e.g., ECtHR, *Eweida and Others v. the United Kingdom*, 15 January 2013.

⁶⁵ See, e.g., ECtHR, *Larissis and Others v. Greece*, 24 February 1998.

⁶⁶ See, e.g., ECmmHR, *Konttinen v. Finland*, 3 December 1996.

(e.g., Islam, Christianity, and Judaism). In short, and as Julie Ringelheim insightfully points out, relying exclusively on a minority-majority framework is unduly reductionist of social reality.⁶⁷

For this and the other reasons stated above – and even when the majority-minority scheme retains some currency⁶⁸ – given the aims of my study, I avoid as much as possible frameworks that do not allow me to adequately ponder or bring into sharper focus more complex issues, including power relations. Indeed, it has been argued that the traditional minority focus on numbers tends to obscure the fundamental problem: ‘abuse of dominant positions that are based on exclusive collective identities’.⁶⁹ My concern is power differentials rather than numbers. Some authors have adopted a concept of minority that captures this concern. For example, Alcoff and Mohanty employ it to signify ‘the nonhegemonic, the nondominant, the position that has to be explained rather than assumed, or the identity that is not taken for granted but is on trial’.⁷⁰ While this conceptualization of minority does offer the kind of analytical purchase required for my study, I still avoid making the notion of minority the central analytical notion of my investigation for the reasons stated earlier.

C. Some Caveats

A number of caveats are in order before moving on to the next section. In the first place, the fact that this Ph.D. focuses on religious and cultural closures in the ECHR subject does not mean that the Court’s jurisprudence exhibits no openings whatsoever in the areas I examine. In the second place, this study does not claim to cover all fundamental closures across the Court’s cultural and religious diversity spectrum but only those that I find most obvious, vital and pressing. Lastly, though the focus of this Ph.D. is on exclusions and hierarchies along religious and cultural lines, the claim is by no means that these are (or should be) the central – let alone sole – forms of exclusion and inequality that matter in legal analysis. Quite the contrary, my wish is that this study encourages further interrogation of how cultural and religious forms of exclusion and inequality may interact with others, in particular those based on gender, race, class and nationality.

⁶⁷ Ringelheim, Julie, *DIVERSITÉ CULTURELLE ET DROITS DE L’HOMME: LA PROTECTION DES MINORITÉS PAR LA CONVENTION EUROPÉENNE DES DROITS DE L’HOMME* (Bruylant, 2006) at 5.

⁶⁸ See, e.g., Alcoff, Linda Martin and Mohanty, Satya P., ‘Reconsidering Identity Politics: An Introduction’ in Linda Martin Alcoff, Michael Hames-Garcia, Satya P. Mohanty and Paula M.L. Moya (eds.) *IDENTITY POLITICS RECONSIDERED* (Palgrave Macmillan, 2006) at 7 (arguing that minority ‘is a convenient way to incorporate diversity of differences and forms of oppression’).

⁶⁹ Fortman, Bas de Gaay, ‘Minority Rights: A Major Misconception?’ 33(2) *Human Rights Quarterly* (2011) at 277.

⁷⁰ Alcoff, Linda Martin and Mohanty, Satya P., ‘Reconsidering Identity Politics: An Introduction’ in Linda Martin Alcoff, Michael Hames-Garcia, Satya P. Mohanty and Paula M.L. Moya (eds.) *IDENTITY POLITICS RECONSIDERED* (Palgrave Macmillan, 2006) at 8. These authors also offer an illuminating political notion of ‘minority’ to signify ‘struggle, a position that is under contestation or actually embattled, that does not enjoy equality of status, of power, or of respect’. *Ibid.*

II. Situating the Study within Wider Debates

This study may be viewed as part of wider critiques of human rights law that challenge the marginalization of a range of beneficiaries from the universal human rights subject. Critiques of this sort call into question the universality of human rights law by pointing to existing exclusions and hierarchies within the ‘human’ of human rights. Though they come from different quarters, their exponents have identified ‘both disguised particularisms in universalism (its androcentrism, heterosexism and Eurocentrism) and the exclusions and disparagement towards certain collectivities that it entails’.⁷¹ Their quarrel is thus with the deficits of universality understood as ‘all-inclusiveness’,⁷² that is, as the inclusion of *all* human beings within its credo.⁷³ These kinds of critiques go to the core of the universal human rights project whose ‘most fundamental premise purports to apply equally “without distinction”, to “everyone”’.⁷⁴

Indeed, universality as ‘all-inclusiveness’ is reflected throughout the language of foundational human rights instruments, such as the Universal Declaration of Human Rights (‘UDHR’).⁷⁵ This notion of universality is embodied for instance in the Preamble proclaiming ‘the equal and inalienable rights of *all* members of the *human family*’ and defining the UDHR ‘as a common standard of achievement for *all peoples*’.⁷⁶ In particular, it is embodied in the ‘everyone’ and the ‘no one’ inserted across nearly all provisions starting with Article 2: ‘*Everyone* is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.⁷⁷ Similar ‘everyones’ and ‘no ones’ are found throughout the texts of other human rights instruments, including the ECHR whose first provision states: ‘The High Contracting Parties shall secure to *everyone* within their jurisdiction

⁷¹ Cowan, Jane K., Dembour, Marie-Bénédicte and Wilson, Richard A., ‘Introduction’ in Jane K. Cowan et al. (eds.) *CULTURE AND RIGHTS: ANTHROPOLOGICAL PERSPECTIVES* (Cambridge University Press, 2001) at 15.

⁷² Brems, Eva, *HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY* (Martinus Nijhoff, 2001) at 4-5 and 20 (identifying ‘all-inclusiveness’ as one of the ‘central features’ of the contemporary concept of universality).

⁷³ *Ibid.* This is the understanding of universality I use for the purposes of this study. This Ph.D. is not therefore concerned with other concepts of universality. In particular, it is not concerned with universality in an anthropological or philosophical sense as rights ‘accepted by or acceptable to all human beings around the world’. *Ibid.* at 9-10. For a list of universality concepts, see *Ibid.* at 3-16.

⁷⁴ Otto, Dianne, ‘Disconcerting “Masculinities”’: Reinventing the Gendered Subject(s) of International Human Rights Law’, in Doris Buss and Ambreena Manji (eds.) *INTERNATIONAL LAW: MODERN FEMINIST APPROACHES* (Hart Publishing, 2005) at 105-106.

⁷⁵ See generally Brems, Eva, *HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY* (Martinus Nijhoff, 2001).

⁷⁶ Preamble of the Universal Declaration of Human Rights (UDHR), G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc A/819, Dec. 10, 1948. Emphasis added.

⁷⁷ *Ibid.* Article 2. Emphasis added. The exception is Article 16 UDHR, which guarantees the right to marry and found a family to ‘men and women’. For a more in-depth analysis, see Gear, Anna, “‘Framing the Project’ of International Human Rights Law: Reflections on the Dysfunctional “Family” of the Universal Declaration’ in Conor Gearty and Costas Douzinas (eds.) *THE CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW* (Cambridge University Press, 2012) at 26-27 (identifying the UDHR inclusive aspiration in those terms) and Brems, Eva, *HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY* (Martinus Nijhoff, 2001) at 4-5 (arguing that the all-inclusiveness of the UDHR is expressed in these and other provisions).

the rights and freedoms defined in Section I of this Convention'.⁷⁸ This all-inclusiveness impulse is re-affirmed by the prohibition of non-discrimination contained in Article 14 ECHR: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. It is therefore clear that universality as 'all-inclusiveness' – or 'universality of the subjects of human rights'⁷⁹ – far from being a controversial notion, is deeply connected with the principles of equality and non-discrimination.⁸⁰

Yet, and despite its inclusive rhetorical force, international human rights law remains fraught with a paradox: the 'everyone' within the 'human family' co-exists with a variety of outsiders or 'non-everyones' in a rather 'dysfunctional family'.⁸¹ As Douzinas and Gearty put it, '[t]he "everyone" of the universal human subject is shadowed by the various categories of exclusion and marginalization'.⁸² Recent genealogical studies of international human rights law show that this paradox in fact rests on a fundamental contradiction lying at the origins of the universal subject.⁸³ At the genesis of human rights law, Anna Grear explains, are two competing impulses. On one side, there is the inclusiveness impulse reflected in the emphasis on 'the unity of the human race as a species' (an 'inclusive species-notion'), as a reaction to the horrendous affront of the Nazi regime to humanity.⁸⁴ On the other side, however, there is what Grear calls 'the discourse of quasi-disembodiment', imported into the human rights project from the notion of 'natural man' – a naturalistic construct that posited rationality as *the* characteristic of human nature 'by subtracting from embodied persons what made them unique, situated, distinctive and nuanced'.⁸⁵ This essentially rational human being, far from being disembodied or abstract, turned

⁷⁸ Article 1 ECHR 'Obligation to respect human rights'. Emphasis added. The exception is Article 12 ECHR, which guarantees the right to marry and found a family to men and women.

⁷⁹ Donders, Yvonne M., 'Human Rights: Eye for Cultural Diversity', Inaugural Lecture Delivered Upon Appointment to the Chair of Professor of International Human Rights and Cultural Diversity at the University of Amsterdam on 29 June 2012 at 8. Like other scholars, Donders argues that 'the idea that human rights should be universally enjoyed – by all persons on the basis of equality – is not very controversial'. See also, Brems, Eva, HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY (Martinus Nijhoff, 2001) at 5 (arguing that an advantage of the universality concept understood this way is its 'unproblematic character').

⁸⁰ Brems, Eva, HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY (Martinus Nijhoff, 2001) at 4.

⁸¹ Grear, Anna, "'Framing the Project" of International Human Rights Law: Reflections on the Dysfunctional "Family" of the Universal Declaration' in Conor Gearty and Costas Douzinas (eds.) THE CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW (Cambridge University Press, 2012) 17-35. See also, Grear, Anna, REDIRECTING HUMAN RIGHTS: FACING THE CHALLENGE OF CORPORATE LEGAL HUMANITY (Palgrave Macmillan, 2010) and Grear, Anna, 'Challenging Corporate "Humanity": Legal Disembodiment, Embodiment and Human Rights', 7 *Human Rights Law Review* (2007) 521-534.

⁸² Douzinas, Costas and Gearty, Conor, 'Introduction' in Conor Gearty and Costas Douzinas (eds.) THE CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW (Cambridge University Press, 2012) at 9.

⁸³ See notably, Grear, Anna, REDIRECTING HUMAN RIGHTS: FACING THE CHALLENGE OF CORPORATE LEGAL HUMANITY (Palgrave Macmillan, 2010).

⁸⁴ *Ibid.* at 143. See UDHR Preamble: 'Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind . . .'

⁸⁵ *Ibid.* at 99. Grear argues that this import is reflected in 'the textual and philosophical continuities between the UDHR and the earlier declarations of the rights of man and the citizen'. *Ibid.* at 103. Specifically, Grear notes that '[t]he rational man of the French Declaration . . . is the direct progenitor of the universal "human being" of the

out to have a specific male body, given the historical fusion of rationality with masculinity in Western philosophy.⁸⁶ Hence Gear's use of the term 'quasi-disembodiment': the empty disembodied human rights subject is not really completely empty or disembodied.⁸⁷ Upendra Baxi explains the exclusionary function that rationality and autonomous will as the 'criteria of individuation' have played in what he calls the 'modern' paradigm of human rights:

The criteria of individuation in the European liberal tradition of thought furnished some of the most powerful ideas in constructing a model of human rights. Only those beings were to be regarded as 'human' who were possessed of the capacity of reason and autonomous moral will. What counted as reason and will varied in the course of the long development of the European liberal tradition. However, in its major phases of development "slaves", heathens, barbarians, colonized peoples, indigenous populations, women, children, the impoverished and the insane have been at various times and in various ways thought unworthy of being bearers of human rights. These discursive devices of Enlightenment rationality were devices of exclusion.⁸⁸

UDHR'. Gear, Anna, "'Framing the Project" of International Human Rights Law: Reflections on the Dysfunctional "Family" of the Universal Declaration' in Conor Gearty and Costas Douzinas (eds.) *THE CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW* (Cambridge University Press, 2012) at 29. A reading of Article 1 of the UDHR indeed confirms the paradigmatic embodiment of the abstract rationality Gear speaks about: '*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood*'. Emphasis added. See also, Brems, Eva, *HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY* (Martinus Nijhoff, 2001) at 17 (arguing that natural law as developed by John Locke and Thomas Hobbes played a crucial role in the American and French declarations, which, in turn, inspired the UDHR drafters). See generally, Marks, Stephen P., 'From the Single Confused Page to the Decalogue for Six Billion Persons: The Roots of the Universal Declaration of Human Rights in the French Revolution' 20 *Human Rights Quarterly* (1998) 459-514.

⁸⁶ Gear notes that disembodied rationalism as the defining characteristic of the 'natural man' – or, as a matter of fact, of the rights bearer or legal subject – was the product of a Western (Cartesian) binary thinking, which attempted to separate the mind from the body and which has historically associated the primary side of the binary (mind or reason) with men and the secondary side with women (body or nature). Rationality thus came to be fused with masculinity and historically served as a basis for the exclusion of women from political life. *Ibid.* at 41-45 and 98-102. Gear thus concludes that the abstract human being is not in fact 'representative of all humanity ... its essential rationality comes laden with philosophical and ideological provenance – most especially, a long-standing co-imbrication of rationality and maleness. Inevitably, then, this abstract universal is gendered'. Gear, Anna, "'Framing the Project" of International Human Rights Law: Reflections on the Dysfunctional "Family" of the Universal Declaration' in Conor Gearty and Costas Douzinas (eds.) *THE CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW* (Cambridge University Press, 2012) at 30. On the historical equation of reason with 'man', see also, Douzinas, Costas, *THE END OF HUMAN RIGHTS* (Hart Publishing, 2000) at 97-98.

⁸⁷ Gear, Anna, *REDIRECTING HUMAN RIGHTS: FACING THE CHALLENGE OF CORPORATE LEGAL HUMANITY* (Palgrave Macmillan, 2010) at 44.

⁸⁸ Baxi, Upendra, *THE FUTURE OF HUMAN RIGHTS* (Oxford University Press, 2002) at 29. Baxi further argues: 'The "Rights of Man" were human rights of all men capable of autonomous reason and will; and a large number of human beings were excluded by this peculiar ontological construction. Exclusionary criteria have provided the signature tune of the "modern" conceptions of human rights'. *Ibid.* Gear similarly argues: 'The marginalisation of "women, humans of colour, children, humans with disabilities, humans who are older or poor and those with different sexual orientations" – those with long histories of exclusion – including indigenous peoples – point ineluctably towards a hidden "insider" – the "one" who is most definitely "not" any of these'. Gear, Anna, "'Framing the Project" of International Human Rights Law: Reflections on the Dysfunctional "Family" of the Universal Declaration' in Conor Gearty and Costas Douzinas (eds.) *THE CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW* (Cambridge University Press, 2012) at 31. In fact, history is full of examples of the exclusionary character of the jusnaturalist idea of human nature underlying the 18th century declarations. For a fuller account of

The particular (male) features of the ‘disembodied’ subject have been more recently confirmed by the post-UDHR ‘production of new categories of human rights’, whose beneficiaries are a range of historically excluded groups.⁸⁹ It has been argued that ‘the *very need*’ for human rights instruments directed at specific right holders (e.g., women, minorities, children, people with disabilities) is in fact evidence of the existence of various marginalized subjectivities within international human rights law.⁹⁰ Anna Grear observes in this regard: ‘It is precisely the felt/lived sense of exclusion, hierarchical marginalization or invisibility that has driven women and a range of other marginalized “others” to seek the specific enumeration of their rights’.⁹¹ In similar terms, Douzinas remarks that the ‘original rights of “man” [broke up and proliferated] into the rights of various types of subject, e.g., rights of workers, women, children, refugees’ in a mechanism of expansion that first asserts similarity with and then difference from those already admitted as ‘human’.⁹²

In sum, Grear’s genealogical reading of human rights law reveals ‘quasi-disembodiment and the abstraction of legal rights discourse to be ongoing sites of exclusion for human beings in human rights law, especially for those beings who do not fit the submerged template of “full humanity” implicated in the abstract universal’.⁹³ Contemporary critical accounts of human rights are well aware of the contradictions between these exclusions and the universality impulse.⁹⁴ Though these critics come from different corners, many of them ultimately attempt to address the same concern: the marginalization and exclusion of those who do not fit the dominant constructions of the human rights subject.⁹⁵ Take for example two of the most well-known critiques of mainstream human rights accounts: (i) the feminist critique and (ii) what some scholars have renamed the ‘particularist’ critique (to refer to those who, unlike cultural

these exclusions, see Brems, Eva, HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY (Martinus Nijhoff, 2001) at 18-19 (noting, in particular, that children, women, prisoners and other people viewed as devoid of reason were not ‘fully human’.).

⁸⁹ Grear, Anna, ‘Challenging Corporate “Humanity”’: Legal Disembodiment, Embodiment and Human Rights’, 7 *Human Rights Law Review* (2007) at 533. See also, Brems, Eva, HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY (Martinus Nijhoff, 2001) at 20-21 (arguing that all-inclusiveness was not immediately achieved in 1948 but remains ‘a project’ that has yet to be fully realized, as the most recent struggles of migrants and sexual minorities attest) and Baxi, Upendra, THE FUTURE OF HUMAN RIGHTS (Oxford University Press, 2002). Baxi distinguishes two paradigms of human rights: modern and contemporary. While in the former ‘the logics of *exclusion* are preminent’, in the latter ‘the logics of *inclusion* are paramount’. *Ibid.* at 27.

⁹⁰ Grear, Anna, “‘Framing the Project’ of International Human Rights Law: Reflections on the Dysfunctional “Family” of the Universal Declaration’ in Conor Gearty and Costas Douzinas (eds.) THE CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW (Cambridge University Press, 2012) at 29.

⁹¹ *Ibid.*

⁹² Douzinas, Costas, THE END OF HUMAN RIGHTS (Hart Publishing, 2000) at 256. See also, Brems, Eva, HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY (Martinus Nijhoff, 2001) at 21: ‘The history of human rights can be read as a history of progressive inclusion in the rights protection system through a series of successful struggles’.

⁹³ Grear, Anna, REDIRECTING HUMAN RIGHTS: FACING THE CHALLENGE OF CORPORATE LEGAL HUMANITY (Palgrave Macmillan, 2010) at 113.

⁹⁴ *Ibid.* at 104.

⁹⁵ *Ibid.*

relativists, do not reject the legitimacy of human rights as such).⁹⁶ One common thread running through these critiques despite their varied dimensions and concerns – and the thread that is most relevant for the purposes of this study – is a concern with universality understood as ‘all-inclusiveness’. Referring to these critiques, Eva Brems argues that ‘[b]oth start from finding that the liberal concept of human rights was developed by the dominant group, excluding the group whose perspective they defend, making this conception of human rights inadequate for their group’.⁹⁷ Moreover, they both ultimately want the same: ‘changes in the human rights system so as to incorporate either a gender perspective or a perspective of cultural diversity’.⁹⁸

Feminists have challenged the presumed universality of human rights law by exposing the gendered premises that operate to marginalize women.⁹⁹ They have taken issue with the idea that the human of human rights law is ‘gender-free’ and that it is therefore unnecessary to add a

⁹⁶ See, notably, Brems, Eva, *HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY* (Martinus Nijhoff, 2001) at 23-25 (rejecting the use of the ‘cultural relativist’ label – usually associated with a school in Western social sciences that challenge the validity of norms across cultures – when it comes to non-Western critiques that do not share this position). Brems thus draws a distinction between cultural particularism (which does not reject international human rights as such) and cultural relativism (which does challenge the legitimacy of international human rights). See also, Brems, Eva, *Reconciling Universality and Diversity in International Human Rights: A Theoretical and Methodological Framework and Its Application in the Context of Islam*, *Human Rights Review* (2004) at 8 and Brems, Eva, ‘Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse’, 19 *Human Rights Quarterly* (1997) at 143-144. Brems distinguishes three levels of rejection of human rights by cultural relativists. The rarest form, ‘human rights are rejected in their totality as foreign and incompatible with a particular non-Western culture’. The most common forms include rejection of ‘specific rights or the specific content or interpretation of those rights’ and rejection of ‘classifications of certain cultural practices as a human rights violation’. According to Brems, the last two moderate forms ‘can be translated into claims of inclusion into the system, conditional on its transformation in such a way as to accommodate cultural differences’. See also, Dembour, Marie-Bénédicte, *WHO BELIEVES IN HUMAN RIGHTS? REFLECTIONS ON THE EUROPEAN CONVENTION* (Cambridge University Press, 2006) at 176-180 (convincingly showing that the opposite of universality is not relativity but particularity [although mostly referring to local specificities] and that that they are not actually opposites but encompass each other) and Otto, Dianne, ‘Rethinking the Universality of Human Rights Law’, 29 *Columbia Human Rights Law Review* (1997) at 39 (arguing that ‘[d]isrupting the dualisms of the universality debates might commence with renaming the central issue as one of plural literacies, or at least of cultural diversity rather than relativity’).

⁹⁷ Brems, Eva, ‘Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse’, 19 *Human Rights Quarterly* (1997) at 154.

⁹⁸ *Ibid.*

⁹⁹ Bunting, Annie, ‘Theorizing Women’s Cultural Diversity in Feminist International Human Rights Strategies’, 20 *Journal of Law and Society* (1993) at 8. For an overview of these critiques (from both Western and ‘Third World’ Feminists) see, Engle, Karen, ‘International Human Rights and Feminisms: When Discourses Keep Meeting’ in Doris Buss and Ambreena Manji (eds.) *INTERNATIONAL LAW: MODERN FEMINIST APPROACHES* (Hart Publishing, 2005) 47-66. For examples of feminist critiques of international human rights law, see Otto, Dianne, ‘Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law’ in Anne Orford (ed.) *INTERNATIONAL LAW AND ITS OTHERS* (Cambridge University Press, 2006) 318-356; Peterson, V. Spike and Parisi, Laura, ‘Are Women Human? It’s Not an Academic Question’ in Tony Evans (ed.) *HUMAN RIGHTS FIFTY YEARS ON: A REAPPRAISAL* (Manchester University Press, 1998) 132-160; Cook, Rebecca J., ‘Women’s International Human Rights: The Way Forward’, 15 *Human Rights Quarterly* (1993) 230-261; Charlesworth, Hilary, Chinkin, Christine and Wright, Shelley, ‘Feminist Approaches to International Law’, 85 *American Journal of International Law* (1991) 613-645 and Bunch, Charlotte, ‘Women’s Rights as Human Rights: Toward a Re-vision of Human Rights’ 12(4) *Human Rights Quarterly* (1990) 486-498.

gender dimension to human rights violations.¹⁰⁰ Dianne Otto, for instance, argues that ‘women’s full inclusion in universal representations of humanity may be an impossibility so long as the universal (masculine) subject continues to rely for its universality on the contrast with feminized particularities’.¹⁰¹ Otto shows how three gendered subjectivities – the ‘wife and mother’,¹⁰² the ‘formally equal with men’,¹⁰³ and the ‘victim’¹⁰⁴ – survived in the UDHR and persisted in later human rights covenants, re-affirming women’s marginalization from full humanity.¹⁰⁵ An example of the ‘formally equal to men’ subjectivity is the rejection of the proposal to add explicit references to women to the UDHR because that would have undermined the ‘everyone’ of the declaration and included rights that were not universal.¹⁰⁶ On this rejection, Otto argues: ‘[The detractors] failed to understand that their imagined universal subject was gendered; their abstract bearer of human rights possessed masculine characteristics’.¹⁰⁷

As noted above, ‘particularist’ critiques of human rights law echo this aspect of the feminist critique: the charge that the universal human rights subject is not actually universal. This is why it is not surprising that demands from both non-Western particularist and feminist critiques ask that human rights law take their particularities into account.¹⁰⁸ Eva Brems argues:

The widespread idea that the universality of human rights needs a trans- or supra- cultural and historical foundation leads to presenting the ‘human’ in human rights as an abstract, decontextualized individual. An abstract individual however does not exist. Neutrality and decontextualization may be pursued in good faith but it is inevitable that the product of this effort

¹⁰⁰ Bunting, Annie, ‘Theorizing Women’s Cultural Diversity in Feminist International Human Rights Strategies’, 20 *Journal of Law and Society* (1993) at 8. In fact, this is not but the international dimension of a broader feminist critique that seeks to disturb the objectivity and neutrality of the law and other disciplines by pointing to its gendered character. *Ibid.* at 10. MacKinnon, for example, argues that ‘feminism in one sense started the critique of universality as currently practiced by showing how women are left out of the human episteme’. MacKinnon, Catharine A., ‘Points against Postmodernism’, 75 *Chicago-Kent Law Review* (2000) at 696.

¹⁰¹ Otto, Dianne, ‘Disconcerting “Masculinities”: Reinventing the Gendered Subject(s) of International Human Rights Law’, in Doris Buss and Ambreena Manji (eds.) *INTERNATIONAL LAW: MODERN FEMINIST APPROACHES* (Hart Publishing, 2005) at 107.

¹⁰² This first subjectivity ‘needs “protection” during times of war and peace and is more an object than a subject of international law’. *Ibid.* at 106.

¹⁰³ *Ibid.*

¹⁰⁴ The ‘victim’ subject is ‘produced by colonial narratives of gender, as well as by notions of women’s sex vulnerability’. *Ibid.*

¹⁰⁵ Each of these female subjects, Otto remarks, depends on its male binary opposite representation: the wife or the mother ‘constitutes her “protector” in the form of the head of the household and, in times of war, the warrior or combatant; the formally equal subject reproduces the masculine standard of “equality” against which her claims to equality are assessed; and the “victim” subject affirms the need for the masculine bearer of “civilization” and savior of “good” women from “bad”, often “native” men’. *Ibid.* Her claim is that the specificities of these female subjects operate as the ‘non-universal against which the universal is defined’. *Ibid.* at 116.

¹⁰⁶ Otto, Dianne, ‘Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law’ in Anne Orford (ed.) *INTERNATIONAL LAW AND ITS OTHERS* (Cambridge University Press, 2006) at 331.

¹⁰⁷ *Ibid.* See also, Peterson, V. Spike and Parisi, Laura, ‘Are Women Human? It’s Not an Academic Question’ in Tony Evans (ed.) *HUMAN RIGHTS FIFTY YEARS ON: A REAPPRAISAL* (Manchester University Press, 1998) at 132 (similarly arguing that references to the universal are actually references to men, to ‘their bodies, their experiences and their stereotypical attributes [e.g., reason, agency, independence] and that, as a result, women are excluded from the category and ‘cast instead as particular and partial’).

¹⁰⁸ Brems, Eva, *HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY* (Martinus Nijhoff, 2001) at 560.

still *reflects the dominant culture*. The so-called abstract human being is in fact molded on the dominant Western male culture. Universal human rights constructed with this abstract human being in mind have an effect of exclusion: the less one complies with the implied norm, the less one feels at home in human rights.¹⁰⁹

So, far from rejecting human rights universality, particularist critiques within the so-called “cultural relativism” ask instead for ‘improved universality’ or inclusion in human rights law.¹¹⁰ I will not give a comprehensive overview of the ‘universalism-cultural relativism’ debate. There are several broader aspects to it that have been exhaustively examined in the literature¹¹¹ and that clearly exceed the scope of my study.¹¹² Moreover, in recent years, there have been growing scholarly efforts to de-essentialize (and de-dichotomize) the debate and move beyond the divide. Brems is in fact not alone in her attempt to re-conceptualize the ‘universalism v. cultural relativism’ discussion in less dichotomous terms. A number of other scholars have proposed to move away from the traditional framing arguing that it rests on a range of reductionist views (e.g., ‘West/East or ‘North/South,’¹¹³ ‘culture/reason,’¹¹⁴ and ‘culture/rights’¹¹⁵). Amidst these

¹⁰⁹ *Ibid.* at 347. Emphasis added.

¹¹⁰ *Ibid.* at 560.

¹¹¹ See generally Donnelly, Jack, ‘The Relative Universality of Human Rights’ 29(2) *Human Rights Quarterly* (2007) 281-306; Donoho, Douglas Lee, ‘Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards’, 27 *Stanford Journal on International Law* (1990-1991) 345-391; Renteln, Alison Dundes, ‘The Unanswered Challenge of Relativism and the Consequences for Human Rights’, 7(4) *Human Rights Quarterly* (1985) 514-540; Renteln, Alison Dundes, ‘Relativism and the Search for Human Rights’ 90(1) *American Anthropologist* (1988) 56-72 and Donnelly, Jack, ‘Cultural Relativism and Universal Human Rights’ 6(4) *Human Rights Quarterly* (1984) 400-419.

¹¹² One of the fundamental aspects of the ‘cultural relativism v. universalism’ debate is the controversial issue of whether human rights norms can hold true across cultures. There are various understandings of cultural relativism but one of the basic claims is that human rights do not hold true across the world. Brems sums up the cultural relativist argument as follows: ‘First, the so-called ‘universal’ Declaration in fact contains Western values. Second, anthropological science teaches that values are culturally relative. Conclusion: therefore the Declaration cannot be valid all over the world’. Brems, Eva, *HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY* (Martinus Nijhoff, 2001) at 25. I do not address the broader issues arising from the inter-cultural or inter-regional transferability/applicability of human rights. I therefore exclude from the analysis what Donders calls ‘universality of the normative content of human rights’ and ‘universality of implementation of human rights’. Donders, Yvonne M., ‘Human Rights: Eye for Cultural Diversity’, Inaugural Lecture Delivered Upon Appointment to the Chair of Professor of International Human Rights and Cultural Diversity at the University of Amsterdam on 29 June 2012 at 8. The issue of how human rights may be interpreted and implemented in light of local circumstances has been addressed in the ECHR context. See, e.g., Dembour, Marie-Bénédicte, *WHO BELIEVES IN HUMAN RIGHTS? REFLECTIONS ON THE EUROPEAN CONVENTION* (Cambridge University Press, 2006) at 155-187 and Hoffmann, Florian and Ringelheim, Julie, ‘Par-delà l’Universalisme et le Relativisme: La Cour Européenne des Droits de l’Homme et les Dilemmes de la Diversité Culturelle’, 52 *Revue Interdisciplinaire d’Etudes Juridiques* (2004) 109-142.

¹¹³ For example, Annie Bunting observes that many in the ‘West’ (e.g., feminists) are critical of the liberal tilt and the universality claim of human rights while many in the ‘non-West’ endorse the ideological and ethical bases of human rights. Bunting, Annie, ‘Theorizing Women’s Cultural Diversity in Feminist International Human Rights Strategies’, 20 *Journal of Law and Society* (1993) at 9.

¹¹⁴ Leti Volpp observes that the ‘universalism v. cultural relativism’ discussion assumes that non-Western or minority cultures are ‘frozen and static entities,’ an assumption that in turn leads to what she calls ‘the asymmetrical ascription of culture’: ‘Non-western people are assumed to be governed by cultural dictates whereas the capacity to reason is thought to characterize the West’. Volpp, Leti, ‘Feminism versus Multiculturalism’, 101(5) *Columbia Law Review* (2001) at 1191.

attempts to overcome the sharp dichotomies (and the stalemate) between universalism and cultural relativism, the idea seems to have taken hold that respect for cultural diversity is not necessarily incompatible with the universality of human rights.¹¹⁶

Critiques of exclusion of the type raised by feminists and particularists can be similarly raised with respect to the ECHR.¹¹⁷ In this study, I argue that major closures of the type discussed above remain in place in the ECHR subject. In particular, I show that a series of allegedly universal subjectivities reproduce exclusions and hierarchies of culture and religion at different levels. Indeed, despite several relatively recent openings – most notably, the creation of a specific right to respect for (minority) lifestyle as part of the general right to respect for private and family life and the growing attention to substantive equality reflected in the notions of indirect discrimination and differential treatment of those differently situated¹¹⁸ – many scholars seem to agree that the overall picture in Strasbourg remains at best mixed and ambivalent.¹¹⁹ In

¹¹⁵ See, e.g., Merry, Sally Engle, ‘Changing Rights, Changing Culture’ in Jane K. Cowan et al. (eds.) *CULTURE AND RIGHTS: ANTHROPOLOGICAL PERSPECTIVES* (Cambridge University Press, 2001) at 39-43 (rejecting an essentialist conception of rights just as much as an essentialist conception of culture). For a similar rejection of essentialist conceptions of both culture and rights, this time in the ECHR context, see, e.g., Hoffmann, Florian and Ringelheim, Julie, ‘Par-delà l’Universalisme et le Relativisme: La Cour Européenne des Droits de l’Homme et les Dilemmes de la Diversité Culturelle’, 52 *Revue Interdisciplinaire d’Etudes Juridiques* (2004) 109-142. See more generally Cowan, Jane K., Dembour, ‘Introduction’ in Jane K. Cowan et al. (eds.) *CULTURE AND RIGHTS: ANTHROPOLOGICAL PERSPECTIVES* (Cambridge University Press, 2001) 1-26 (arguing against understanding the rights/culture debate in ‘stark either/or terms’ and in favor of shifting the approach ‘from a focus on supposedly irreconcilable worldviews to that of the inherent tensions between an abstract ideal and its implementation in the real world’). *Ibid.* at 5 and 8.

¹¹⁶ To borrow Yvonne Donders’ words, ‘[c]ultural relativism, in the sense of asking for respect for cultural diversity, not of merely challenging the legitimacy of international human rights norms as such, and universality do not have to mutually exclude each other’. Donders, Yvonne M., ‘Human Rights: Eye for Cultural Diversity’, Inaugural Lecture Delivered Upon Appointment to the Chair of Professor of International Human Rights and Cultural Diversity at the University of Amsterdam on 29 June 2012 at 8.

¹¹⁷ For instance, the closures that Grear and others identify in the UDHR are arguably replicated in the ECHR given their shared genealogical lineage. Grear, Anna, ‘Challenging Corporate “Humanity”’: Legal Disembodiment, Embodiment and Human Rights’, 7 *Human Rights Law Review* (2007) at 535. As Marie-Bénédicte Dembour recalls, the French Declaration, ‘directly influenced the UN Universal Declaration of 1948, which in turn proved a model for the substantive provisions of the European Convention’. Dembour, Marie-Bénédicte, *WHO BELIEVES IN HUMAN RIGHTS? REFLECTIONS ON THE EUROPEAN CONVENTION* (Cambridge University Press, 2006) at 31. See also, Danchin, Peter G. and Forman, Lisa, ‘The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities’ in Peter Danchin and Elizabeth Cole (eds.), *PROTECTING THE HUMAN RIGHTS OF RELIGIOUS MINORITIES IN EASTERN EUROPE* (Columbia University Press, 2002) at 193-194.

¹¹⁸ These developments have been amply discussed in ECHR scholarship. See, e.g., Pentassuglia, Gaetano, ‘The Strasbourg Court and Minority Groups: Shooting in the Dark or a New Interpretive Ethos?’ 19 *International Journal on Minority and Group Rights* (2012) 1-23; Brems, Eva, ‘Human Rights as a Framework for Negotiating/Protecting Cultural Differences: An Exploration of the Case-Law of the European Court of Human Rights’ in Marie-Claire Foblets, Jean-François Gaudreault-Desbiens and Alison Dundes Renteln (eds.) *CULTURAL DIVERSITY AND THE LAW: STATE RESPONSES FROM AROUND THE WORLD* (Bruylant, 2010) 663-715 and Henrard, Kristin, ‘A Patchwork of “Successful and “Missed” Synergies in the Jurisprudence of the ECHR’ in Kristin Henrard and Robert Dunbar (eds.) *SYNERGIES IN MINORITY PROTECTION: EUROPEAN AND INTERNATIONAL LAW PERSPECTIVES* (Cambridge University Press, 2008) 314-364.

¹¹⁹ See, e.g., Brems, Eva, ‘Human Rights as a Framework for Negotiating/Protecting Cultural Differences: An Exploration of the Case-Law of the European Court of Human Rights’ in Marie-Claire Foblets, Jean-François Gaudreault-Desbiens and Alison Dundes Renteln (eds.) *CULTURAL DIVERSITY AND THE LAW: STATE RESPONSES FROM AROUND THE WORLD* (Bruylant, 2010) 663-715; Henrard, Kristin, ‘The Added Value of the Framework Convention for the Protection of National Minorities (II): The Two Pillars of An Adequate System of Minority

fact, one repeated scholarly critique is that the principles surrounding these ECHR openings remain largely theoretical: gaps persist between their enunciation and their actual application in particular cases.¹²⁰ For instance, the door may have been opened to indirect discrimination, but religious and cultural claims against seemingly neutral norms have rarely gone through.¹²¹ Likewise, the Court may have recognized a right to respect for minority lifestyle but, in reality, it has seldom found a violation of this right.¹²²

Though part of the ECHR scholarship is highly critical of this state of affairs, most of it tends to bypass its deeper roots.¹²³ Significant effort has been put into critiquing doctrinal aspects of the Court's legal reasoning.¹²⁴ Some commentators, in particular freedom of religion scholars, have exposed the exclusionary effects of these doctrinal aspects.¹²⁵ Considerable attention has also been given to the need to move beyond formal equality¹²⁶ and various proposals have already emerged as a result, most notably the notion of reasonable accommodation.¹²⁷ Yet little energy has been devoted to bringing into view – let alone subvert and transform – the deeper

Protection Revisited in Verstichel, Aneelies et al. (eds.) *THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES: A USEFUL PAN-EUROPEAN INSTRUMENT?* (Intersentia, 2008) at 102-103 ; and Ringelheim, Julie, *DIVERSITÉ CULTURELLE ET DROITS DE L'HOMME: LA PROTECTION DES MINORITÉS PAR LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME* (Bruylant, 2006) at 427.

¹²⁰ See Chapter II, I.

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ My Ph.D. inquiry into the cultural and religious closures originally arose from the concerns of the ERC project and an analysis of repeated critiques in the literature – confirmed by my own assessment – suggesting that the Court is failing to provide adequate protection in some areas of its cultural and religious diversity case law. Commonly made critiques and my own reading of the Court's case law have led me to ask whether there was something deeper hampering further developments in these areas.

¹²⁴ This is particularly the case with respect to the Court's freedom of religion case law. Critiques include those that challenge the Court's narrow construction of 'manifestation' of religion as well as its large deference to State concerns. See, e.g., Evans, Carolyn, *FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (Oxford University Press, 2001) at 200-204; Evans, Malcolm D., 'Freedom of Religion and the European Convention on Human Rights: Approaches, Trends and Tensions in Peter Cane, Carolyn Evans and Zoe Robinson (eds.) *LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT* (Cambridge University Press, 2011) at 315 and Danchin, Peter G. and Forman, Lisa, 'The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities' in Peter Danchin and Elizabeth Cole (eds.), *PROTECTING THE HUMAN RIGHTS OF RELIGIOUS MINORITIES IN EASTERN EUROPE* (Columbia University Press, 2002) 192-221 (critiquing in particular the wide margin of appreciation).

¹²⁵ See, e.g., Evans, Carolyn, *FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (Oxford University Press, 2001) at 200 (noting how the narrow scope given by the Court to the right to have and to manifest a religion 'makes it difficult for applicants acting outside the traditional, European model of religious practice to make successful Article 9 claims') and Danchin, Peter G. and Forman, Lisa, 'The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities' in Peter Danchin and Elizabeth Cole (eds.), *PROTECTING THE HUMAN RIGHTS OF RELIGIOUS MINORITIES IN EASTERN EUROPE* (Columbia University Press, 2002) 192-221 (noting that the large margin of appreciation granted to States have hampered protection of religious minorities).

¹²⁶ See, e.g., Ringelheim, Julie, *DIVERSITÉ CULTURELLE ET DROITS DE L'HOMME: LA PROTECTION DES MINORITÉS PAR LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME* (Bruylant, 2006); Henrard, Kristin, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' 5(1) *Erasmus Law Review* (2012) 59-77 and Bribosia, Emmanuelle, Ringelheim, Julie and Rorive, Isabelle, 'Aménager la Diversité: Le Droit de l'égalité Face a la Pluralité Religieuse', 78 *Revue Trimestrielle des Droits de l'Homme* (2009) 319-373.

¹²⁷ *Ibid.*

embedded assumptions that inform such exclusionary modes of reasoning and the vacillation to go beyond formal equality. This study sustains that these underlying assumptions need first to be exposed, critically examined and rethought if substantive equality and a more robust protection of cultural and religious diversity is to take hold. These are assumptions that underlie the Court's conceptions of the individual behind freedom of religion or respect for cultural lifestyle claims; conceptions of certain religious or cultural groups; and conceptions of religion and family life more broadly.

Freedom of religion scholars appear to be increasingly aware of the need to reach and rethink several of these assumptions, in particular, those behind the conceptions of 'religion' and religious subjectivity. In recent years, a handful of commentators have started to attend to the deeper, structural limitations underlying the Court's freedom of religion case law.¹²⁸ In the process, they have importantly hinted at the particularities that the seemingly paradigmatic bearer of freedom of religion exhibits in Strasbourg (cerebral,¹²⁹ autonomous¹³⁰ and private¹³¹) and at the 'others' that this constructed bearer has (re-)produced as a result.¹³² While these are no doubt crucial insights, this kind of literature takes only tangential issue with exposing and challenging the features of the 'universals' embedded in the Court's implicit assumptions. The fact remains that the freedom of religion 'universal' as well as several cultural 'universals' continue to be, for the most part, veiled by a certain 'surface universalism:' 'a thin layer of universalizing rhetoric' that makes it look like the Court is describing individuals' experiences in

¹²⁸ See, e.g., Ringelheim, Julie 'Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory' in Camil Ungureanu and Lorenzo Zucca (eds.) *LAW, STATE AND RELIGION IN THE NEW EUROPE: DEBATES AND DILEMMAS* (Cambridge University Press, 2012) 283-306; Ferrari, Silvio, 'The Strasbourg Court and Article 9 of the European Convention of Human Rights: A Quantitative Analysis of the Case Law' in Jeroen Temperman (ed.) *THE LAUTSI PAPERS: MULTIDISCIPLINARY REFLECTIONS ON RELIGIOUS SYMBOLS IN THE PUBLIC SCHOOL CLASSROOM* (Martinus Nijhoff, 2012) 13-34; Danchin, Peter G., 'Islam in the Secular *Nomos* of the European Court of Human Rights', 32 *Michigan Journal of International Law* (2011) 663-747 and Evans, Carolyn, 'Religious Freedom in European Human Rights Law: The Search for a Guiding Conception' in Mark W. Janis and Carolyn Evans (eds.), *RELIGION AND INTERNATIONAL LAW* (Martinus Nijhoff, 1999) 385-400.

¹²⁹ This is mostly manifested in the primacy given by the Court to the *forum internum*. See notably Evans, Carolyn, 'Religious Freedom in European Human Rights Law: The Search for a Guiding Conception' in Mark W. Janis and Carolyn Evans (eds.), *RELIGION AND INTERNATIONAL LAW* (Martinus Nijhoff, 1999) 385-400.

¹³⁰ This is mostly manifested in the Court's emphasis on 'choice' in its freedom of religion case law. For a discussion of this, see, e.g., Smet, Stijn, 'Freedom of Religion v. Freedom from Religion: Putting Religious Duties Back on the Map' in Jeroen Temperman (ed.) *THE LAUTSI PAPERS: MULTIDISCIPLINARY REFLECTIONS ON RELIGIOUS SYMBOLS IN THE PUBLIC SCHOOL CLASSROOM* (Martinus Nijhoff, 2012) 113-142. See also, Ferrari, Silvio, 'The Strasbourg Court and Article 9 of the European Convention of Human Rights: A Quantitative Analysis of the Case Law' in Jeroen Temperman (ed.) *THE LAUTSI PAPERS: MULTIDISCIPLINARY REFLECTIONS ON RELIGIOUS SYMBOLS IN THE PUBLIC SCHOOL CLASSROOM* (Martinus Nijhoff, 2012) 13-34 (arguing that the Court has less difficulties in understanding conceptions of religion that emphasize 'freely chosen belief'). *Ibid.* at 33.

¹³¹ See, e.g., Ringelheim, Julie 'Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory' in Camil Ungureanu and Lorenzo Zucca (eds.) *LAW, STATE AND RELIGION IN THE NEW EUROPE: DEBATES AND DILEMMAS* (Cambridge University Press, 2012) 283-306 (arguing that the Court's understanding of religion as belonging in the private sphere echoes the classic paradigm of secularization).

¹³² See, e.g., Danchin, Peter G., 'Islam in the Secular *Nomos* of the European Court of Human Rights', 32 *Michigan Journal of International Law* (2011) 663-747 (referring mostly to the marginalization of Muslim applicants).

universal terms.¹³³ The study I offer can be viewed as an attempt to more fully reveal the ‘faces’ of the universals behind these veils.

III. Research Questions

This Ph.D. draws upon and seeks to contribute to the critical academic debates discussed above by exposing and contesting the contours of some of the ‘universals’ responsible for the (re-)production of exclusions and hierarchies of religion and culture in Strasbourg. To this end, I ask two sets of questions. At a descriptive level, I ask: What are the assumptions or conceptions implicitly defining the ‘ECHR subject’ against which religious and cultural claimants are judged? In particular, which experiences, features or views are regarded as essential or ‘universal’ in the construction of this subject and which ones are marginalized as invisible, negligible or ‘particular’? Moreover, what kinds of consequences do these assumptions carry for religious and cultural applicants and their groups? Do they create exclusions and hierarchies between them? If so, what forms or shapes do such exclusions and hierarchies take and at what levels do they occur (e.g., within groups, across groups)? At a normative level, the research questions are: Should the Court avoid these exclusions and hierarchies – or open up these ‘universals’? If so, on what basis and how exactly might the Court do this?

IV. Thesis and Normative Basis

The thesis I advance in this study is two-fold. The first central argument is that there are several fundamental closures in the ‘universals’ of the ECHR subject hampering fuller and more equal inclusion of a range of religious and cultural ‘others’. These closures manifest themselves in various forms and take place at different levels. Yet they all respond to the same exclusionary logic: the experiences of some are confused with the experiences of all and posited as the yardstick against which everyone is judged. Indeed, the workings of such universals have not just led to the trivialization and marginalization of applicants’ experiences. Most worryingly, they have sometimes led to their devaluation and delegitimation. The second central argument is that the Court should open up such ‘universals’ in order to avoid exclusion and inequality.

The overall thesis proceeds in three major parts, each of which identifies these closures and proposes to open up the ECHR subject at a different level (hence the reference to the overall resulting framework as ‘multilayered’). First, it identifies exclusions and hierarchies *within* the abstract category of ‘human’. It argues that the Court has, to some extent, opened up the abstract universal human rights subject by acknowledging the constructed vulnerability of some groups. Yet traces of invulnerability foreclose fuller inclusion of cultural and religious group members.

¹³³ Kavey, Michael, ‘The Public Faces of Privacy: Rewriting *Lustig-Prean and Beckett v. the United Kingdom*,’ in Eva Brems (ed.) *DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR* (Cambridge University Press, 2012) at 302 (coining the term ‘surface universalism’ in the context of the Strasbourg Court’s sexual orientation case law and describing it in these terms).

Second, the dissertation identifies exclusions and hierarchies within the religious and cultural ECHR subject, that is to say, across different religious and cultural groups. The dissertation argues that operating as one of the ‘universals’ of freedom of religion is a Protestant, belief-centered notion of religion, which favors internal and disembodied forms of religious subjectivity over external and embodied ones. The dissertation further unveils one of the ‘universals’ of the right to respect for family life: the nuclear family idealized in some parts of Western Europe. Last, the dissertation identifies exclusions and hierarchies within sub-religious and sub-cultural ECHR subjects, namely within groups. It shows how such exclusions and hierarchies arise from elevating a particular cultural or religious practice to the norm, as if it were the group paradigmatic practice. This practice is subsequently either fixed as the ‘essence’ of group identity or associated with negative stereotypes.

My arguments – and the framework I propose – are normatively anchored in a substantive conception of equality. This notion of equality grows out of the realization of the limits of formal equality and its paramount principle that individuals should be treated the same.¹³⁴ This sameness-of-treatment version of equality rests on several assumptions, including: (i) that characteristics such as sex, race and religion should be irrelevant (i.e., law should be sex-blind, race-blind, religion-blind, etc.) and (ii) that what matters is the ‘abstract individual’, detached from her particular characteristics (e.g., gender, race, religion) and her specific contexts.¹³⁵ Substantive equality, on the contrary, does not bracket off the individual’s specific context or circumstances and the role of her gender, religion or race within them.¹³⁶ Moreover, substantive equality is not just sensitive to *identical treatment* but also, and crucially, to differential outcomes or effects.¹³⁷ It is thus concerned with equality in result. Thus, substantive equality does not disapprove of – and in fact sometimes requires – *differential treatment* when this is necessary to avoid or redress differential consequences.¹³⁸ Sandra Fredman calls this dimension of substantive equality ‘transformative’ because, instead of asking the removal of ‘difference’, it demands the removal of the disadvantage attached to it.¹³⁹ This dimension of substantive equality is sensitive to the fact that in reality ‘the abstract individual is clothed with the characteristics of the dominant group, which are then asserted as if they were universal’.¹⁴⁰

Though mostly grounded on this dimension and rationale of substantive equality, my arguments and framework go yet deeper in an attempt to incorporate the following insight:

¹³⁴ Fredman, Sandra, ‘Facing the Future: Substantive Equality under the Spotlight’, Oxford University Legal Research Paper Series, Paper No. 57 (2010).

¹³⁵ *Ibid.* See also, Fineman, Martha Albertson, ‘The Vulnerable Subject and the Responsive State’, 60 *Emory Law Journal* (2010) at 251 (arguing that the same-of-treatment version ‘ignores contexts, as well as differences in circumstances and abilities on the part of those whose treatment is compared’).

¹³⁶ Fredman, Sandra, ‘Facing the Future: Substantive Equality under the Spotlight’, Oxford University Legal Research Paper Series, Paper No. 57 (2010).

¹³⁷ *Ibid.*

¹³⁸ This idea is not foreign to the Court. See ECtHR (GC), *Thlimmenos v. Greece*, 6 April 2000. For a more detailed discussion of this, see Part I, especially, Chapters II and III.

¹³⁹ Fredman, Sandra, *DISCRIMINATION LAW* (Oxford University Press, 2nd ed. 2011) at 30.

¹⁴⁰ Fredman, Sandra, ‘Facing the Future: Substantive Equality under the Spotlight’, Oxford University Legal Research Paper Series, Paper No. 57 (2010).

equality does not just require recognizing ‘difference’ – or, more precisely, the disadvantage attached to it – but simultaneously interrogating how ‘difference’ is produced in the first place.¹⁴¹ Understanding how difference comes about requires acknowledging that ‘difference’ is not inherent but relational: it expresses comparisons between people (different from whom?).¹⁴² The problem is that the ‘whom’ is most of the time left unstated. Since dominant institutional arrangements are designed with only some people in mind, those not contemplated in such arrangements appear ‘different’, ‘visible’, if not ‘deviant’.¹⁴³ It is therefore vital to seek out the ‘unstated point of reference when assessing others’.¹⁴⁴ Otherwise, we risk leaving unchallenged standards that privilege some but disadvantage others.¹⁴⁵ Martha Minow observes:

From the point of reference of this norm, we determine who is different and who is normal. Women are different in relation to the unstated male norm. Blacks, Mormons, Jews, and Arabs are different in relation to the unstated white, Christian norm. Handicapped persons are different in relation to the unstated norm of able-bodiedness, or, as some have described it, the vantage point of the “Temporarily Able Persons.” The unstated point of comparison is not neutral, but particular, and not inevitable, but only seemingly so when left unstated.¹⁴⁶

Thus, it is not just the disadvantage attached to ‘difference’ that I want to reach. Crucially, I additionally aim to investigate the other side of the coin: advantage or privilege.¹⁴⁷ In particular – and this is one of the crucial aspects of my study – I interrogate the workings of hegemonic cultural or religious forces, usually so intertwined in legal frameworks and modes of reasoning, that they are hardly noticeable and oftentimes viewed as ‘natural’ or ‘universal’.¹⁴⁸ In exposing

¹⁴¹ See, e.g., Fineman, Martha Albertson, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’, 20(1) *Yale Journal of Law and Feminism* (2008-2009) at 16 (insisting on the need to interrogate how systems of power – and the emerging webs of privileges and disadvantages – produce identities in the first place) and Beaman, Lori G. ‘Conclusion’ in Lori G. Beaman (ed.) *REASONABLE ACCOMMODATION: MANAGING RELIGIOUS DIVERSITY* (University of British Columbia Press, 2012) at 215 (arguing that ‘equality requires not only the recognition of difference but also a simultaneous questioning of the very social construction of difference’).

¹⁴² See, most prominently, Minow, Martha, ‘Foreword Justice Engendered’, 101 *Harvard Law Review* (1987) 10-95. As a way of acknowledging this insight, I will use scare quotes every time I use the word ‘difference’. However, I will not use scare quotes when I refer to differences because, framed in plural, the term retains its relational nature. In essence, when one speaks of differences, the point of reference does not necessarily have to be the dominant one. Take the example of the Turkish-speaking majority and the Kurdish-speaking minority in Turkey. So long as I speak of differences (in plural) when I refer to their language traits, I implicitly acknowledge that they are *both* different from each other (this, however, does not occur if I refer only to one of the two language traits as ‘different’, in singular).

¹⁴³ *Ibid.* at 14.

¹⁴⁴ *Ibid.* at 32.

¹⁴⁵ There are a host of other flawed assumptions following from not understanding difference as relational. I address some of them in more detail in Chapter II.

¹⁴⁶ Minow, Martha, ‘Foreword Justice Engendered’, 101 *Harvard Law Review* (1987) at 32.

¹⁴⁷ See, e.g., Fineman, Martha Albertson, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’, 20(1) *Yale Journal of Law and Feminism* (2008-2009) at 1-23 (insisting on the need to reach privilege).

¹⁴⁸ In a significant way, these two additional equality inquiries from which my arguments proceed share several premises or ‘points of contact’ with Lori Beaman’s notion of ‘deep equality’. See Beaman, Lori G. ‘Conclusion’ in Lori G. Beaman (ed.) *REASONABLE ACCOMMODATION: MANAGING RELIGIOUS DIVERSITY* (University of British Columbia Press, 2012) 208-223.

and challenging several taken-for-granted assumptions operating at different levels of the ECHR ‘universal’, I thus wish to reach the more structural inequalities embedded therein.

In particular, I show that a failure to recognize the particulars cloaked in these ‘universals’ often results in a failure to address several forms of inequality. One of these forms operates by ignoring the particularities of those who do not fit the ‘universal’: whereas the particularities of some are already taken into account in the ‘universal’, the specificities of others are not. Another form of inequality operates by requiring those who do not fit to mold themselves into – or conform to – the ‘universal’: whereas those who are already represented in the ‘universal’ live comfortably by their own standards, those who are not are required to live by standards that are not theirs. A third form of inequality occurs when the particularities of those who do not fit operate as the (devalued) ‘opposite’ of the (valued) ‘universal’ in binary constructions that serve to re-affirm the latter. The former thus acts as the ‘other’ or ‘the non-universal against which the universal is defined’.¹⁴⁹ In one way or another, all these forms of inequality ultimately reaffirm the ‘universal’ as the standard against which an array of cultural and religious group members are rendered invisible, assimilated or ‘othered.’ In essence, all of them point to what Nancy Fraser calls ‘misrecognition’, a harm that arises when ‘institutionalized patterns of cultural value . . . constitute some actors as inferior, excluded, wholly other, or simply invisible’.¹⁵⁰

Fraser proposes rethinking misrecognition as status subordination rather than as ‘free-standing cultural harm’.¹⁵¹ ‘What requires recognition’, she claims, ‘is not group-specific identity but the status of individual group members as full partners in social interaction’.¹⁵² Fraser’s ‘status model’ is an attempt to mitigate the pitfalls of the ‘identity model’ (including religious and cultural identity), which all too often obscures the ways in which these identities are socially, institutionally and historically produced.¹⁵³ The claim is that emphasis on ‘difference’ and ‘identity’ shields from view the subordination and disadvantage produced by patterns of cultural value that constitute ‘some categories of social actors as normative and others as deficient or inferior’.¹⁵⁴ Fraser’s model, therefore, does not see culture as ‘free-floating’ but as ‘socially grounded’ and aims not at ‘valorizing group identity but rather at overcoming subordination’.¹⁵⁵

¹⁴⁹ Otto, Dianne, ‘Disconcerting “Masculinities”: Reinventing the Gendered Subject(s) of International Human Rights Law’ in Doris Buss and Ambreena Manji (eds.) *INTERNATIONAL LAW: MODERN FEMINIST APPROACHES* (Hart Publishing, 2005) at 116.

¹⁵⁰ Fraser, Nancy, ‘Rethinking Recognition’, 3 *New Left Review* (2000) at 113.

¹⁵¹ *Ibid.* at 133.

¹⁵² *Ibid.*

¹⁵³ This is, in fact, one of the classic critiques made against identity politics and multiculturalism more generally. See, among other critics, Fineman, Martha Albertson, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’, 20(1) *Yale Journal of Law and Feminism* at 16 (arguing, that ‘it is not’ multiple identities that intersect to produce compounded inequalities . . . but rather systems of power and privilege that interact to produce webs of advantages and disadvantages’) and Fraser, Nancy, ‘Rethinking Recognition’, 3 *New Left Review* (2000) at 111. For an overview of this critique against multiculturalism and identity politics, see Damon, Rita, *IDENTITY/DIFFERENCE POLITICS: HOW DIFFERENCE IS PRODUCED AND WHY IT MATTERS* (University of British Columbia Press, 2009) at 3-9

¹⁵⁴ Fraser, Nancy, ‘Rethinking Recognition’, 3 *New Left Review* (2000) at 114.

¹⁵⁵ *Ibid.* at 114 and 116.

In summary, this Ph.D. exposes and contests assumptions and conceptions in the Court's legal reasoning that 'constitute some [religious and cultural] actors as inferior, excluded, wholly other, or simply invisible'.¹⁵⁶ In an attempt to redress these forms of subordination, I employ two simultaneous strategies: (i) taking under-recognized specificities into account (ii) outing the distinctiveness of 'dominant and advantaged groups' that has been 'falsely parading as universal'.¹⁵⁷

V. Methodology

A. ECHR Provisions Covered

Though various ECHR Articles may serve as a direct or indirect basis for religious and cultural claims, this study does not offer a comprehensive examination of all ECHR provisions under which such claims have been brought.¹⁵⁸ Rather, it focuses primarily on three of them – Articles 8, 9 and 14 ECHR – for these are the provisions that offer the most common and direct grounds for claims of the nature examined in this Ph.D. As a matter of fact, these are the provisions under which applicants have most frequently brought direct claims of culture and religion and the ones under which the most significant jurisprudential developments have taken place.¹⁵⁹

There are further reasons for focusing my analysis on these three ECHR provisions. Two of them – Article 9 and Article 14 ECHR – have long been neglected by the Court and, as a result, remain largely underdeveloped. Indeed, it took decades for the Court to find the first Article 9 ECHR violation¹⁶⁰ to the bewilderment of several ECHR scholars. Some of these scholars have spoken of 'a history of avoidance,'¹⁶¹ others of decades of 'dead letter'.¹⁶² Marie-Bénédicte Dembour, for instance, puzzles over the fact that 'over thirty years elapsed before the Court identified that something had gone wrong in Europe as far as freedom of religion was concerned'.¹⁶³ And Danchin and Forman show how the pattern has long been to examine cases

¹⁵⁶ *Ibid.* at 113.

¹⁵⁷ *Ibid.* at 115 (mentioning these strategies among others).

¹⁵⁸ Such exhaustive studies already exist in recent literature. See, most notably, Ringelheim, Julie, *DIVERSITÉ CULTURELLE ET DROITS DE L'HOMME: LA PROTECTION DES MINORITÉS PAR LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME* (Bruylant, 2006).

¹⁵⁹ The prominent role of these three ECHR provisions for advancing direct recognition of cultural and religious differences can be noted in *e.g.*, Brems, Eva, 'Human Rights as a Framework for Negotiating/Protecting Cultural Differences: An Exploration of the Case-law of the European Court of Human Rights' in Marie-Claire Foblets, Jean-François Gaudreault-Desbiens and Alison Dundes Renteln (eds.) *CULTURAL DIVERSITY AND THE LAW: STATE RESPONSES FROM AROUND THE WORLD* (Bruylant, 2010) 663-715.

¹⁶⁰ ECtHR, *Kokkinakis v. Greece*, 25 May 1993.

¹⁶¹ Danchin, Peter G. and Forman, Lisa, 'The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities' in Peter Danchin and Elizabeth Cole (eds.), *PROTECTING THE HUMAN RIGHTS OF RELIGIOUS MINORITIES IN EASTERN EUROPE* (Columbia University Press, 2002) at 206.

¹⁶² Evans, Carolyn, 'Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture', 26 *Journal of Law and Religion* (2010-2011) at 321.

¹⁶³ Dembour, Marie-Bénédicte, 'The Cases that were Not to Be: Explaining the Dearth of Case Law on Religious Freedom in Strasbourg' in Italo Pardo (ed.) *MORALS OF LEGITIMACY: BETWEEN AGENCY AND SYSTEM* (Berghahn, 2000) at 208.

on grounds other than Article 9 ECHR wherever possible.¹⁶⁴ Even nowadays, the statistical figures continue to astound. A look at the Court's most recent table of violations reveals that, in the period of 1959-2012, the Court has found only forty-six violations of Article 9 ECHR,¹⁶⁵ ahead of just five other ECHR provisions, namely the prohibition of slavery and forced labor,¹⁶⁶ no punishment without law,¹⁶⁷ the right to marry,¹⁶⁸ the right to education¹⁶⁹ and the right not be tried or punished twice.¹⁷⁰ The total number of Article 9 ECHR violations looks particularly small when compared with the amount of violations of other rights and freedoms subject to similar limitations: Article 8 ECHR (nine hundred and forty violations); Article 10 ECHR (five hundred and twelve) and Article 11 ECHR (a hundred and forty one).¹⁷¹ Of course, this state of affairs is not only the Court's responsibility. As a complaint-driven system, much of the development of the ECHR provisions obviously depends on the number and types of applications that actually reach Strasbourg.¹⁷² Yet the available statistics do give worrying signals, confirming the critiques often made in the literature.

Article 14 ECHR features a much higher number of violations than Article 9 ECHR in the same period (one hundred and ninety nine). However, the Court's tendency has long been – and still is – to refuse separate analysis under this provision once the issues have been decided (and, especially, a violation found) under other ECHR provisions.¹⁷³ While it is true that the ECHR non-discrimination is now 'larger and bolder', it remains overall 'marginal' and has only

¹⁶⁴ Danchin, Peter G. and Forman, Lisa, 'The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities' in Peter Danchin and Elizabeth Cole (eds.), *PROTECTING THE HUMAN RIGHTS OF RELIGIOUS MINORITIES IN EASTERN EUROPE* (Columbia University Press, 2002) at 199-200. Indeed, as these authors observe, even claims of religious discrimination in the context of custody and access cases, are examined under Article 8 ECHR, the most well-known example being ECtHR, *Hoffmann v. Austria*, 23 June 1993. For an analysis of the Court's reluctance to frame this line of case law as freedom of religion cases, see Uitz, Renata, 'Rethinking *Deschomets v. France*: Reinforcing the Protection of Religious Liberty through Personal Autonomy in Custody Disputes' in Eva Brems (ed.), *DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR* (Cambridge University Press 2012) 173-191.

¹⁶⁵ European Court of Human Rights, Violations by Article and by Respondent State (1959-2012) <http://www.echr.coe.int/Documents/Stats_violation_1959_2012_ENG.pdf> accessed 2 February 2014.

¹⁶⁶ *Ibid.* Five violations.

¹⁶⁷ *Ibid.* Thirty one violations.

¹⁶⁸ *Ibid.* Eight violations

¹⁶⁹ *Ibid.* Ten violations.

¹⁷⁰ *Ibid.* Ten violations.

¹⁷¹ European Court of Human Rights, Violations by Article and by Respondent State (1959-2012) <http://www.echr.coe.int/Documents/Stats_violation_1959_2012_ENG.pdf> accessed 2 February 2014.

¹⁷² Admittedly, any definitive conclusions require a comparison of these statistics with the actual number of complaints filed with the Court under all ECHR provisions.

¹⁷³ Besson, Samantha, 'Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: It Takes Two to Tango in the Council of Europe', 60 *American Journal of Comparative Law* (2012) at 157. For critiques of this reluctance, see, e.g., Loucaides, Loukis G., 'The Limitations of Human Institutions', available at <http://www.errc.org/en-research-and-advocacy-roma-details.php?page=8&article_id=3613> accessed 2 February 2014; and Rorive, Isabelle, 'Religious Symbols in the Public Space: In Search of a European Answer', 30 *Cardozo Law Review* (2009) 2669-2697.

evolved recently after ‘a period of stagnation’.¹⁷⁴ Unsurprisingly, authors have referred to Article 14 ECHR as ‘a second-class guarantee’¹⁷⁵ and, most poignantly, as ‘a Cinderella provision’.¹⁷⁶

As for Article 8 ECHR, my additional reasons for its selection are of a different nature. First, this is the Article within which the Court has, in a groundbreaking move, inserted a specific right to protection of (minority) cultural lifestyle. To the extent that Article 8 ECHR is now the direct and main basis for advancing and deciding cultural claims, its examination takes priority over other ECHR provisions that may concern similar issues more indirectly and peripherally (e.g., Article 1 of Protocol 1, Article 12 ECHR). Second, Article 8 ECHR has been the silent site of two sets of cultural claims that, perhaps because of their ‘quiet’ nature (given either their small number or their obliquity), have largely escaped both the Court’s and scholars’ radars. The first group of these claims concerns language minorities’ claims for respect of the linguistic integrity of their names; the second, migrants’ claims for respect of their right to family life. In these two groups of cases, the Court has failed to recognize the cultural aspect of family life and names.

A number of caveats are in order. First, language-related claims decided under the right to respect for correspondence of Article 8 ECHR are included only as part of my background analysis. This is because applicants’ demands in these cases do not generally concern respect for their language as such, at least not to the same extent as language-related-name claims. Second, cultural claims examined under other ECHR provisions, most notably Article 1 of Protocol 1, are included mostly as part of my background analysis. So are language-related claims decided under other ECHR provisions, particularly Article 2 of Protocol 1 (the right to education) and Article 3 of Protocol 1 (the right to free elections). Last, Article 2 of Protocol 1, though a provision of important implications for religious claims, remains largely outside the scope of my study, principally because it raises wider complex issues that merit their own, separate, fuller examination. This provision is, in any event, rather tangentially and instrumentally related to religious claims.

B. ECHR Sub-sets of Case Law Not Covered

Article 14 ECHR case law is examined to the extent that is relevant to the types of claims I focus on in this study. As for Article 9 ECHR, my analysis largely excludes two lines of case law. First, unless relevant to the object of this study, it does not study Article 9 ECHR case law from the angle of Church-State relations. A focus on issues concerning Church-State relations would in fact be deeply diversionary, as the distinctiveness and complexity of the questions and challenges they raise require separate, thorough consideration. Second, I do not focus on what

¹⁷⁴ Besson, Samantha, ‘Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: It Takes Two to Tango in the Council of Europe’, 60 *American Journal of Comparative Law* (2012) at 147.

¹⁷⁵ *Ibid.* at 159 (given its still largely accessory character).

¹⁷⁶ O’Connell, Rory, ‘Cinderella Comes to the Ball: Article 14 and the Right to Non-discrimination in the ECHR’, 29 (2) *Legal Studies* (2009) 211-229.

Martinez Torron terms ‘the institutional side’ of freedom of religion¹⁷⁷ or the claims brought by what Carolyn Evans calls ‘institutional applicants’ (e.g., churches and religious communities).¹⁷⁸ This body of case law primarily concerns associational or organizational issues (e.g., recognition of legal entity status and autonomy in the organization of internal affairs)¹⁷⁹ as well as property issues (e.g., taxation and protection of monasteries),¹⁸⁰ both of which are rather instrumental in the enjoyment of freedom of religion.¹⁸¹ The most fundamental reason for the exclusion of this group of cases is because the Court has shown itself highly protective of freedom of religion in this area as opposed to other spheres.¹⁸² The fact that one of the principal aims of my study is to uncover the closures lying at the heart of the cultural and religious exclusions and hierarchies in the ECHR naturally excludes areas where the Court has offered high levels of protection.

C. Case Law Selection

The selected cases comprise a mix of ‘high-profile’ cases – which I define as Grand Chamber and widely-cited cases in the Court’s jurisprudence – and less known cases. Moreover, the selection makes sure to combine Grand Chamber judgments, Chamber judgments and inadmissibility decisions. Though the sample is by no means complete, it is substantial enough to allow for meaningful analysis and conclusions. It includes judgments and decisions passed by the Commission and the Court until 15 July 2013.

(i) Article 9 ECHR – Freedom of Religion

My sample includes a total number of a hundred and fifteen judgments/decisions, most of them identified through the Court’s HUDOC database under Article 9 ECHR.¹⁸³ I have additionally identified many of the cases compromising the sample through existing literature, the snowball

¹⁷⁷ Martinez-Torron, Javier, ‘The (Un)Protection of Individual Religious Identity in the Strasbourg Case Law’, *Oxford Journal of Law and Religion* (2012) at 3.

¹⁷⁸ Evans, Carolyn, ‘Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture’, 26 *Journal of Law and Religion* (2010-2011) at 322. See however Chapter VI of this Ph.D., where I do take a look at the cases concerning this dimension of freedom of religion for the purposes of this Chapter.

¹⁷⁹ See, e.g., ECtHR, *Church of Scientology Moscow v. Russia*, 5 April 2007; ECtHR (GC), *Hasan and Chaush v. Bulgaria*, 26 October 2000 and ECtHR, *Serif v. Greece*, 14 December 1999.

¹⁸⁰ See, e.g., ECtHR *Association Les Témoins de Jéhovah v. France*, 30 June 2011 and ECtHR, *Holy Monasteries v. Greece*, 9 December 1994.

¹⁸¹ As Geoff Gilbert argues, recognition of legal personality ‘is not part of the group’s religious rights *stricto sensu*. Yet without recognition, a religious group may not formally be able to regulate its own affairs in terms of its finances, its holding of property and vis-à-vis its members’. Gilbert, Geoff, ‘Religious Minorities and Their Rights: A Problem of Approach’ 5 *International Journal on Minority and Group Rights* (1997) at 111.

¹⁸² See, e.g., Martinez Torron, Javier, ‘The (Un)Protection of Individual Religious Identity in the Strasbourg Case Law’, *Oxford Journal of Law and Religion* (2012) 1-25 and Evans, Carolyn, ‘Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture’, 26 *Journal of Law and Religion* (2010-2011) 321-343 (both of them noting the differences in the degree of protection between this and other areas of the Court’s freedom of religion case law).

¹⁸³ For a full list of cases, see the ‘Religion’ List of the Case Law included at the end of this Ph.D.

method (some cases led to others) and bi-weekly team discussions of the Court's latest case law at the Human Rights Center (these discussions are internally known as 'the Strasbourg Club'). The sample makes sure to include all Level of Importance '1' judgments/decisions from this database. This level is assigned by the Court itself and means that the ruling in question makes a significant contribution to the development, clarification or modification of its case-law. Moreover, the selection makes sure to include nearly all judgments/decisions¹⁸⁴ featuring in the 2013 'Freedom of Religion' Factsheet prepared by the Court. Last, the selection includes several cases concerning parental rights – which, in fact, are ultimately about religious discrimination but still typically examined by the Court under Article 8 ECHR.

(ii) Article 8 ECHR – Cultural Lifestyle

While the selection of freedom of religion case law is a relatively straightforward enterprise in the HUDOC database, the collection of cultural lifestyle cases is not. This is because the right to respect for one's cultural lifestyle is just one of the rights protected under Article 8 ECHR. Therefore, in order to identify the relevant cases, I employed a combination of the following methods: existing literature, use of specific search terms in the HUDOC database,¹⁸⁵ the Court's factsheets,¹⁸⁶ the snowball method, and the 'Strasbourg Club' discussions. I employed the following search terms in the HUDOC database: 'way of life', 'cultural practice', 'minority lifestyle', and 'lifestyle'. As a result, the cultural lifestyle sample includes a total of twenty cases.¹⁸⁷

(iii) Article 8 ECHR – Language

The language-related name case law falls under the right to respect for private and family life of Article 8 ECHR. Since this provision, as mentioned earlier, covers other rights, the search of relevant cases in the HUDOC database proceeded on the basis of key terms: 'minority', 'language', 'ethnic' and 'name'. Additionally, I have relied on existing literature, the Court's own factsheets¹⁸⁸ and other documents,¹⁸⁹ the snowball method, and the 'Strasbourg Club'

¹⁸⁴ It leaves out two education cases: ECtHR, *Appel-Irrgang v. Germany*, 6 September 2010 and ECtHR, *Dojan and others v. Germany*, 22 September 2011.

¹⁸⁵ For the most part, I employed key terms in English because most cases are available in both English and French.

¹⁸⁶ There is no specific factsheet on this right but the factsheet 'Roma and Travellers' (May 2013) covers related issues. Moreover, I have looked at the Report 'Cultural Rights in the Case-Law of the European Court of Human Rights' of January 2011, prepared by the Court's Research Division, which provides a selection of the Court's main jurisprudence in the context of cultural rights.

¹⁸⁷ See 'Cultural Practice/Lifestyle' List of the Case Law included at the end of this Ph.D. Note, however, that this list contains several non-Article 8 ECHR cases, in addition to these twenty cases. The additional cases are: ECmmHR, *From v. Sweden*, 4 March 1998; ECtHR, *Muñoz Díaz v. Spain*, 8 December 2009; ECtHR, *Johtti Sappelacat r.y. and Others v. Finland*, 18 January 2005; ECtHR, *The Gypsy Council and Others v. the United Kingdom*, 14 May 2002; ECtHR, *Muonio Saami Village v. Sweden*, 9 January 2001; and ECmmHR, *Konkama and 38 Others Sami Villages v. Sweden*, 25 November 1996.

¹⁸⁸ There is no specific factsheet on the issue but the ones on 'Right to Free Elections' (May 2013) and 'Racial Discrimination' (April 2013) have proved useful in the search.

discussions. A list of these cases – along with other language cases (under other ECHR provisions) informing my overall analysis – may be found in the Case Law Annex under ‘Language’. The list comprises a total of twenty-two cases.

(iv) Article 8 ECHR – Family Life

In my search of the relevant case law concerning the right to respect for family life, I have employed exactly the same methods as the ones used in the above-mentioned Article 8 ECHR searches: existing literature, Court’s documents, snowball method and search terms in the HUDOC database, which included: ‘extended family’, ‘sisters’, ‘brothers’, ‘siblings’, ‘adult children’, ‘adult(s)’, ‘extended relatives’, ‘distant relatives’, ‘grandparents’, ‘niece’, and ‘nephew’. The point of departure of my search was the Court’s own document ‘Key Case Law Issues: The Concepts of Private and Family Life’ of 24 January 2007. In total, I have examined eighty-five cases.

(v) Article 14 ECHR – Non-discrimination

Most of the relevant Article 14 cases have been found through an analysis of Article 9 ECHR and Article 8 ECHR case law, existing literature and the snowball method. Additionally, I have resorted to HUDOC searches (i.e., Article 14-Article 9 and Article 14-Article 8; the latter was further refined through the insertion of the search language and traditional lifestyle terms mentioned above). References to these cases are scattered through the Case Law Annex.

(vi) Group Vulnerability

Chapter I of this thesis is devoted to an assessment of the Court’s emerging concept of ‘vulnerable groups’. The following HUDOC terms have been employed in the search: ‘vulnerable group’, ‘vulnerable groups’, ‘vulnerable individual’ and ‘vulnerable position’. A list of the ‘vulnerable group’ and related case law may be found in the Case Law Annex under ‘Group Vulnerability’. They are in total sixteen rulings.

(vii) Other ECHR Provisions

In addition to the previously-mentioned case law, a number of high-profile rulings from others areas of the Court’s case law are included mostly as background information. Though very few of them are explicitly mentioned in this study, they have certainly informed my overall analysis. These cases range widely from those concerning freedom of association to the right to education

¹⁸⁹ Report ‘Cultural Rights in the Case-Law of the European Court of Human Rights’ of January 2011 prepared by the Court’s Research Division.

and the right to free elections. In total, they are twenty-one cases. The full list can be found in the Case Law Annex under ‘Other’.

(viii) Case Law Selection in Chapter VI

In this Chapter, the case law selection follows a slightly different pattern, more suitable for the purposes and questions therein addressed. Therefore, the selection criteria and the resulting sample are discussed in detail in a specific section dedicated to the methodology at the beginning of the Chapter.

D. Framework and Modes of Analysis

This study combines description, criticism and prescription but the overall approach remains largely critical. The analysis, though case-law oriented, is theoretically informed by a range of critical frameworks coming principally from critical human rights theory, feminist legal theory, and postmodern critiques (in particular, the anti-essentialist critique). The reason for these choices lies in the purposes of my study: the identification and disruption of exclusionary mechanisms not always apparent to the naked eye. All of them – critical human rights theory, feminist legal theory, and postmodern critiques – offer the theoretical resources apt for the task at hand. Indeed, as it might have become clear from the discussion in Section II above, critical accounts of human rights highlight their ambivalence ‘for producing and cloaking privilege and yet, simultaneously . . . for the unveiling of oppression’.¹⁹⁰ This problematization of and ambivalence towards human rights law distinguishes these accounts from mainstream or traditional ones.¹⁹¹

Feminist legal theory and postmodern critiques, in turn, are renowned for their critical force. Indeed, as I more fully explain at the beginning of Parts II and III, respectively, feminists are well-known for successfully exposing the law’s gendered assumptions that reinforce women’s inequality and oppression¹⁹² and postmodern theorists for challenging the unitary and essentialist character of categories (including identity and group categories) for their exclusionary character.¹⁹³ In particular, postmodern feminist critique is especially known for refusing to reduce ‘reality to one key factor,’ that, for this reason, ignores other factors ‘that do not fit’.¹⁹⁴ While the insights from critical human rights theory appear most obviously in Chapter

¹⁹⁰ Grear, Anna, “‘Framing the Project’ of International Human Rights Law: Reflections on the Dysfunctional ‘Family’ of the Universal Declaration’ in Conor Gearty and Costas Douzinas (eds.) *THE CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW* (Cambridge University Press, 2012) at 25.

¹⁹¹ *Ibid.*

¹⁹² For a fuller discussion, see *infra* Part II.A. ‘Feminist Method of Critique’.

¹⁹³ For a fuller discussion, see *infra* Introduction to Part III.

¹⁹⁴ Dembour, Marie-Bénédicte, *WHO BELIEVES IN HUMAN RIGHTS? REFLECTIONS ON THE EUROPEAN CONVENTION* (Cambridge University Press, 2006) at 211. As Dembour explains, this strand of feminism ironically offers ‘greater inclusiveness.’ *Ibid.*

I, those from feminist legal theorists and from the postmodern critique feature most fully in Chapters IV, V and VI.

My analytical framework is not only informed by insights from these theories. It integrates further tools from deconstruction and critical discourse analysis. The former, famously associated with Derrida, is well-known for its capacity to challenge taken-for-granted assumptions;¹⁹⁵ the latter for reaching the ideological underpinnings of seemingly innocuous language.¹⁹⁶ Given the nature of the legal claims I deal with in this study (religious and cultural), my framework also includes insights from anthropology and religious studies. While some insights from anthropology are scattered through my thesis,¹⁹⁷ the insights from religious studies are most fully at work in Chapter IV.¹⁹⁸

In short, this study proceeds across methodological and disciplinary boundaries. Given its purposes and object, a purely legalistic analysis exclusively focused on doctrinal issues would have not enabled me to adequately uncover and critique the background assumptions embedded in the Court's legal reasoning. Of course, this does not mean that the framework of my analysis excludes legal scholarship. Scholarly works on equality and non-discrimination (including emerging legal scholarship on vulnerability), on law and religion, on minority rights and on the ECHR are at the heart of my analytic framework.

Though this thesis is largely characterized by a critical assessment of the Court's legal reasoning, it is not all about critique. It is also deeply concerned with relevance and practicality. Indeed, my intention is that this kind of critical assessment serves as a basis for exploring and suggesting possible avenues of change. As I noted at the beginning of this section, this study also has a prescriptive dimension. Most of the proposed prescriptions build upon existing lines of the Court's case law. While my initial idea was to adopt a comparative approach – and ultimately to reach out other jurisdictions in search of 'solutions' – I immediately abandoned the project after noticing that some of the 'recipes' were actually 'home', sometimes even in exactly the same area that exhibited the most problematic aspects.¹⁹⁹ In a way, this realization has allowed me to suggest more realistic strategies that, precisely for resting on the bases of what is already 'there', may be more easily and fruitfully implemented. I show how such strategies might pan out in practice at the end of Parts I, II and III.

VI. Structure of the Study

This study is divided into three Parts. Part I deals with closures at the level of the abstract universal ECHR subject and unveils the inegalitarian and exclusionary implications of these closures for cultural and religious applicants. In fact – and perhaps somehow ironically – Part I

¹⁹⁵ For a fuller discussion, see *infra* Part II 'Deconstruction and Interdisciplinary Analysis'.

¹⁹⁶ For a fuller discussion, see *infra* Chapter VI, Section I.B. I borrow tools from critical discourse analysis for my examination in this Chapter.

¹⁹⁷ See particularly *supra* Section I.B. and Chapter V.

¹⁹⁸ For a fuller discussion, see *infra* Part II 'Deconstruction and Interdisciplinary Analysis'.

¹⁹⁹ See particularly Chapter VI, Section III.

starts off by examining a major opening in the ECHR subject: the concept of ‘vulnerable groups’. Yet Part I soon makes clear that this subject – the vulnerable group member – has yet to make her/his (further) appearance in the context of claims of religion, cultural lifestyle and language. Part II examines the closures at the level of the ECHR religious and cultural subject, that is to say, the closures that create exclusions and hierarchies *across* cultural and religious groups. Part III looks at the closures at the level of the ECHR sub- religious and cultural subject, meaning the closures that produce exclusions and hierarchies *within* religious and cultural groups. Part I comprises three Chapters, Part II includes two Chapters and Part III contains one Chapter.

Chapter I lays the groundwork for my analysis in the next two Chapters of Part I. It critically examines the concept of ‘vulnerable groups’, a notion developed by the Court to refer to groups as varied as Roma, people with disabilities and asylum seekers. One of the central arguments in this Chapter is that the insertion of this concept in the Court’s jurisprudence represents a fundamental step towards a more inclusive universal human rights subject. The thrust of this argument is that, it is in response to the exclusions of human rights law that the Court has been forced to attend to the constructed disadvantage of certain groups. In so doing, it has deployed the concept of group vulnerability. At the same time, however, Chapter I urges a critical deployment of the concept, pointing to its inherent pitfalls and warning that it otherwise runs the risk of reinstating the very exclusions it seeks to put an end to. The overall assessment of the concept remains optimistic: the emergence of group vulnerability is a positive development given its capacity to push for a more inclusive ECHR human rights subject and to encourage more powerful scrutiny of inequality. This Chapter is based on a Journal Article written together with Alexandra Timmer. For this reason, it keeps the first person plural throughout even though the rest of the Ph.D. uses the first person singular; *caveat lector*.

For all the positive tone of Chapter I, Chapter II is critical. It argues that the vulnerable group member of other areas of the Court’s case law is largely absent in the context of religion and language claims and has hardly ever made any meaningful appearance in the context of cultural lifestyle claims. Chapter II shows that, in fact, these areas of the Court’s case law are rather inhabited by an invulnerable subject. One of the central arguments of this Chapter is that the Court’s analytical gaze has so far been wrongly placed on the seemingly invulnerable religious and cultural applicant, rather than on the social or institutional arrangements that heighten her vulnerability. This Chapter, however, is not merely critical. It is also meant as an exploration of the potential of group vulnerability to advance substantive equality in the context of claims of culture and religion. In this regard, Chapter II argues that group vulnerability holds out great potential to shift the focus of analysis towards the societal arrangements that heighten the vulnerability of some religious/cultural/linguistic groups while lessening the vulnerability of others.

Chapter III, the most practically-oriented of all Chapters, is specifically devoted to language claims and is ultimately a hands-on exploration of what group-vulnerability analysis may look like in practice. After offering an overview of the Court’s language case law and

explaining the bases guiding my analysis, Chapter III redrafts the Court's judgment in *Kemal Taşkın and Others v. Turkey*,²⁰⁰ a case concerning the refusal to register the applicants' Kurdish names on the basis that the letters 'q', 'w' and 'x' do not exist in the Turkish alphabet. I show how both the reasoning and the outcome of the case would have been different, had the Court incorporated vulnerable-group analysis.

Chapter IV focuses on freedom of religion. The main argument is that, by elevating interiority and disembodiment (i.e., the *forum internum*) as the primary characteristics of 'religion', the Court implicitly articulates a conception of religion that is largely Protestant and that, as a result, is inherently exclusionary of a host of religious 'others' that do not exhibit such characteristics. Incorporating insights from religious studies and employing deconstructive analysis, Chapter IV thus challenges the account of religion that the Court has (re)produced in Strasbourg. It contends that, in construing freedom of religion in terms of a binary opposition between the *forum internum* and the *forum externum*, the Court has given priority to the former over the latter, giving rise to a hierarchical relationship between the two terms. The Chapter argues against this sharply dichotomized way of reasoning about freedom of religion. It sustains that legally imagining belief and practice in binary terms gives rise to a fixed opposition and hierarchical relations between the religious forms associated with one term or the other. Moreover, the Chapter proposes that the relationship between belief and practice be reconceived in more interconnected ways. The thrust of the argument is that, by considering belief and practice more interrelatedly, the Court may avoid producing inegalitarian relations between the religions associated with one or the other side of the dichotomy. In other words, the Court needs to reject sharp dichotomization in order to construct a more inclusive account of 'legal' religion in Strasbourg.

Chapter V deals with family life claims in the context of migration case law. It argues that the concept of family life, as developed by the Court, has a Janus-faced character. On the one hand, the concept has an inclusive, open-ended face: the existence or non-existence of family life is determined on the basis of the real existence in practice of close personal ties. On the other hand, and despite its radical inclusive potential, this face of family life paradoxically co-exists with a more restrictive, exclusionary face: that of the 'core' family, namely parents and minor children. This narrow conception appears most prominently in the spheres of entry and expulsion of non-nationals. The thrust of the argument in Chapter V is that this limited and limiting conception of family life privileges an ideal mainstream cultural form of family (the nuclear family) while disadvantaging others such as the extended family.

Chapter VI is the most experimental in character and the one that examines the 'universals' inhabiting *within* cultural and religious groups. Using language as the main entry point of analysis (thanks to tools borrowed from critical discourse analysis) and incorporating insights from post-modern critiques (in particular, from the anti-essentialist critique), Chapter VI reveals the exclusionary and inegalitarian implications of positing some religious and cultural practices as representative of the whole group. This Chapter in fact deals with two versions of

²⁰⁰ ECtHR, *Kemal Taşkın and Others v. Turkey*, 2 February 2010.

this reductionist, exclusionary process. In the first version, the Court posits one cultural or religious practice/way of life as the paradigmatic one and fixes it as the ‘essence’ of group identity. In the second version, the Court similarly portrays the experience of some group members as the experience of all but then equates it with negative stereotypes. The two versions involve a reductionist process – the group or collective is reduced to one general trait and then posited as *the* group trait. Yet there is one fundamental difference between the two versions: whereas under the first form the trait is valued or esteemed, under the second form the trait is devalued or delegitimized.

All three Parts conclude by harnessing the strategies and approaches suggested in each of its Chapters. In turn, a General Conclusion, ties together the strategies outlined at the end of the three Parts. The General Conclusion, moreover, gathers the images of the ‘universals’ identified throughout the study in an overall ‘picture’ and closes by identifying some issues for future research.

PART I

OPENING UP THE ABSTRACT ECHR SUBJECT

In reality, the abstract individual is clothed with the characteristics of the dominant group, which are then asserted as if they were universal. Only those who can conform to this norm are sufficiently ‘alike’ to be entitled to ‘like treatment’. The result is that formal equality demands conformity as a price for equal treatment.

-- Sandra Fredman²⁰¹

After decades of assessing equality from a formal perspective – that is, of assuming that everybody should be treated the same and of tackling formal distinctions on certain grounds lacking objective and reasonable justification – the Strasbourg Court has gradually moved towards an idea of equality whose central concern is ‘not whether the law makes distinctions, but whether the *effect* of the law is to perpetuate disadvantage, discrimination, exclusion or oppression’.²⁰²

Thus, in the context of Article 14 ECHR, the Court has shown growing awareness that seemingly neutral norms can in reality disproportionately burden some groups.²⁰³ This understanding of equality finds one of its clearest articulations in the concept of indirect discrimination famously applied in *D.H. and Others v. the Czech Republic*, a case concerning the segregation of Roma children, following the application of a supposedly neutral norm that placed them in special schools.²⁰⁴ The Court reiterated that ‘a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group . . . and that discrimination

²⁰¹ Fredman, Sandra, ‘Facing the Future: Substantive Equality under the Spotlight’, *Oxford University Legal Research Paper Series*, Paper No. 57 (2010) at 4-5.

²⁰² O’Connell, Rory, ‘Cinderella Comes to the Ball: Article 14 and the Right to Non-discrimination in the ECHR’, 29 (2) *Legal Studies* (2009) at 214. See also, O’Connell, Rory, ‘Substantive Equality in the European Court of Human Rights?’, 107 *Michigan Law Review First Impressions* (2009) at 129.

²⁰³ Timmer, Alexandra, ‘Toward an Anti-Stereotyping Approach for the European Court of Human Rights’, 11(4) *Human Rights Law Review* (2011) at 711.

²⁰⁴ ECtHR (GC), *D.H. and Others v. the Czech Republic*, 13 November 2007. In fact, in *Hugh Jordan v. the United Kingdom*, the Court had accepted that a general policy or measure with disproportionately prejudicial effects on a particular group may be considered discriminatory even when it is not specifically aimed at that group but concluded that there was no Article 14 ECHR violation. ECtHR, *Hugh Jordan v. the United Kingdom*, 4 May 2001 § 154. See also, ECtHR, *Hoogendijk v. the Netherlands*, 6 January 2005.

potentially contrary to the Convention may result from a *de facto* situation'.²⁰⁵ Another articulation of this substantive approach to equality can be found in the call for different treatment of those differently situated. The principle was embraced in *Thlimmenos v. Greece*,²⁰⁶ albeit hardly ever after applied. *Thlimmenos* concerned a Jehovah's Witness denied access to the profession of accountant due to a past conviction for refusing to serve in the military for religious reasons. In finding a violation of Article 14 jointly with Article 9 ECHR, the Court's Grand Chamber held: 'The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different'.²⁰⁷ These developments have received ample scholarly attention; they have rightly been viewed as two major openings of the non-discrimination provision towards substantive equality.²⁰⁸

Yet one recent major opening towards substantive equality has so far escaped the scholarly radar: the emergence and development of 'group vulnerability.' Indeed, recent years have seen the appearance of a new kind of human rights subject in Strasbourg. The human rights subject in question is not the abstract universal but a specific group member who shares the attribute of vulnerability with other human beings. The vulnerability of this group member is not however the same as everyone else's. It is rather differentiated, heightened by specific socio-historical contexts or institutional arrangements. In other words, this 'new' ECHR subject is *more vulnerable* than others to experience human rights violations, including inequality and discrimination. The Strasbourg Court has so far used the concept of 'vulnerable groups' to refer to groups as varied as Roma, people with mental disabilities and asylum seekers.

The notion of group vulnerability emerges not only in the context of Article 14 ECHR but also in the context of substantive ECHR provisions, most notably Articles 3 and 8 ECHR

²⁰⁵ ECtHR (GC), *D.H. and Others v. the Czech Republic*, 13 November 2007 § 175.

²⁰⁶ ECtHR (GC), *Thlimmenos v. Greece*, 6 April 2000.

²⁰⁷ *Ibid.* § 44.

²⁰⁸ See, e.g., Henrard, Kristin, 'A Patchwork of "Successful and "Missed" Synergies in the Jurisprudence of the ECHR', in Kristin Henrard and Robert Dunbar (eds.) *SYNERGIES IN MINORITY PROTECTION: EUROPEAN AND INTERNATIONAL LAW PERSPECTIVES* (Cambridge University Press, 2008) at 316-319. See also, O'Connell, Rory, 'Cinderella Comes to the Ball: Article 14 and the Right to Non-discrimination in the ECHR', 29 (2) *Legal Studies* (2009) at 221 (arguing that *D.H.* 'is a major breakthrough for a more substantive model of equality in Strasbourg'); Henrard, Kristin, 'The European Convention on Human Rights and the Protection of the Roma as a Controversial Case of Cultural Diversity' *European Diversity and Autonomy Papers* EDAP 5/2004 at 12 (arguing that *Thlimmenos* represents an opening towards substantive equality); and Jackson Preece, Jennifer 'Emerging Standards of Reasonable Accommodation towards Minorities in Europe?' in *INSTITUTIONAL ACCOMMODATION AND THE CITIZEN: LEGAL AND POLITICAL INTERACTION IN A PLURALIST SOCIETY*, Council of Europe (2009) at 115 (arguing, by reference to *D.H.* and *Thlimmenos*, that 'more recently, [the Court's] decisions have acknowledged the difficulties created by indirect discrimination and the substantive view of equality this entails'). An important limitation still remains that Article 14 ECHR is not free standing but subsidiary to other ECHR rights. See ECtHR (GC), *Chassagnou and Others v. France*, 29 April 1999 § 89. Protocol 12, which entered into force in 2005, seeks to remedy this situation; it contains a self-standing non-discrimination principle. However, given the low number of ratifications and the small body of case that has originated, its significance remains limited. See Besson, Samantha, 'Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: It Takes Two to Tango in the Council of Europe' 60 *American Journal of Comparative Law* (2012) at 157.

alone. The concept comes to consolidate the shift away from the abstract individual (paramount in formal equality)²⁰⁹ towards a ‘collective and social dimension of non-discrimination’ (preeminent in substantive equality).²¹⁰ Indeed, the insertion of group vulnerability in the Court’s case law promises to consider how societal contexts and arrangements render some groups more vulnerable than others and to understand how the individuals situated in society through those groups may more likely suffer human rights violations, including discrimination. The concept arrives at a time where equality law is called upon to ‘effectively deal with more subtle and entrenched forms of discrimination, disadvantage and stereotyping’.²¹¹

All this, however, does not mean that the Court’s formalistic approach to equality has disappeared from view in Strasbourg. The equality as sameness-of-treatment approach stubbornly underlies the Court’s reasoning in various areas, most relevantly in cases concerning applicants’ complaints against seemingly neutral rules burdening their religious practice, language or cultural lifestyle. In many of these cases, the Court follows a mechanical application of formal equality, without investigating the advantages possibly built into the rule for some and the ensuing disadvantages for others. Indeed, after more than a decade of its appearance,²¹² the concept of ‘vulnerable groups’ remains largely absent in freedom of religion/religious discrimination case law.²¹³ Moreover, and even though the notion of ‘vulnerable groups’ was coined in the context of a case concerning the protection of a minority applicant’s lifestyle,²¹⁴ the concept remains for the most part ‘in exile’²¹⁵ in this area. Admittedly, these blanks in the Court’s jurisprudential map may be due to the fact that the concept of group vulnerability is still in its infancy. At the same time, nonetheless, the absence of group vulnerability in these areas may simply suggest that the Court is still trapped in a formal-equality state of mind that makes it unlikely to view as disproportionate or discriminatory supposedly neutral norms or practices.

²⁰⁹ Fredman, Sandra, ‘Providing Equality: Substantive Equality and the Positive Duty to Provide’ 21 *South African Journal on Human Rights* (2005) at 164 (arguing that ‘formal equality, with its focus on the abstract individual, has failed to address deeply entrenched patterns of social disadvantage’). Fredman also notes that the premise of formal equality is that ‘individuals should be treated as individuals, on the basis of their own merit, rather on attributions based on irrelevant characteristics such as race, colour, gender, caste or other analogous status’. Fredman, Sandra, ‘Facing the Future: Substantive Equality under the Spotlight’, *Oxford University Legal Research Paper Series*, Paper No. 57 (2010) at 3. An expression of this approach is the notion of direct discrimination or unequal treatment. *Ibid.*

²¹⁰ Besson, Samantha, ‘Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: It Takes Two to Tango in the Council of Europe’ 60 *American Journal of Comparative Law* (2012) at 147 (arguing that the Court introduces and consolidates the collective dimension of non-discrimination through the notion of indirect discrimination).

²¹¹ Alidadi, Katayoun, ‘Through the Door, Up the Stairs: Religion and its Sins Striding Up the Equality Ladder’, 11(4) *International Journal of Discrimination and the Law* (2012) at 207.

²¹² The origin of the concept is examined in Chapter I, Part II.A.

²¹³ Reference to vulnerable religious groups remains scarce and has been made in the context of Article 3 ECHR rather than in the context of Article 9 ECHR, alone or in combination with Article 14 ECHR. *See, e.g.*, ECtHR, *M.Y.H. and Others v. Sweden*, 27 June 2003 § 60 and ECtHR, *Milanović v. Serbia*, 14 December 2010 § 89.

²¹⁴ ECtHR (GC) *Chapman v. United Kingdom*, 18 January 2001.

²¹⁵ I borrow the notion of the subject ‘in exile’ from Kathryn Abrams. *See* Abrams, Kathryn, ‘The Legal Subject in Exile’, 51 *Duke Law Journal* (2001) 27-74.

The discussion in this Part proceeds in three Chapters. Chapter I charts and evaluates the concept of ‘vulnerable groups’ developed by the Court in recent years. It argues that the insertion of the concept in the Strasbourg case law is, on the whole, a positive development given its capacity to push for a more inclusive ECHR human rights subject and to encourage more powerful scrutiny of inequality. At the same, however, Chapter I urges a critical deployment of the concept, pointing to its inherent pitfalls and warning that it otherwise runs the risk of reinstating the very exclusions it seeks to put an end to. Chapter I lays the theoretical and jurisprudential groundwork for the analysis in Chapters II and III. Chapter II explores the potential of group vulnerability for the assessment of cultural and religious claims and argues for its critical application in cases concerning seemingly neutral rules or practices with differential or disproportionate impact on certain group members. Chapter III illustrates this potential by applying group-vulnerability reasoning in the context of a language-based claim made by members of the Kurdish minority in Turkey. While the discussion in Chapter I is largely critical, the one in Chapter II is rather exploratory. In Chapter III, finally, the discussion is more practically oriented.

CHAPTER I

VULNERABLE GROUPS: THE PROMISE OF AN EMERGING CONCEPT IN EUROPEAN HUMAN RIGHTS CONVENTION LAW*

Introduction

Though each and every move of the Strasbourg Court is intensely followed these days,²¹⁶ one recent development in the front lines of its reasoning has so far escaped scholarly attention: the emergence of the concept of vulnerable groups. The Strasbourg Court originally used this concept in relation to the Roma minority. '[A]s a result of their turbulent history', the Court has held, 'the Roma have become a specific type of disadvantaged and vulnerable minority' in need of special protection.²¹⁷ In recent years, the concept has gained legal momentum when the Court started to regard people with mental disabilities as a 'particularly vulnerable group in society, who have suffered considerable discrimination in the past.'²¹⁸ The list of vulnerable groups has been most recently expanded to asylum seekers²¹⁹ and people living with HIV.²²⁰

In this Chapter, we trace the characterization and implications of the concept of vulnerable groups in the Strasbourg case law. Arguing for a reflective use of group vulnerability, we offer a critical assessment of the concept by reference both to theoretical debates on vulnerability and to the Court's case law.²²¹ We show that the Court's use of the term 'vulnerable

* This Chapter is a reproduction of a Journal Article written jointly with Alexandra Timmer. See Peroni, Lourdes and Timmer, Alexandra, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law', 11(4) *International Journal of Constitutional Law I•CON* (2013) 1056-1085. Alexandra and I thank Eva Brems, Marie-Bénédicte Dembour, Anna Grear, Mathias Möschel, Stijn Smet and an anonymous reviewer for their insightful comments on earlier versions of this Article. We had inspiring conversations with six judges of the European Court of Human Rights in Strasbourg, France in June 2011 and we wish to thank them too. We are also grateful to Martha Fineman for generously hosting us as Visiting Scholars at Emory Law School in Atlanta, Georgia, within the framework of the Vulnerability and the Human Condition Initiative. The Article has received a special mention by the jury of the Max van der Stoep Human Rights Award 2013. I have written the following parts of this Chapter: Part I.A ('Meanings of Vulnerability'); Part II A and B (Vulnerability in *Chapman* and Post-*Chapman* Case Law); Part III (Unnamed Introduction), Part III.A (Positive Obligations) and Conclusion.

²¹⁶ Both the Court and its critics are especially closely followed in the legal blogosphere. See ECHR Blog, <http://echrblog.blogspot.com>; Strasbourg Observers, <http://strasbourgobservers.com>; and UK Human Rights Blog, <http://ukhumanrightsblog.com>.

²¹⁷ See, e.g., ECtHR (GC) *D.H. and Others v. the Czech Republic*, 13 November 2007 § 182.

²¹⁸ ECtHR, *Alajos Kiss v. Hungary*, 20 May 2010 § 42.

²¹⁹ ECtHR (GC), *M.S.S. v. Belgium and Greece*, 21 January 2011 § 251.

²²⁰ ECtHR, *Kiyutin v. Russia*, 20 May 2010 § 63.

²²¹ We will confine ourselves to the case law in which the Court speaks of vulnerable *groups*. There is a considerable amount of case law in which the Court recognizes that the applicant is in a vulnerable position individually, notably in cases concerning prisoners or children. These cases, however, lack a group-centered analysis and therefore raise different kinds of questions than the ones we address in this Article. For an analysis of this other area of the Court's vulnerability case law, see Timmer, Alexandra, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' in Martha Fineman and Anna Grear (eds.) *VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS* (Ashgate, 2013) 147-170.

groups' is not mere rhetorical flourish. The term *does* something: it allows the Court to address different aspects of inequality in a more substantive manner and to open up the abstract human rights subject. We argue that, for these reasons, the emergence of the concept represents a positive development in the Court's case law. Yet, for all its inclusive potential and its power to further substantive equality, the concept also risks sustaining the very exclusion and inequality it aims to redress. We therefore maintain that, if the Court wishes to retain the capability of 'vulnerable groups' to fulfill its equality mission, it will have to attend to the stigmatizing, essentializing and stereotyping risks associated to the concept.

Our analysis proceeds in four parts. We begin by locating the broader theoretical context within which vulnerability has been used as a critical tool and by exploring the links between vulnerability and human rights (I). We continue with an assessment of the ways in which the Court has evoked the notion of vulnerable groups, highlighting the pitfalls inherent in the concept and offering guidance on how the Court could circumvent them. (II). Then, we evaluate the consequences that the Court's use of vulnerable groups has had in its case law and show how the concept has reinvigorated the Strasbourg antidiscrimination and equality case law. (III). Lastly, we offer some thoughts on whether the Court's use of the vulnerable-group concept may lead the Court to overstep its proper subsidiary role (IV).

I. The Concept of Vulnerability and Its Relationship to Human Rights

Vulnerability is a concept fraught with paradox. To start with, the concept is in common use but its meaning is imprecise and contested. Confusing,²²² complex,²²³ vague,²²⁴ ambiguous²²⁵ are but a few of the labels scholars across disciplines have used to refer to it. (Bio)ethics and law, in particular, are disciplines which have spawned an extensive literature on vulnerability. As the purpose of this Chapter is to analyze the Strasbourg Court's deployment of the vulnerable-group concept, we will base our account of vulnerability primarily on legal scholarship.

A. Meanings of Vulnerability

A central paradox of vulnerability is that it is both universal and particular. Both of these features arise in the first place from our embodiment:²²⁶ as embodied beings we are all vulnerable, but we experience this vulnerability uniquely through our individual bodies. The centrality of the corporeal dimension of vulnerability is reflected in the term's etymology: the term stems from

²²² Solbakk, Jan Helge, 'Vulnerability: A Futile or Useful Principle in Healthcare Ethics?' in Ruth Chadwick, Henk ten Have & Eric M. Meslin (eds.) *THE SAGE HANDBOOK OF HEALTH CARE ETHICS* (SAGE Publications Ltd., 2011) at 229.

²²³ *Ibid.*

²²⁴ Ruof, Mary C. 'Vulnerability, Vulnerable Populations, and Policy', 14 *Kennedy Institute of Ethics Journal* (2004) at 411.

²²⁵ Fineman, Martha Albertson, 'The Vulnerable Subject: Anchoring Equality in the Human Condition', 20(1) *Yale Journal of Law and Feminism* (2008-2009) at 9.

²²⁶ *Ibid.*

the Latin *vulnus*, which means, ‘wound.’²²⁷ Turning first to the meaning of vulnerability in the universal sense, it comes as no surprise that harm and suffering feature centrally in most accounts of vulnerability.²²⁸ Mary Neal neatly summarizes the literature:

[V]ulnerability speaks to our universal capacity for suffering, in two ways. First, I am vulnerable because I depend upon the co-operation of others (including, importantly, the State) . . . Second, I am vulnerable because I am penetrable; I am permanently open and exposed to hurts and harms of various kinds.²²⁹

Thus, as vulnerable subjects we are constantly susceptible to harm. Harm, of course, comes in many varieties that intersect and reinforce one another. Injuries can be bodily, moral,²³⁰ psychological,²³¹ economic and institutional,²³² just to mention a few. These different forms of harm already hint at the ways in which vulnerability is particular (as well as universal). Our ‘different forms of embodiment’ and our different positions within ‘webs of economic and institutional relationships’²³³ make that each of us experiences vulnerability uniquely. Martha Fineman points out that the experience of vulnerability ‘is greatly influenced by the quality and quantity of resources we possess or can command’.²³⁴

Recently, however, theorists have moved towards an understanding of vulnerability that expands beyond (universal and particular) suffering, to encompass positive aspects.²³⁵ Human vulnerability is generative of suffering, so the argument runs, but also of empathy, pleasure, innovation, social institutions, intimacy and social-connectedness. Martha Fineman argues that this generative capacity of vulnerability ‘presents opportunities for innovation and growth, creativity, and fulfillment. It makes us reach out to others, form relationships, and build institutions’.²³⁶ Indeed, Fineman insists that we need to re-conceptualize vulnerability in this positive manner in order to get rid of the stigmatizing effects otherwise attached to the term.²³⁷

²²⁷ Turner, Bryan S., *VULNERABILITY AND HUMAN RIGHTS* (Penn State University Press, 2006) at 28.

²²⁸ See, e.g., Butler, Judith, *PRECARIOUS LIFE: THE POWERS AND MOURNING OF VIOLENCE* (Verso, 2006) at xii; Goodin, Robert E., *PROTECTING THE VULNERABLE: A REANALYSIS OF OUR SOCIAL RESPONSIBILITIES* (University of Chicago Press, 1985) at 110; and Turner, Bryan S., *VULNERABILITY AND HUMAN RIGHTS* (Penn State University Press, 2006) at 27.

²²⁹ Neal, Mary, “‘Not Gods but Animals’: Human Dignity and Vulnerable Subjecthood”, 33 *Liverpool Law Review* (2012) at 186–187.

²³⁰ Turner, Bryan S., *VULNERABILITY AND HUMAN RIGHTS* (Penn State University Press, 2006) at 28.

²³¹ *Ibid.*

²³² Fineman, Martha Albertson, ‘The Vulnerable Subject and the Responsive State’, 60 *Emory Law Journal* (2010) at 268.

²³³ *Ibid.* at 269.

²³⁴ Fineman, Martha Albertson, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’, 20(1) *Yale Journal of Law and Feminism* (2008-2009) at 10.

²³⁵ See, e.g., Bergoffen, Debra *CONTESTING THE POLITICS OF GENOCIDAL RAPE: AFFIRMING THE DIGNITY OF THE VULNERABLE BODY* (Routledge, 2012) 101-119; Fineman, Martha Albertson, “‘Elderly’ as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility”, 20 *The Elder Law Journal* (2012) at 101; and Grear, Anna, *REDIRECTING HUMAN RIGHTS: FACING THE CHALLENGE OF CORPORATE LEGAL HUMANITY* (Palgrave Macmillan, 2010) at 132-133.

²³⁶ Fineman, Martha Albertson, “‘Elderly’ as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility”, 20 *The Elder Law Journal* (2012) at 126.

²³⁷ *Ibid.*

B. Vulnerability as a Heuristic Device

Fineman has described vulnerability as a heuristic device that allows us to ‘examine hidden assumptions and biases folded into legal . . . practices.’²³⁸ The fact that vulnerability can be used as a heuristic device points to the next paradox inherent in the concept: it can be deployed both to diagnose the ‘is’ and the ‘ought’. In other words, vulnerability is analytically both a descriptive and prescriptive tool. The problem is that the bridge between the descriptive and the prescriptive powers of vulnerability is not easy to build. Especially ethicists struggle with the question how vulnerability can have prescriptive force, since embodied vulnerability is known to trigger both care and abuse.²³⁹ Scholars from different disciplines agree, however, that using vulnerability as a critical tool involves exploring how societal or institutional arrangements originate, sustain, and reinforce vulnerabilities.²⁴⁰ As was mentioned above, part of the reason why people are vulnerable is because they are inevitably dependent on the cooperation of others. Vulnerability is therefore inherently a ‘relational’ concept,²⁴¹ which supplements ‘attention to the individual subject by placing him/her in social context.’²⁴² In the next Part, we will adopt a similar contextual approach to vulnerability in our case law analysis.

Within the legal literature there is a tension between group-based and universality-based deployments of vulnerability. This seems due to the paradoxical nature of the concept. On the one hand vulnerability is often used to analyze specific populations²⁴³ – on the other hand Martha Fineman has developed a vulnerability thesis that is expressly universal in its scope and ‘post identity.’²⁴⁴ Fineman objects to applying the term vulnerability only to specific groups. She maintains that, as long as vulnerability is only associated with certain (marginalized) identities, the liberal myth that, ‘normally,’ people are self-sufficient, independent, and autonomous is

²³⁸ Fineman, Martha Albertson, ‘The Vulnerable Subject and the Responsive State’, 60 *Emory Law Journal* (2010) at 266, footnote 53.

²³⁹ Murphy, Ann V., “‘Reality Check:’ Rethinking the Ethics of Vulnerability’ in Renée J. Heberle and Victoria Grace (eds.), *THEORIZING SEXUAL VIOLENCE* 55 (Routledge, 2009).

²⁴⁰ See, e.g., Fineman, Martha Albertson, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’, 20(1) *Yale Journal of Law and Feminism* (2008-2009); Goodin, Robert E., *PROTECTING THE VULNERABLE: A REANALYSIS OF OUR SOCIAL RESPONSIBILITIES* (University of Chicago Press, 1985) at 191; Kirby, Peadar, *VULNERABILITY AND VIOLENCE: THE IMPACT OF GLOBAZALISATION* (Pluto Press, 2006); Luna, Florencia, ‘Elucidating the Concept of Vulnerability: Layers Not Labels’, 2 *International Journal of Feminist Approaches to Bioethics* (2009); and Vandenhoe, Wouter and Ryngaert, Julie, ‘Mainstreaming Children’s Rights in Migration Litigation: *ECtHR, Muskhadzhiyeva and others v. Belgium*’ in Eva Brems (ed.) *DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR* (Cambridge University Press, 2012) at 68.

²⁴¹ Luna, Florencia, ‘Elucidating the Concept of Vulnerability: Layers Not Labels’, 2 *International Journal of Feminist Approaches to Bioethics* (2009) at 129.

²⁴² Fineman, Martha Albertson, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’, 20(1) *Yale Journal of Law and Feminism* (2008-2009) at 13.

²⁴³ See, e.g., Chapman, Audrey R. and Carbonetti, Benjamin, ‘Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights’, 33 *Human Rights Quarterly* (2011) at 682-732.

²⁴⁴ Fineman, Martha Albertson, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’, 20(1) *Yale Journal of Law and Feminism* (2008-2009) at 1.

sustained.²⁴⁵ This myth – which is in her view pervasive in American society – has led to an impoverished notion of what the function of the State is and has moreover legitimized rampant inequality. Instead, Fineman proposes to understand vulnerability as a ‘universal, inevitable, enduring aspect of the human condition’ and posits that the proper role of the State is to be responsive to this.²⁴⁶ She presents her vulnerability thesis as an alternative to traditional group-based U.S. equal protection analysis.²⁴⁷ Fineman argues that her analysis is capable of delivering substantive equality (where the traditional analysis has failed) because her thesis turns the inquiry to the ‘institutional practices that produce the identities and inequalities in the first place.’²⁴⁸

The vulnerable-group reasoning of the Strasbourg Court seems to fit ill with Fineman’s thesis. While Fineman supports vulnerability for its potential of capturing the universal, the Court does it for its ability to capture the particular. In our view, however, there is no inherent impediment to reconciling these two approaches on a *conceptual* level – on the contrary; that would fit the concept’s paradoxical nature well. When we asked a Strasbourg judge about the Court’s reasoning, he replied: ‘All applicants are vulnerable, but some are more vulnerable than others.’ The judge thus neatly merged the universal approach with the group-based approach. This reply also points to the fact that, as we will show in the next Part, the Court’s reasoning is a way of recognizing that people are differently vulnerable; that vulnerability is partially constructed depending on economic, political and social processes of inclusion and exclusion. Whether the Court in practice manages to handle vulnerability as a critical tool with the care that is required – without falling in the pitfalls that Fineman and others warn against – is also the subject of the next Part.

C. Human Rights Law and Vulnerability

Before moving on to the case law analysis, it bears standing still for a moment and consider what kind of role vulnerability has so far played in the human rights context. At first sight, human rights lawyers suffer less from the is/ought-dilemma precisely because they can refer to the

²⁴⁵ Fineman’s vulnerability thesis builds in this respect on her earlier work that concerned autonomy and dependency. See Fineman, Martha Albertson, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (The New Press, 2004).

²⁴⁶ Fineman, Martha Albertson, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’, 20(1) *Yale Journal of Law and Feminism* (2008-2009) at 8.

²⁴⁷ Unfortunately, it falls outside the scope of this Article to take a comparative angle on the Strasbourg Court’s vulnerable-group reasoning. The American ‘discrete and insular minorities’ approach has arguably parallels with the Court’s vulnerable-group approach. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152, footnote 4 (1938). Moreover, American scholars in the anti-subordination tradition have linked group-based equality analysis to social exclusion, be it in the form of prejudice and stigmatization or in the form of material disadvantage. See, e.g., Balkin, Jack M. and Siegel, Reva, ‘The American Civil Rights Tradition: Anti-Classification or Anti-Subordination’, 58 *University of Miami Law Review* (2003-2004) 9-33. Others, famously John Hart Ely, reason in terms of minorities’ exclusion from the political process. Ely, John Hart, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (Harvard University Press, 1980). Comparative perspectives on vulnerable-group reasoning would make fascinating material for another scholarly project.

²⁴⁸ Fineman, Martha Albertson, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’, 20(1) *Yale Journal of Law and Feminism* (2008-2009) at 16.

human rights corpus, which in essence lays down the rule that abuse of human embodied vulnerability is prohibited. However, as we shall see, critically minded human rights scholars have shown that the story is not that straightforward. The relationship between vulnerability and human rights is a contested terrain.²⁴⁹

In view of the topic of this paper the crucial question is: *are human rights so construed as to protect the most vulnerable people?* On a conceptual level, Anna Grear shows, the answer to this question is complex and bifurcated.²⁵⁰ Grear argues that the Universal Declaration of Human Rights ('UDHR')²⁵¹ paradigm contains two contradictory impulses. On the one hand, the whole human rights system is founded on a concern for embodied vulnerability.²⁵² Grear presents a genealogy of human rights in which she shows that this is the case both during the idea's early articulations in the 18th century and when the UDHR was created as a reaction to the horrors of World War II. On the other hand, the liberal legal subject has been imported into the human rights structure: archetypically this is a rationalistic and quasi-disembodied subject.²⁵³ In many ways, this subject is conceived of as *invulnerable*.²⁵⁴ What flows from the dominance of the liberal quasi-disembodied subject in human rights law is a set of deeply troubling exclusions. Drawing on a well-known theme from feminist legal theory,²⁵⁵ Grear argues that the many groups that do not fit the liberal archetype – women, dispossessed, people of color and (especially) asylum seekers – fall outside the scope of the purportedly universal protection of human rights.

Of course, many within the human rights movement are aware that the human rights universal fails to include marginalized subjects. In response to this problem, specific treaties

²⁴⁹ The scholarly terrain is moreover rapidly expanding. Recent publications include: Bergoffen, Debra *CONTESTING THE POLITICS OF GENOCIDAL RAPE: AFFIRMING THE DIGNITY OF THE VULNERABLE BODY* (Routledge, 2012); Chapman, Audrey R. and Carbonetti, Benjamin, 'Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights', 33 *Human Rights Quarterly* (2011) 682-732; Grear, Anna, *REDIRECTING HUMAN RIGHTS: FACING THE CHALLENGE OF CORPORATE LEGAL HUMANITY* (Palgrave Macmillan, 2010); and Turner, Bryan S., *VULNERABILITY AND HUMAN RIGHTS* (Penn State University Press, 2006).

²⁵⁰ Grear, Anna, *REDIRECTING HUMAN RIGHTS: FACING THE CHALLENGE OF CORPORATE LEGAL HUMANITY* (Palgrave Macmillan, 2010) 132-133.

²⁵¹ G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc A/819, Dec. 10, 1948. The European Convention on Human Rights is based on the UDHR.

²⁵² Bryan Turner has also conceptualized vulnerability as the foundation of the human rights regime. Turner, Bryan S., *VULNERABILITY AND HUMAN RIGHTS* (Penn State University Press, 2006).

²⁵³ Grear, Anna, 'Challenging Corporate "Humanity": Legal Disembodiment, Embodiment and Human Rights', 7 *Human Rights Law Review* (2007) at 521-534; and Grear, Anna, *REDIRECTING HUMAN RIGHTS: FACING THE CHALLENGE OF CORPORATE LEGAL HUMANITY* (Palgrave Macmillan, 2010) at 96-113. *See generally* Naffine, Ngaire, 'Who are Law's Persons? From Cheshire Cats to Responsible Subjects', 66 *The Modern Law Review* (2003) 346-367.

²⁵⁴ Bergoffen, Debra *CONTESTING THE POLITICS OF GENOCIDAL RAPE: AFFIRMING THE DIGNITY OF THE VULNERABLE BODY* (Routledge, 2012) at 109 ('current human rights paradigms take their cue from the masculine image of the invulnerable body').

²⁵⁵ *See, e.g.*, MacKinnon, Catharine A., 'Crimes of War, Crimes of Peace', 4 *UCLA Women's Law Journal* (1993-1994) 59-86; and Otto, Dianne, 'Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law' in Anne Orford (ed.) *INTERNATIONAL LAW AND ITS OTHERS* (Cambridge University Press, 2006) 318-356.

have proliferated, such as the *Convention on the Rights of Persons with Disabilities*;²⁵⁶ the *Convention on the Elimination of all Forms of Discrimination against Women*;²⁵⁷ the *Convention on the Elimination of Racial Discrimination*;²⁵⁸ and the *Convention on the Rights of the Child*.²⁵⁹ Grear interprets the creation of these specific human rights instruments as repeated critiques of ‘the closures of the abstract universal’ and ‘the outcome of quasi-disembodiment.’²⁶⁰ Aside from the specific treaties, general treaty bodies – in their General Comments and Concluding Observations – also regularly emphasize the imperative to pay special attention to the needs of particularly vulnerable people.²⁶¹ The same holds true for human rights commissioners.²⁶² In academic scholarship, lastly, these critiques are mirrored in the writings of what Marie-Bénédicte Dembour has termed ‘protest scholars’; those who conceive of human rights as articulating ‘rightful claims made by or on behalf of the poor, the underprivileged and the oppressed.’²⁶³

So to go back to the question whether human rights law is so construed as to protect the most vulnerable people: the answer is yes and no (again a paradox!). Drawing on the work of Grear, the subject of human rights law is arguably not an embodied vulnerable subject – let alone a highly vulnerable subject. We would wish that the Court is only doing its regular job by reasoning from vulnerability, but the Court’s reliance on the concept is more complex than that. Our diagnosis is this: in response to the exclusions of human rights law, the Strasbourg Court has been forced to attend to the constructed disadvantage of certain groups, and in so doing, has deployed the concept of group vulnerability.²⁶⁴ As we will now proceed to show, the Court’s deployment of the concept has both strengths and weaknesses.

²⁵⁶ Adopted 13 Dec. 2006, G.A. Res. 61/106, U.N. GAOR, 61st Sess., Agenda Item 67(b), U.N. Doc. A/RES/61/106 (2006) (entered into force 3 May 2008).

²⁵⁷ Adopted 18 Dec. 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., U.N. Doc. A/34/46 (1980), 1249 U.N.T.S. 13 (entered into force 3 Sept. 1981).

²⁵⁸ Adopted 21 Dec. 1965, G.A. Res. 2106 (XX), U.N. GAOR, 20th Sess., U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195 (entered into force 4 Jan. 1969).

²⁵⁹ Adopted 20 Nov. 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., U.N. Doc. A/44/49 (1989), 1577 U.N.T.S. 3 (entered into force 2 Sept. 1990).

²⁶⁰ Grear, Anna, *REDIRECTING HUMAN RIGHTS: FACING THE CHALLENGE OF CORPORATE LEGAL HUMANITY* (Palgrave Macmillan, 2010) at 112 (italics removed).

²⁶¹ For example the UN Committee on Economic, Social and Cultural Rights; *see, e.g.*, Chapman, Audrey R. and Carbonetti, Benjamin, ‘Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights’, 33 *Human Rights Quarterly* (2011) 682-732.

²⁶² Hammarberg, Thomas, *HUMAN RIGHTS IN EUROPE: NO GROUNDS FOR COMPLACENCY* (Council of Europe, 2011).

²⁶³ Dembour, Marie-Bénédicte, ‘What Are Human Rights? Four Schools of Thought’, 32 *Human Rights Quarterly* (2010) at 3. Examples of such scholarship are: Baxi, Upendra, *THE FUTURE OF HUMAN RIGHTS* (Oxford University Press, 2002); and Harvey, Colin, ‘Protecting the Marginalized?’ in John Morison, Kieran McEvoy and Gordon Anthony (eds.) *JUDGES, TRANSITION, AND HUMAN RIGHTS* (Oxford University Press, 2007) 515-534.

²⁶⁴ We note that, within the Council of Europe, the Strasbourg Court is not alone in this approach. The European Committee of Social Rights, for example, regularly uses the concept of vulnerable groups in its decisions. *See, e.g.*, *Centre on Housing Rights and Evictions (COHRE) v. Italy*, Complaint No. 58/2009, Merits, 25 June 2010 § 76 (concerning Roma and Sinti); *Centre on Housing Rights and Evictions (COHRE) v. Croatia*, Complaint No. 52/2008, Merits, 22 June 2010 § 88 (concerning displaced families of Serb ethnicity); and *Autism – France v. France*, Complaint No. 13/2002, Merits, 4 November 2003 § 53 (concerning persons with autism).

II. Characterization and Risks of the Concept of Vulnerable Groups in the Court's Case Law

The rapid development of the concept of vulnerable groups in recent high-profile judgments of the Strasbourg case law raises several basic questions. How has the Court evoked the concept of group vulnerability? And, are there any risks associated to the Court's characterization and deployment of the concept? Based on these questions, this Part offers a critical assessment of the Court's formulation and use of the concept.

A. *Chapman* and the Origin of Group Vulnerability

The concept of vulnerable groups was introduced in 2001, in *Chapman v. the United Kingdom*, to refer to the Roma minority.²⁶⁵ The case involved a Roma woman who was evicted from her own land because she stationed her caravan there without planning permission. The Court rejected the applicant's alleged violation of the right to respect for her minority lifestyle (Article 8 ECHR). It also dismissed her discrimination complaint (Article 14 ECHR). The applicant's argument was that the U.K. government prevented her from pursuing a lifestyle that she viewed as central to her cultural tradition: living and travelling in a caravan. The Court's Grand Chamber held:

As intimated in *Buckley*, 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.²⁶⁶

In this early formulation, the vulnerability of Roma seems to arise primarily from the group's minority status and from the lack of consideration of its minority lifestyle in the planning and decision-making processes. Group vulnerability does not however play a key role in the Court's proportionality reasoning.²⁶⁷ In fact, Ms. Chapman loses the case, mostly as a result of the large margin of appreciation left to States when it comes to the implementation of planning policies, in this case, environmental regulations. Notwithstanding this, *Chapman's* articulation of vulnerability already puts in place the elements that will shape the Court's later formulations of 'vulnerable groups': belonging to a group (in this case, the Roma minority) whose vulnerability is partly constructed by broader societal, political and institutional circumstances (in this case, power differentials and a planning framework unresponsive to the needs arising from a way of life different from that of the majority).

²⁶⁵ ECtHR (GC) *Chapman v. United Kingdom*, 18 January 2001 § 96.

²⁶⁶ *Ibid.* The Court refers to the *Buckley v. the United Kingdom* judgment from 1996, but in that judgment the Court did not actually use the term 'vulnerable' to describe Roma.

²⁶⁷ Cf. ECtHR (GC) *Chapman v. United Kingdom*, 18 January 2001 § 3 (2001) (Riduejo, Bonello, Tulkens, Stráznická, Lorenzen, Fischbach and Casadevall J., dissenting).

B. Group Vulnerability in the Post-*Chapman* Case Law

(i) Characteristics of the Vulnerable-Group Concept: Relational, Particular and Harm-based

In the years following *Chapman*, the Court has broadened and refined the concept's content and scope. As we will discuss, the Court has not only reaffirmed the vulnerability of Roma in different contexts and for a mix of other reasons; it has also extended the list of 'vulnerable groups' to persons with mental disabilities, people living with HIV and asylum seekers. However, what exactly ties all these groups together is still not entirely clear, as the Court has not (yet) fully developed a coherent set of indicators to determine what renders a group vulnerable. To be sure, in all the cases, the Court draws on European or international human rights reports and resolutions to determine what it is that makes groups vulnerable.²⁶⁸ These references, however, serve to confirm rather than to establish group vulnerability.

Based on a close reading of the case law, our understanding is that the concept of group vulnerability, as used by the Court, has three characteristics: it is relational, particular, and harm-based. The Court's account of group vulnerability is first of all *relational*. As already transpired from *Chapman*, the Court locates vulnerability not in the individual alone but rather in her wider social circumstances. The Court's notion of vulnerable groups is thus relational because it views the vulnerability of certain groups as shaped by social, historical and institutional forces. In other words, the Court links the individual applicant's vulnerability to the social or institutional environment, which originates or sustains the vulnerability of the group she is (made) part of. The emphasis on context inherent in the relational character of the Court's understanding of group vulnerability is in line with contemporary analyses that use vulnerability as a critical tool. As we have seen in Part I.B, they all insist on the need to explore the role of societal or institutional arrangements in originating and maintaining vulnerability.

However, contrary to legal scholars' efforts to theorize vulnerability in a universal way – most prominently, Fineman's vulnerability thesis²⁶⁹ – the Court's vulnerable subject is not the inherently vulnerable human being. Rather, the Court's vulnerable subject is a particular group member. In our view, this understanding of vulnerability is not necessarily at odds with universal accounts of vulnerability. On the contrary, and as we have argued in Part I.B, this fits the concept's paradoxical nature: vulnerability is at once universal and particular. In fact, the Court tends to talk of 'particularly vulnerable groups'²⁷⁰ rather than just of 'vulnerable groups.' The inclusion of the term 'particularly' underlines the idea that people belonging to these groups are simply 'more' vulnerable than others. This points to the second characteristic of the Court's account of vulnerability: it is *particular*. By 'particular,' we mean that the Court's vulnerable subject is a group member whose vulnerability is shaped by specific group-based experiences.

²⁶⁸ See, e.g., ECtHR (GC), *D.H. and Others v. the Czech Republic*, 13 November 2007 § 182 (Roma); ECtHR, *Alajos Kiss v. Hungary*, 20 May 2010 § 44 (disability); and ECtHR (GC), *M.S.S. v. Belgium and Greece*, 21 January 2011 § 251 (asylum).

²⁶⁹ See *supra* Part I.B.

²⁷⁰ See ECtHR, *Alajos Kiss v. Hungary*, 20 May 2010 § 42; and ECtHR, *Kiyutin v. Russia*, 10 March 2011 § 74.

A third characteristic of the Court's formulation of group vulnerability in the post-*Chapman* case law is its focus on *harm*. Indeed, all the indicators that the Court has employed to determine group vulnerability show that harm features centrally in the Court's account of group vulnerability. This is far from surprising since, as we have indicated in Part I.A, harm is central to most basic accounts of vulnerability. Thus, one clear set of indicators that emerges from the Court's case law is (historical) prejudice and stigmatization. These indicators point to the harm of *misrecognition*, which, according to Nancy Fraser, takes place when 'institutionalized patterns of cultural value . . . constitute some actors as inferior, excluded, wholly other, or simply invisible—in other words, as less than full partners in social interaction . . .' ²⁷¹ As we will explain below, these indicators have played out in the Court's group-vulnerability analysis, most notably in the context of discrimination. Most recently, the Court has started to delineate more complex indicators linked to social disadvantage and material deprivation in the context of Articles 3 and 8 ECHR. These indicators point to what Fraser calls *maldistribution*, which results 'when some actors lack the necessary resources to interact with others as peers.'²⁷²

In what follows, we organize our analysis of the vulnerable-group case law in two parts, depending on which of the two kinds of harm plays out more prominently in determining group vulnerability. This bifurcation of our examination of the Court's case law does not mean that there are no connections between the two types of harm. What it means is that, though elements of misrecognition and maldistribution underlie all the cases, the Court's assessment of group vulnerability tends to focus more on one than on the other, often leaving the links between the two unexplored.

(ii) Prejudice and Stigmatization: Misrecognition Cases

The first set of indicators that has crucially informed the Court's assessment of group vulnerability are prejudice and stigma. In the post-*Chapman* years, the Court has preserved the original designation of the Roma minority as 'vulnerable' but with different connotations. Indeed, in cases concerning the discrimination of Roma students in education (Article 14 ECHR together with Article 2 of Protocol No. 1 of the Convention), the Court acknowledges the vulnerability of Roma against a different background: prejudices. These are the well-known school segregation cases: *D.H. and Others v. the Czech Republic* (2007), *Sampanis and Others v. Greece* (2008), and *Oršuš and Others v. Croatia* (2010).²⁷³ In all these cases, the Court found that the Roma children were discriminated against in the enjoyment of the right to education. The Grand Chamber held in *D.H.*:

²⁷¹ Fraser, Nancy, 'Rethinking Recognition', 3 *New Left Review* (2000) at 113.

²⁷² *Ibid.* at 116.

²⁷³ ECtHR (GC), *D.H. and Others v. the Czech Republic*, 13 November 2007; ECtHR, *Sampanis and Others v. Greece*, 5 June 2008; and ECtHR (GC), *Oršuš and Others v. Croatia*, 16 March 2010.

[A]s a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority.²⁷⁴

The extensive reference in these judgments to Council of Europe documents reporting prejudices against Roma pupils in several parts of Europe indicates that such prejudices have informed the Court's understanding of Roma's vulnerability.²⁷⁵ Moreover, the factual background of some of these cases shows non-Roma parents' negative and hostile attitudes towards Roma children.²⁷⁶ Most recently, the Court has recognized prejudice more explicitly as a source of group vulnerability in *Horváth and Kiss v. Hungary*, a case concerning the placement of Roma children in special schools following the systematic misdiagnosis of mental disability.²⁷⁷ The Court notes that many students were misdiagnosed because of their socio-economic disadvantage or cultural differences and acknowledges the 'bias in past placement procedures.'²⁷⁸

The Court has also viewed negative social attitudes as the main source of vulnerability of Roma in *V.C. v. Slovakia* (2011), a case concerning the forced sterilization of a Roma woman.²⁷⁹ The Court recognizes that forced sterilization has affected vulnerable individuals of different ethnic origins but admits that Roma are at particular risk 'due, *inter alia*, to the widespread negative attitudes towards the relatively high birth rate among the Roma compared to other parts of the population, often expressed as worries of an increased proportion of the population living on social benefits.'²⁸⁰ The Court condemned Slovakia for not ensuring the applicant's free and informed consent to sterilization, finding violations of both Article 3 ECHR (degrading treatment) and Article 8 ECHR (respect for private and family life). However, and somewhat puzzlingly, despite linking the harmful practices it condemned to the widespread prejudice against Roma, the Court did not examine the applicant's discrimination complaint (Article 14 ECHR) separately.

The Court has similarly grounded its vulnerability assessment on (historical) prejudice – and, additionally, on the resulting social exclusion – in cases concerning other non-dominant groups. One example is *Alajos Kiss v. Hungary* (2010).²⁸¹ The case deals with the blanket disenfranchisement of people with mental disabilities in Hungary. The Court found a violation of the applicant's right to vote (Article 3 of Protocol 1 to the Convention). The Court's view of people with mental disabilities as a 'particularly vulnerable group' rests on the considerable discrimination they have experienced in the past.²⁸² The group, the Court affirms, was

²⁷⁴ ECtHR (GC), *D.H. and Others v. the Czech Republic*, 13 November 2007 § 182 (references omitted). See also, ECtHR (GC), *Oršuš and Others v. Croatia*, 16 March 2010 § 147.

²⁷⁵ See, e.g., ECtHR (GC), *D.H. and Others v. the Czech Republic*, 13 November 2007 §§ 54-80; and ECtHR (GC), *Oršuš and Others v. Croatia*, 16 March 2010 §§ 65-86.

²⁷⁶ See, e.g., ECtHR (GC), *Oršuš and Others v. Croatia*, 16 March 2010 §§ 154 and 204 (2010); and ECtHR, *Sampanis and Others v. Greece*, 5 June 2008 §§18 and 19.

²⁷⁷ ECtHR, *Horváth and Kiss v. Hungary*, 29 January 2013.

²⁷⁸ *Ibid.* §116.

²⁷⁹ ECtHR, *V.C. v. Slovakia*, 8 November 2011 §146.

²⁸⁰ *Ibid.*

²⁸¹ ECtHR, *Alajos Kiss v. Hungary*, 20 May 2010.

²⁸² *Ibid.* § 42.

‘historically subject to prejudice with lasting consequences, resulting in their social exclusion.’²⁸³ With this approach the Court takes the first steps towards embracing a ‘social model’ of disability: this way of framing disability recognizes the built environment and society’s negative attitude towards people with impairment as the main factor disabling and excluding people.²⁸⁴ Contrary to the ‘medical model’ of disability, the hallmark of a social approach to disability emphasizes social prejudices and stereotypes, rather than individual impairments.²⁸⁵

The Court has continued along these lines with *Kiyutin v. Russia* (2011), another case concerning the indiscriminate exclusion of a group historically subject to prejudice.²⁸⁶ This time, the group in question is people living with HIV and the exclusion at issue the refusal of residence permit. The applicant, a man from Uzbekistan married to a Russian national with whom he had a daughter, was denied residence permit on the ground that he was HIV-positive. The Court found that the applicant was discriminated against in the enjoyment of his private and family life (Article 14 ECHR together with Article 8 ECHR). In the *Kiyutin* judgment, the Strasbourg Court refers to *Alajos Kiss* and explains in considerable detail how it came about that people living with HIV have suffered from widespread stigma and exclusion from the 1980s till the present. The Court therefore holds that ‘people living with HIV are a vulnerable group with a history of prejudice and stigmatization.’²⁸⁷ The Court realizes that the basis for excluding HIV-positive non-nationals from obtaining residence permits was the general assumption that they would engage in unsafe behavior.²⁸⁸ For the Court, such a generalization was not founded in facts and failed ‘to take into account the individual situation, such as that of the applicant’.²⁸⁹

(iii) Social Disadvantage and Material Deprivation: Maldistribution Cases

Two indicators of group vulnerability that are less clearly but not less importantly emerging in the Court’s case law are *social disadvantage* and *material deprivation*. In the cases that we will discuss now, what the Court ultimately addresses is the harm of maldistribution. The first case in point is *Yordanova v. Bulgaria* (2012), which concerned a planned mass eviction of Roma inhabitants from their decades-old settlement.²⁹⁰ The applicants had built their homes on State land in Sofia without authorization. The government, however, *de facto* tolerated the unlawful settlement for decades. It did not take any action until the matter became ‘urgent,’ following neighbours complaints ‘about the Roma families’ behaviour.’²⁹¹ Indeed, neighbours had

²⁸³ *Ibid.*

²⁸⁴ Fredman, Sandra, *DISCRIMINATION LAW* (Oxford University Press, 2nd ed. 2011) at 172.

²⁸⁵ Stein, Michael Ashley, ‘Disability Human Rights’, 95 *California Law Review* (2007) at 86-87.

²⁸⁶ ECtHR, *Kiyutin v. Russia*, 10 March 2011.

²⁸⁷ *Ibid.* § 64.

²⁸⁸ *Ibid.* § 68.

²⁸⁹ *Ibid.*

²⁹⁰ ECtHR, *Yordanova v. Bulgaria*, 24 April 2012.

²⁹¹ *Ibid.* § 93.

requested that the Roma inhabitants be removed and ‘returned to their native places,’ holding them responsible for littering, stealing, drug abuse and aggressive behaviour.²⁹²

The Court found a violation of the applicants’ right to respect for home, private and family life (Article 8 ECHR). In stopping the eviction that would have rendered the applicants homeless, the Court held that the Bulgarian State failed to recognize ‘the applicants’ situation as an outcast community and one of the socially disadvantaged groups.’²⁹³ *Yordanova* differs from the other Roma cases previously discussed – school segregation and forced sterilization – in that the focus of the Court’s group vulnerability lies on poverty rather than on prejudice and discrimination. The Court holds for example that the authorities should have taken into account the disadvantaged position of the group to which the applicants belonged in assisting them with the eligibility for social housing.²⁹⁴ Surprisingly, the Court does not explore the links between the group’s disadvantaged status (maldistribution) and the social prejudices against them (misrecognition), even though the facts of the case clearly show that prejudices played a role.²⁹⁵ The Court dismisses the applicants’ complaint of discrimination (Article 14 ECHR).²⁹⁶ Like in *V.C.*, and given the particular context of anti-Roma sentiment in which the removal was ordered, the Court should have at least acknowledged the role played by negative social views against Roma.

The case that has significantly broadened the Court’s notion of group vulnerability is *M.S.S. v. Belgium and Greece* (2011).²⁹⁷ The applicant, an Afghan asylum seeker, was returned by Belgium to Greece under the ‘Dublin II Regulation’ of the EU.²⁹⁸ One of the main questions was whether the detention and living conditions of M.S.S in Greece amounted to inhuman and degrading treatment under Article 3 ECHR. In analyzing the applicant’s conditions of detention – more precisely, in examining the Greek government’s argument that the duration of his detention was insignificant – the Court observes:

In the present case the Court must take into account that the applicant, being an asylum seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously.²⁹⁹

At first sight, this wording points to the specific experiences of the applicant. Thus, one might easily be under the impression that those individual experiences are paramount in the Court’s vulnerability decision. In the next paragraph, however, the Court states the particular vulnerability of asylum seekers in a much more sweeping manner, as though it were an inherent

²⁹² *Ibid.*

²⁹³ *Ibid.* §129.

²⁹⁴ *Ibid.* §132.

²⁹⁵ *Ibid.* §§§§§ 20, 21, 23, 45 and 46.

²⁹⁶ *Ibid.* §§ 157-161.

²⁹⁷ ECtHR (GC), *M.S.S. v. Belgium and Greece*, 21 January 2011.

²⁹⁸ Council Regulation 343/2003, O.J. (L 222) 3.

²⁹⁹ ECtHR (GC), *M.S.S. v. Belgium and Greece*, 21 January 2011§ 232.

attribute of the entire class. The Court holds: ‘[T]he applicant's distress was accentuated by the vulnerability inherent in his situation as an asylum seeker.’³⁰⁰

The Court’s analysis of the applicant’s living conditions is also marked by references to different aspects of asylum seekers’ vulnerability. In this part of the reasoning, the Court states yet more sweepingly:

The Court attaches considerable importance to the applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection.³⁰¹

In this passage, the Court refers to *Oršuš and Others v. Croatia*, a case that, as we have seen above, concerned the vulnerability of Roma in the context of school segregation. This may explain Judge Sajó’s reaction in his separate opinion, arguing that, unlike other ‘particularly vulnerable groups’ in the Court’s case law, asylum seekers ‘are not a group historically subject to prejudice with lasting consequences, resulting in their social exclusion.’³⁰² For him, the concept of vulnerable groups has a ‘specific meaning in the jurisprudence of the Court’ and asylum seekers simply do not fit the concept.³⁰³

Leaving aside that it is debatable whether asylum seekers have not suffered historically from prejudice, Judge Sajó’s concern clearly points to the problem of the open-endedness of the vulnerable-group concept.³⁰⁴ Indeed, while Judge Sajó attempts to keep the vulnerable-group formulation limited to a narrowly defined set of factors,³⁰⁵ the majority opens up the meaning of the concept by relying on a series of other indicators.

For example, the majority finds M.S.S. particularly vulnerable because he was ‘wholly dependent on State support . . . unable to cater for his most basic needs.’³⁰⁶ The dependency argument rings familiar: it is taken from other Article 3 ECHR cases, concerning prisoners and detainees, although in this part of the *M.S.S.* judgment the Court reasons outside the context of detention or imprisonment.³⁰⁷ Moreover, the majority realizes that the applicant’s situation exists on a large scale due to a series of institutional shortcomings inherent in the Greek asylum system.³⁰⁸ These shortcomings included the lack of sufficient reception centers to accommodate asylum seekers; the administrative obstacles impeding their access to the job market; and the

³⁰⁰ *Ibid.* § 233.

³⁰¹ *Ibid.* § 251.

³⁰² ECtHR (GC), *M.S.S. v. Belgium and Greece*, 21 January 2011 (Sajó J., partly concurring and partly dissenting, at 102).

³⁰³ *Ibid.* at 101.

³⁰⁴ We address the problems arising from the concept’s open-endedness in Part IV. See *infra* Part IV.

³⁰⁵ We critique this attempt as a misconceived form of essentialism. See *infra* Part II.C.

³⁰⁶ ECtHR (GC), *M.S.S. v. Belgium and Greece*, 21 January 2011 §§ 253-254.

³⁰⁷ The Court routinely holds that prisoners and detainees are in a vulnerable position. See, e.g., ECtHR, *Denis Vasilyev v. Russia*, 17 December 2009 § 115. On the Court’s use of vulnerability in cases concerning prisoners, see Timmer, Alexandra, ‘A Quiet Revolution: Vulnerability in the European Court of Human Rights’ in Martha Fineman and Anna Gear (eds.) *VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS* (Ashgate, 2013) 147-170.

³⁰⁸ ECtHR (GC), *M.S.S. v. Belgium and Greece*, 21 January 2011 § 255.

lengthy procedures to examine their asylum requests.³⁰⁹ By unveiling all these deficiencies in the Greek asylum system, the Court is ultimately pointing to the institutional production of vulnerability of asylum seekers in Greece.

In sum, *M.S.S.* seems to show that the Court has deemed asylum seekers vulnerable on a series of interacting grounds, including: (i) the daily reality for asylum seekers in Greece; a reality that is characterized by material and psychological want; (ii) asylum seekers' complete dependence on the State; (iii) an inherent vulnerability of asylum seekers due to everything they have been through during the process of migration and the trauma that often accompanies such migration; and (iv) the systemic deficiencies of the Greek asylum system. As a result, it is not quite clear whether *all* asylum seekers are to be considered vulnerable, or just the ones who arrive in Greece. What is clear, however, is that the Court's analysis in *M.S.S.* challenges simplistic conceptions of group vulnerability, making room for more textured and complex formulations.

(iv) Blanks on the Map

In examining the Court's use of the term 'vulnerable groups,' we have closely followed the Court's own terminology. This focus on the Court's terminology has led us to discuss Roma, people with impaired health or abilities and asylum seekers, but not other groups who could reasonably be considered particularly vulnerable. Indeed, an examination of the Court's wider case law reveals some blanks or inconsistencies in the application of the notion of vulnerable groups.

Using prejudice and stigmatization, dependency on the State, and social exclusion and disadvantage as indicators of vulnerability, there are more groups that – according to international human rights reports and scholarly literature – could have fallen within the notion of vulnerable groups.³¹⁰ Examples include national minorities,³¹¹ religious minorities³¹² and LGBT people.³¹³

More puzzlingly, sometimes the Court has been silent on group vulnerability in its case law concerning Roma applicants, notably in cases where the harm of misrecognition towards them is manifested in its most brutal form – namely in physical violence. In these cases, the Court overlooks the broader context of prejudice and discrimination within which vulnerability to

³⁰⁹ *Ibid.* §§ 258-262.

³¹⁰ A more general list of vulnerable groups is compiled by the Iceland Human Rights Centre. See Icelandic Human Rights Centre, 'The Human Rights Protection of Vulnerable Groups' available at <<http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/humanrightsideasandfora/Undirflokkur/>> accessed 2 February 2014. For an analysis on the problems that group-based approaches may entail, see *infra* Part II.C.

³¹¹ Specifically relating to the Kurds in Turkey as a vulnerable national minority, see Peroni, Lourdes, 'Erasing Q, W and X, Erasing Cultural Differences' in Eva Brems (ed.) *DIVERSITY AND EUROPEAN HUMAN RIGHTS* (Cambridge University Press, 2012) 445-469.

³¹² Hammarberg, Thomas, *HUMAN RIGHTS IN EUROPE: NO GROUNDS FOR COMPLACENCY* (Council of Europe, 2011) at 36-43.

³¹³ *Ibid.* at 113-25.

violence originates.³¹⁴ *Aksu v. Turkey*, concerning the stereotyping of Roma in government-sponsored publications, is another example of the Court's failure to incorporate a vulnerable-group approach in its reasoning.³¹⁵ The Court's Grand Chamber refers to the vulnerability of Roma, but this seems more a matter of lip service, as it carries no real weight in the Court's analysis of the case.³¹⁶ What makes the Court's omission particularly puzzling is that at the heart of the case was precisely stereotyping and stigmatization of a particularly vulnerable group.

C. The Risks Inherent in the Concept of Vulnerable Groups

These blanks on the map do not represent the only concern we have with regards to the Court's increasing reliance on the vulnerable-group concept. The Court's account of group vulnerability also has more fundamental drawbacks. In what follows, we will show that the Court's reasoning risks reinforcing the vulnerability of certain groups by essentializing, stigmatizing, victimizing and paternalizing them.

(i) Essentialism

In the first place, the Court's vulnerable-group reasoning is sometimes guilty of essentialism. Briefly put, essentializing means to reify one experience as paradigmatic, at the expense of other experiences.³¹⁷ In fact, the Court runs a *double-essentializing risk*. First, there is essentialism of the so-called vulnerable groups and the people belonging to these groups, i.e. Roma, asylum-seekers, and people with a disability. Essentializing vulnerable groups is harmful to the people from these groups. This occurs, for example, when 'significant differences of location and concern' within one sub-group are obscured.³¹⁸ The lesson to be learned here is that, with its group-based approach, the Court should not overlook 'the different kinds of vulnerabilities that individuals of the same subgroup may be susceptible to.'³¹⁹ There have been cases wherein the Court did not seem to realize that it relied on a conception of a unitary vulnerable group. The Roma caravan cases come to mind. Marie-Bénédicte Dembour notes that the applicants in both *Buckley* and *Chapman* were women who were the principle caretakers of some of their family

³¹⁴ A case in point is ECtHR, *Eremiášová and Pechová v. the Czech Republic*, 16 February 2012.

³¹⁵ ECtHR (GC), *Aksu v. Turkey*, 15 March 2012.

³¹⁶ *Ibid.* § 75.

³¹⁷ See Munro, Vanessa E., 'Resemblances of Identity: Ludwig Wittgenstein and Contemporary Feminist Legal Theory', 13 *Res Publica* (2006) at 138. Essentialism is a complex concept, with several meanings, that has been used extensively in feminist and other critical analysis of law. Our discussion is case law oriented, rather than theoretical. Thorough theoretical discussions of the concept are provided by others. See, e.g., *ibid.* and Phillips, Anne, 'What's wrong with Essentialism?' 20 *Distinktion: Scandinavian Journal of Social Theory* (2010) 47-60.

³¹⁸ Phillips, Anne, 'What's wrong with Essentialism?' 20 *Distinktion: Scandinavian Journal of Social Theory* (2010) at 55.

³¹⁹ Solbakk, Jan Helge, 'Vulnerability: A Futile or Useful Principle in Healthcare Ethics?' in Ruth Chadwick, Henk ten Have & Eric M. Meslin (eds.) *THE SAGE HANDBOOK OF HEALTH CARE ETHICS* (SAGE Publications Ltd., 2011) at 232.

members.³²⁰ Dembour points out that the Court failed to consider this in the respective majority judgments. The ways in which Roma mothers might be differently vulnerable are left unexplored and unrecognized in these judgments.

Essentialism of vulnerable groups also occurs when the Court ‘polices’ the boundaries of a group.³²¹ A case in point is the little-known admissibility decision of *Horie v. the United Kingdom* (2011).³²² We have not discussed *Horie* so far because the Court forecloses actual group-vulnerability reasoning in the admissibility phase. And that is precisely the point. *Horie* concerns a New Traveller who had been pursuing a nomadic lifestyle for almost three decades. The Court observes that, unlike ‘Romani gypsies’ and ‘Irish travelers,’ ‘New Travellers live a nomadic lifestyle through personal choice and not on account of being born into any ethnic or cultural group.’³²³ The Court implies that only those who are gypsies by birth, and not by choice, can be considered as belonging to a vulnerable group. In other words, the Court applies the immutability-criterion to police the boundaries of the (vulnerable) group of ‘gypsies’.³²⁴ Ms. Horie’s experiences end up getting no recognition.

The second type of essentialism is essentialism of the heuristic device itself: this kind concerns the question what is and is not allowed to fall under the vulnerable-group concept. Essentializing the heuristic device itself is harmful because it unduly limits the application of group-vulnerability reasoning. The clearest example of this kind of essentialism is found in the separate opinion of Judge Sajó in *M.S.S. v. Belgium and Greece*. As we noted in Part II.B, Judge Sajó’s attempts to keep the vulnerable-group formulation limited to a narrowly defined set of factors. This sort of essentialism threatens to create a competition among groups for recognition of their vulnerability.³²⁵ Sure enough, we see this competition between groups reflected in Judge Sajó’s separate opinion:

In terms of vulnerability, dependence, and so on, the mentally disabled (and other vulnerable groups, whose members are subject to social prejudice) *are in a more*

³²⁰ Dembour, Marie-Bénédicte, WHO BELIEVES IN HUMAN RIGHTS? REFLECTIONS ON THE EUROPEAN CONVENTION (Cambridge University Press, 2006) at 197-201.

³²¹ Anne Phillips defines this as the ‘treatment of certain characteristics as the defining ones for anyone in the category, as characteristics that cannot [be] questioned or modified without thereby undermining one’s claim to belong to the group.’ Phillips, Anne, ‘What’s wrong with Essentialism?’ 20 *Distinktion: Scandinavian Journal of Social Theory* (2010) at 57.

³²² ECtHR, *Horie v. United Kingdom*, 1 February 2011.

³²³ *Ibid.* § 28.

³²⁴ Many commentators have critiqued the use of the immutability criterion in discrimination law; see, e.g., Fredman, Sandra, DISCRIMINATION LAW (Oxford University Press, 2nd ed., 2011) at 131-34; and Yoshino, Kenji, ‘Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”’ 108 *Yale Law Journal* (1998) 485-571.

³²⁵ This is an important reason why Martha Fineman disapproves of group-language in her vulnerability theory. Fineman, Martha Albertson, ‘The Vulnerable Subject and the Responsive State’, 60 *Emory Law Journal* (2010) at 253-54.

difficult situation than asylum seekers, who are not a homogeneous group subject to social categorisation and related discrimination.³²⁶ (Emphasis added)

(ii) Stigmatization

In *Kiyutin v. Russia*, the stigmatization of people living with HIV is central to the Court's finding that they constitute a vulnerable group.³²⁷ Paradoxically, however, the Court itself risks stigmatizing vulnerable groups, by applying the very term 'vulnerable,' which – as was discussed in Part I – for many people carries solely negative associations such as harm and injury. The Court should be weary of stigmatization, especially as it is possible that vulnerability can take on a 'master status.' This occurs when 'the defining attribute eclipses all other aspects of stigmatized persons, their talents and abilities.'³²⁸ When vulnerability overshadows all other aspects of an applicant's identity in the Court's reasoning, it has taken on a master status.³²⁹

(iii) Paternalism: Denying Agency and Imposing Protection

Lastly, the Court on occasion engages in misplaced paternalism with its group-vulnerability reasoning. In *D.H.*, in response to the government's objection that the Roma children would not have been placed in special schools had their parents not consented to it, the majority of the Grand Chamber held:

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.³³⁰

In a passionate dissent, Judge Borrego Borrego denounced this denial of the ability of Roma parents to make informed decisions regarding the education of their children.³³¹ By denying the Roma parents' capacity to make an informed decision about placing their children in special schools, the Court seems to reinforce their powerlessness. The Court should have confined itself to noting that meaningful consent is problematic in the specific context of the case.

³²⁶ ECtHR (GC), *M.S.S. v. Belgium and Greece*, 21 January 2011 (Sajó J., partly concurring and partly dissenting, at 104). We note that Judge Sajó's reference to homogeneity is also a form of essentialism: no group is homogeneous, individuals within a group are always positioned differently.

³²⁷ ECtHR, *Kiyutin v. Russia*, 10 March 2011 § 64.

³²⁸ Lenhardt, R.A., 'Understanding the Mark: Race, Stigma, and Equality in Context', 79 *New York University Law Review* (2004) at 819 n.63 (citations omitted).

³²⁹ Cf. Kramer, Zachary A., 'Of Meat and Manhood', 89 *Washington University Law Review* (2011) at 304-05.

³³⁰ ECtHR (GC), *D.H. and Others v. the Czech Republic*, 13 November 2007 § 203. Similarly ECtHR, *Sampanis and Others v. Greece*, 5 June 2008 § 94; and ECtHR (GC), *Oršuš and Others v. Croatia*, 16 March 2010 §§ 178-179.

³³¹ Among other things, the Judge cautioned against 'certain "well-intentioned" people [who] feel constrained to impose their conception of life on all'. ECtHR (GC), *D.H. and Others v. the Czech Republic*, 13 November 2007 § 15 (2007) (Borrego Borrego J., dissenting).

The Court does much better in assessing the particular circumstances of the case in *V.C. v. Slovakia*, concerning the forced sterilization of a Roma woman. The Court even roundly condemns the paternalistic behaviour of the hospital staff in performing the sterilization-procedure on V.C., without first obtaining her informed consent.³³² The Court notes that ‘in similar situations informed consent was required, promoting autonomy of moral choice for patients,’³³³ and it emphasizes the need to respect a person’s dignity and integrity.³³⁴ This kind of language is much more empowering than the language used by the majority in *D.H.*

(iv) Ways of Lessening these Risks

In our opinion it is not problematic that the Court pays increased attention to group vulnerability, provided that the Court ensures that (i) it is specific about *why* it considers that *group* particularly vulnerable and (ii) it demonstrates *why* that makes the *particular applicant* more prone to certain types of harm or why the applicant should be considered and treated as a vulnerable member of that group in the instant case. The test should therefore entail two interrelated levels of inquiry: collective and individual. Otherwise, the Court may end up essentializing vulnerable groups and stereotyping the individuals from these groups; thereby reinforcing their vulnerability rather than lessening it. Besides, our suggestion has the advantage that the Court does not lay itself open to the charge that it delivers judgments on the situation of particular groups in general, rather than on the facts of the case.³³⁵

Moreover, in order to prevent group-vulnerability reasoning from reducing applicants to pure victims and from stigmatizing their vulnerability, the Court should, firstly, always make sure that it does not apply vulnerability as simply a ‘label’ (a label easily turns into a stigma), but as a ‘layered’ concept.³³⁶ The focus should be on the various circumstances that *render* certain groups vulnerable, not on which groups *are* vulnerable.³³⁷ The Court should insist on and strengthen its contextual inquiry to determine whether a group may be deemed vulnerable or not. This approach will help avoiding a reified conception of group vulnerability, as the focus is expanded towards the social and historical forces that originate, maintain, or reinforce the vulnerability of a group.³³⁸

All of this is to say that the Court should beware of the temptation to turn group-vulnerability into an easy and straightforward narrative: people are rendered particularly

³³² ECtHR, *V.C. v. Slovakia*, 8 November 2011 § 114.

³³³ *Ibid.*

³³⁴ *Ibid.* §115.

³³⁵ This criticism was leveled at the majority of the Court by the dissenters in ECtHR (GC), *Oršuš and Others v. Croatia*, 16 March 2010 (Jungwiert, Vajić, Kovler, Gyulumyan, Jaeger, Myjer, Berro-Lefèvre and Vučinić J. partly dissenting, § 15).

³³⁶ These metaphors are taken from Luna, Florencia, ‘Elucidating the Concept of Vulnerability: Layers Not Labels’, *2 International Journal of Feminist Approaches to Bioethics* (2009) 121-139.

³³⁷ *Ibid.* at 129.

³³⁸ Cf. Abrams, Kathryn, “‘Groups’ and the Advent of Critical Race Scholarship”, *1 Issues in Legal Scholarship* (2003) at 5 (describing group disadvantage as not simply ‘an empirical fact’ but as ‘a circumstance that emerged from a sequence of historical events or a pattern of oppressive treatment.’).

vulnerable due to a complex set of causes (ranging from economic disempowerment, to social attitudes, and physical limitations). Moreover, people always possess sources of *resilience* in the face of their vulnerabilities.³³⁹ The Court should not trivialize the abilities of persons who belong to an otherwise vulnerable group. So for example, in his separate opinion in *M.S.S.*, Judge Sajó points out that the applicant ‘had money and speaks English.’³⁴⁰ In our view Judge Sajó is right to point out these sources of resilience of the applicant (even if we do not agree with all he says in his separate opinion). Portraying applicants as purely vulnerable will disempower them.

III. The Effect of the Vulnerable-Group Concept in the Court’s Case Law: Substantive Equality

In spite of the perils that group vulnerability may carry in practice, we still believe that the emergence of the concept has had positive implications in the Court’s case law. Our overall judgment, therefore, is that emphasis on group vulnerability is a welcome development. In particular, its insertion represents a crucial step towards an enhanced antidiscrimination case law and a more robust idea of equality.³⁴¹ The Court’s use of the term ‘vulnerable groups’ is therefore not mere rhetorical flourish. The term *does* something: it addresses and redresses different aspects of inequality in a more substantive manner.

Using Sandra Fredman’s multi-dimensional characterization of substantive equality, we argue that the Court’s insertion of the notion of vulnerable groups has addressed substantive equality’s four chief aims: participation, transformation, redistribution, and recognition.³⁴² The *participative* dimension of substantive equality, Fredman argues, requires compensating for the ‘absence of political voice’ and opening up ‘channels for greater participation in the future.’³⁴³ Participation, as she explains, is a ‘multi-layered concept,’ which entails not only political participation but also ‘taking part in decisions in a wide range of situations affecting individuals or groups, including at the workplace, in education, in health care, and in community organization.’³⁴⁴ The *transformative* dimension seeks to accommodate group differences; the point is to remove ‘the detriment which is attached to difference,’ rather than difference itself.³⁴⁵

³³⁹ See, e.g., Fineman, Martha Albertson, ‘Elderly’ as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility’, 20 *The Elder Law Journal* (2012) at 101.

³⁴⁰ ECtHR (GC), *M.S.S. v. Belgium and Greece*, 21 January 2011 (Sajó J., partly concurring and partly dissenting, at 106 n.1).

³⁴¹ On other developments within Article 14 ECHR case law that connote a more substantive conception of equality and a more proactive role of the Court in the area, see, e.g., Danisi, Carmelo, ‘How Far Can the European Court of Human Rights Go in the Fight Against Discrimination? Defining New Standards in Its Nondiscrimination Jurisprudence’, 9 *International Journal of Constitutional Law* (2011) 793-807; O’Connell, Rory, ‘Cinderella Comes to the Ball: Article 14 and the Right to Non-discrimination in the ECHR’, 29 *Legal Studies* (2009) 211-229; and Timmer, Alexandra, ‘Toward an Anti-Stereotyping Approach for the European Court of Human Rights’, 11 *Human Rights Law Review* (2011) 707-738.

³⁴² Fredman, Sandra, *DISCRIMINATION LAW* (Oxford University Press, 2nd ed. 2011) at 25-33.

³⁴³ *Ibid.* at 31.

³⁴⁴ Fredman, Sandra, *HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES* (Oxford University Press, 2008) at 180.

³⁴⁵ *FREDMAN DISCRIMINATION LAW* (Oxford University Press, 2nd ed. 2011) at 30.

The *redistributive* aspect of substantive equality, in turn, aims at ‘breaking the cycle of disadvantage,’ which encompasses, among other things, ‘the maldistribution of resources.’³⁴⁶ Last, substantive equality’s *recognition* facet seeks to ‘promote respect for dignity and worth, thereby redressing stigma, stereotyping, humiliation and violence because of membership of an identity group.’³⁴⁷

The capacity of the vulnerable-group concept to address the multiple dimensions of substantive equality lies primarily in its *particular* nature.³⁴⁸ The Court’s particularized understanding of vulnerability explained in Part II.B – that is, of vulnerability as shaped by specific group-based experiences of prejudice, stigma and social disadvantage – introduces an asymmetrical approach in the analysis of equality. The notion of asymmetry, essential to substantive equality, implies that not all differentiations are problematic but only those that affect groups suffering disadvantage, prejudice and stereotyping.³⁴⁹ Thus, as Sandra Fredman notes, ‘instead of aiming to treat everyone alike, regardless of status, substantive equality focuses on the group which has suffered disadvantage.’³⁵⁰ In practice, this means that substantive equality focuses on women rather than men, ethnic minorities rather than ethnic majorities, sexual minorities rather than heterosexuals.³⁵¹

In the next pages, we discuss three different ways in which the asymmetry implicit in the Court’s vulnerable-group approach has manifested itself: (i) the positive obligations resting on the State become more pronounced under Article 2 of Protocol 1 (in conjunction with Article 14 ECHR), Article 3 ECHR and Article 8 ECHR; (ii) the harm inflicted on the applicant weighs more heavily in Article 3 ECHR scope analysis and in Article 8 ECHR proportionality analysis; and (iii) the margin of appreciation in Article 14 ECHR direct discrimination cases is narrowed.

³⁴⁶ *Ibid.* at 26.

³⁴⁷ *Ibid.* at 25 and 28-30.

³⁴⁸ The relational character of the Court’s notion of group vulnerability also serves to advance substantive equality. Indeed, and as we have shown in Part II.B, this feature has enabled the Court to inquire into the broader societal and institutional structures that create or reinforce applicants’ vulnerabilities. This relational understanding of group vulnerability is in line with one fundamental premise of substantive equality: discrimination and inequalities are not the exclusive or concrete fault of one or various individuals, but the result of societal and institutional structures more broadly. *See, e.g.*, Freeman, Alan David, ‘Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of the Supreme Court Doctrine’, 62 *Minnesota Law Review* (1978) 1049-1120. In this Part, we focus however on the implications that the *particular* nature of group vulnerability has carried in the Court’s case law, as this aspect has brought more concrete doctrinal consequences.

³⁴⁹ Jagwanth, Saras, ‘Expanding Equality’, *Acta Juridica* (2005) at 133.

³⁵⁰ Fredman, Sandra, *DISCRIMINATION LAW* (Oxford University Press, 2nd ed. 2011) at 26.

³⁵¹ Loenen, Titia, ‘Indirect Discrimination: Oscillating between Containment and Revolution’ in Titia Loenen and Peter R. Rodrigues (eds.) *NON-DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES* (Kluwer Law International, 1999) 205-206. *See also*, Fredman, Sandra, *DISCRIMINATION LAW* (Oxford University Press, 2nd ed. 2011) at 26.

A. Special Positive Obligations: Article 3 ECHR, Article 8 ECHR, and Article 2 of Protocol 1 (in conjunction with Article 14 ECHR)

Substantive equality does not confine itself to a duty to refrain from discrimination.³⁵² Substantive equality involves more than that; it requires the State to take a proactive role and to adopt positive steps to promote equality.³⁵³ The case law examined below shows that the Court has embraced several aspects of substantive equality by establishing positive obligations towards vulnerable groups in both the context of Article 14 ECHR and of freestanding Convention rights (e.g., Articles 8 and 3 ECHR), which may not associate themselves with equality-based reasoning as easily as Article 14 ECHR.

Moreover, the Court's recognition of positive obligations towards members of particularly vulnerable groups has often involved 'special consideration to' or 'special protection of' their 'specificities' and 'needs.'³⁵⁴ This kind of reasoning reflects the asymmetry that characterizes substantive equality: when it comes to the most vulnerable, States are obliged to provide a level of protection that is more responsive or tailored to their particular needs and concerns. Though group vulnerability has played an instrumental role in deriving these positive obligations, it would not do to overstate the weight the Court attaches to it. The vulnerability of the group in question is always one of a constellation of factors that the Court takes into account in its decisions to establish positive obligations.

The Court has, first of all, furthered the participative dimension of substantive equality. This has taken place in the context of Article 8 ECHR. Starting with the so-called caravan-cases, the Court has held that because Roma are vulnerable, States are to a certain extent under the obligation to facilitate their lifestyle.³⁵⁵ The positive obligation to facilitate a Roma lifestyle in *Chapman* and its sister cases³⁵⁶ does not require enabling (Roma) minority members to live according to their culture, which in these cases would have meant making available sufficient caravan sites.³⁵⁷ The positive obligation is procedural; it requires that State authorities show they have taken into account the Roma's cultural situation both in policy-making and judicial interpretation.³⁵⁸ This kind of positive duty offers redress for the vulnerability of minorities whose concerns are most likely to be ignored in legislative, policy and administrative decision-

³⁵² See generally Fredman, Sandra, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES (Oxford University Press, 2008) at 175-180.

³⁵³ *Ibid.*

³⁵⁴ See, e.g., ECtHR (GC) *Chapman v. United Kingdom*, 18 January 2001 § 96; ECtHR (GC), *M.S.S. v. Belgium and Greece*, 21 January 2011 § 251; and ECtHR, *Yordanova v. Bulgaria*, 24 April 2012 §§ 128 and 129.

³⁵⁵ ECtHR (GC), *Chapman v. United Kingdom*, 18 January 2001 § 96. See also, ECtHR, *Connors v. United Kingdom*, 27 May 2004 § 84.

³⁵⁶ Four similar other cases were decided the same day as *Chapman*. See ECtHR (GC), *Smith v. United Kingdom*; *Lee v. United Kingdom*; *Coster v. United Kingdom*; and *Beard v. United Kingdom* (all from January 18 2001).

³⁵⁷ Brems, Eva, 'Human Rights as a Framework for Negotiating/Protecting Cultural Differences: An Exploration of the Case-Law of the European Court of Human Rights' in Marie-Claire Foblets, Jean-François Gaudreault-Desbiens and Alison Dundes Renteln (eds.) CULTURAL DIVERSITY AND THE LAW: STATE RESPONSES FROM AROUND THE WORLD (Bruylant, 2010) at 673.

³⁵⁸ *Ibid.* at 674.

making processes. In addition, *Chapman* and its sister cases take a significant step in the direction of transformative substantive equality (accommodation of differences) by recognizing a ‘positive obligation . . . to facilitate the Gypsy way of life.’³⁵⁹ To be sure, the judgments in these cases ultimately fall short of achieving transformative equality because the Court did not actually require the United Kingdom to accommodate traveling people, but the potential is there.

In *V.C.*, though the positive duty derived from Article 8 ECHR takes a different form and character than in *Chapman*, the Court similarly furthers the participative aspect of equality. This time, the aim is to secure the applicant’s involvement in a procedure that concerns her reproductive health. Indeed, the Court realizes that this process did not involve the applicant ‘to a degree permitting her interests to be effectively protected.’³⁶⁰ As a result, the Court demands that the State put in place ‘safeguards to protect the reproductive health of, in particular, women of Roma origin,’ enabling the applicant, ‘as a member of the vulnerable Roma community, to effectively enjoy her right to respect for her private and family life.’³⁶¹ The safeguards the Court has in mind are those aimed at ensuring Roma women’s full and informed consent in procedures that concern their reproductive health.

The Court has also furthered the redistributive aspect of substantive equality in the contexts of Articles 8 and 3 ECHR as a result of the socio-economic nature of the positive duty imposed on the State. The examples are *Yordanova* and *M.S.S.* Though decided against different backdrops, both cases raise issues of homelessness. In *Yordanova* – the case concerning an attempt to remove a Roma community from unlawfully occupied State land – the applicants would have become homeless as a result of the State’s action. In *M.S.S.*, on the other hand, the applicant asylum seeker was actually rendered homeless as a result of the State’s inaction.

The Court reaffirms in both cases that neither Article 3 ECHR nor Article 8 ECHR can be interpreted as giving rise to a duty to provide housing.³⁶² In *M.S.S.*, moreover, the Court says that Article 3 ECHR does not entail an obligation to give refugees financial assistance.³⁶³ Notwithstanding the Court’s caveats, the obligations affirmed in the two cases contain socio-economic elements. The Court states in *Yordanova*: ‘[A]n obligation to secure shelter to particularly vulnerable individuals may flow from Article 8 in exceptional cases.’³⁶⁴ What exactly the Court means by ‘exceptional cases’ is not clear from the judgment. In the context of *Yordanova*, the scope of the positive obligation to provide shelter seems to be tied to the negative obligation not to arbitrarily remove vulnerable individuals from their homes. So, if States plan to evict members of a vulnerable group from their unlawful settlement, they should first consider whether the eviction would render them homeless. In fact, the Court makes clear that the risk of rendering the applicants homeless was not ‘irrelevant,’ as the government had claimed.³⁶⁵

³⁵⁹ ECtHR (GC) *Chapman v. United Kingdom*, 18 January 2001 § 96.

³⁶⁰ ECtHR, *V.C. v. Slovakia*, 8 November 2011 § 151.

³⁶¹ *Ibid.* §§ 154 and 179.

³⁶² ECtHR, *Yordanova v. Bulgaria*, 24 April 2012 § 130; and ECtHR (GC), *M.S.S. v. Belgium and Greece*, 21 January 2011 § 249.

³⁶³ ECtHR (GC), *M.S.S. v. Belgium and Greece*, 21 January 2011 § 249.

³⁶⁴ ECtHR, *Yordanova v. Bulgaria*, 24 April 2012 § 130.

³⁶⁵ *Ibid.* § 126.

M.S.S., on the other side, is the first case in which the Court has found a violation of Article 3 ECHR on the grounds of extreme material poverty for which it held a State responsible.³⁶⁶ The majority held:

[T]he Court considers that the Greek authorities have not had due regard to the applicant's vulnerability as an asylum seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs.³⁶⁷

This reasoning establishes that it is not only in a context of imprisonment³⁶⁸ that an applicant's vulnerability can be an argument for deriving positive obligations in the social and economic sphere from the civil and political right encapsulated in Article 3 ECHR. Though the applicant's status as a member of a particularly vulnerable group carries 'considerable importance' in the Court's decision to derive such positive obligations,³⁶⁹ this is not the only factor the Court relies on. Another factor that carries much weight is the existence of the EU Reception Directive incorporated into Greek domestic law,³⁷⁰ which lays down minimal rules as to the material conditions to which asylum seekers are entitled.³⁷¹

Last, the Court has advanced the recognition and redistribution aspects of substantive equality in the context of education of Roma children (Article 2 of Protocol 1, in conjunction with Article 14 ECHR). It has furthered recognition by imposing on the State positive obligations 'to avoid the perpetuation of past discrimination.'³⁷² It has fostered redistribution by requiring the State to put in place safeguards guaranteeing that Roma children do not end up in a system of inferior education.³⁷³ In *D.H. and Oršuš*, the positive obligation that the Court demanded from the States was in essence procedural. For example, in *Oršuš* the Court speaks of the obligation to put in place 'safeguards that would ensure that . . . the State had sufficient regard to [Roma children's] special needs as members of a disadvantaged group'.³⁷⁴ However, in *Horváth and Kiss*, the Court seems to go a step further by demanding from the State a more substantive and

³⁶⁶ In a complaint that was ruled inadmissible, prior to the judgment of *M.S.S.*, the Court had already held that 'inhuman or degrading treatment' can occur when 'an applicant, in circumstances wholly dependent on State support, found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity.' ECtHR, *Budina v. Russia*, 18 June 2009; similar reasoning is in *Larioshina v. Russia*, 23 April 2002.

³⁶⁷ ECtHR (GC), *M.S.S. v. Belgium and Greece*, 21 January 2011 § 263.

³⁶⁸ The Court regularly recognizes that the prisoners with (mental) health problems are vulnerable and that the State is under a duty to provide appropriate (health) care for them. *See, e.g.*, ECtHR, *G. v. France*, 23 February 2012 §§ 72 and 77.

³⁶⁹ ECtHR (GC), *M.S.S. v. Belgium and Greece*, 21 January 2011 § 251.

³⁷⁰ Council Directive 2003/9, 2003 O.J. (L 31) 18 (EC).

³⁷¹ ECtHR (GC), *M.S.S. v. Belgium and Greece*, 21 January 2011 § 250.

³⁷² ECtHR, *Horváth and Kiss v. Hungary*, 29 January 2013 § 116.

³⁷³ In practice, the lack of appropriate safeguards resulted in the placement of Roma children in special schools with a more basic curriculum, which ultimately compromised Roma students' education and future job opportunities. *See, e.g.*, ECtHR (GC), *D.H. and Others v. the Czech Republic*, 13 November 2007 § 207.

³⁷⁴ ECtHR (GC), *Oršuš and Others v. Croatia*, 16 March 2010 § 183.

far-reaching positive obligation: ‘to undo a history of racial segregation in special schools.’³⁷⁵ Moreover, in *Horváth and Kiss*, the Court addresses the redistributive concerns by acknowledging that, as a result of their misplacement in special schools, Roma children are ‘unlikely to break out of [the] system of inferior education, resulting in their lower educational achievement and poorer prospects of employment.’³⁷⁶

B. Increased Weight of Harm in the Scope and Proportionality Analyses: Articles 3 and 8 ECHR

Group vulnerability has introduced an asymmetrical approach in the Court’s Article 3 ECHR scope analysis and Article 8 ECHR proportionality.³⁷⁷ This approach entails that the ill treatment inflicted on the applicant may take a greater dimension if she or he belongs to a particularly vulnerable group. This is illustrated in *M.S.S.* In this case, the vulnerability of the applicant as an asylum seeker plays a role in the Court’s decision of whether his conditions of detention reached the ‘minimum level of severity’ to fall within the scope of Article 3 ECHR. Indeed, in determining whether the duration of the applicant’s detention was significant – the Greek government had argued that it was brief – the Court says:

[The Court] does not regard the duration of the two periods of detention imposed on the applicant – four days in June 2009 and a week in August 2009 – as being insignificant. In the present case, the Court must take into account that the applicant, being an asylum seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously.³⁷⁸

So here, because of the applicant’s vulnerable status as an asylum seeker, the effects of his detention take a dimension that they would have not taken if the case had concerned a less vulnerable applicant. As Judge Sajó rightly puts it in his separate opinion: ‘For the Court the duration of the detention in the present case is comparable in its effects to much longer stays in detention because of the assumed vulnerability of the applicant.’³⁷⁹ Group vulnerability therefore acts as a magnifying glass: the ill treatment caused to the applicant looks bigger through the vulnerability lens.

Yordonava, on the other side, is an example of the role group vulnerability may play in Article 8 ECHR proportionality analysis. The Court states:

³⁷⁵ ECtHR, *Horváth and Kiss v. Hungary*, 29 January 2013 § 127.

³⁷⁶ *Ibid.* § 115.

³⁷⁷ See also, Timmer, Alexandra, ‘A Quiet Revolution: Vulnerability in the European Court of Human Rights’ in Martha Fineman and Anna Gear (eds.) *VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS* (Ashgate, 2013) 147-170.

³⁷⁸ ECtHR (GC), *M.S.S. v. Belgium and Greece*, 21 January 2011 § 232.

³⁷⁹ *Ibid.* (Sajó J., partly concurring and partly dissenting, at 101).

In the context of Article 8, in cases such as the present one, the applicants' specificity as a social group and their needs must be one of the relevant factors in the proportionality assessment that the national authorities are under a duty to undertake.³⁸⁰

The Court does not indicate the precise weight that national authorities should attach to the applicants' disadvantaged status. However, it makes clear that when governments do not show that they have considered the specificities and needs of particularly vulnerable groups, they will not be able to pass the ECHR proportionality analysis. In other words, attention to vulnerability takes the form of a procedural requirement.³⁸¹ As we have pointed out in Part II.A, the Court did not follow this approach in *Chapman*, since vulnerability played no real role in the proportionality analysis in that case.

It goes without saying that the inclusion of group vulnerability in the proportionality does not guarantee a favorable outcome to the vulnerable applicant; vulnerability enters the balance along with a host of other factors. Its inclusion may nonetheless increase the applicant's chances of obtaining protection. The idea underlying this argument is that the Court should give the interests of vulnerable individuals and groups *more* weight in the proportionality because they are likely to experience harm *more acutely*. Ultimately, by thus giving weight to group vulnerability in the proportionality analysis, the Court furthers substantive equality. Fredman has argued that 'substantive equality focuses on the group which has suffered disadvantage' with the aim of breaking that cycle of disadvantage.³⁸² In our view, the Court takes the first step towards breaking the cycle of disadvantage by recognizing disadvantage (in the form of historically developed vulnerabilities) as a relevant factor in the proportionality analysis.

C. Narrowed Margin of Appreciation: Article 14 ECHR

The last way in which the concept of vulnerable groups has introduced an asymmetrical interpretation of the Convention, is by narrowing the margin of appreciation in Article 14 cases. A few times now, the Court has applied strict scrutiny in cases that concerned discrimination of vulnerable groups. This approach is of recent date; the two seminal cases are *Alajos Kiss* (2010) and *Kiyutin* (2011). Both cases, as we have seen in Part II.B, concern the direct and outright exclusion of an entire class of individuals from the enjoyment of a right.

In *Kiyutin*, the case concerning an indiscriminate refusal of residence permit to those living with HIV, the Court observes:

If a restriction on fundamental rights applies to a particularly vulnerable group in society that has suffered considerable discrimination in the past, then the State's margin of

³⁸⁰ ECtHR, *Yordanova v. Bulgaria*, 24 April 2012 § 129.

³⁸¹ Timmer, Alexandra, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' in Martha Fineman and Anna Gear (eds.) *VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS* (Ashgate, 2013) 147-170.

³⁸² Fredman, Sandra, *DISCRIMINATION LAW* (Oxford University Press, 2nd ed. 2011) at 26.

appreciation is substantially narrower and it must have *very weighty reasons* for the restrictions in question. The reason for this approach, which questions certain classifications *per se*, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice could entail legislative stereotyping which prohibited the individualised evaluation of their capacities and needs.³⁸³ (Emphasis added)

This line of reasoning was in fact first used in *Alajos Kiss v. Hungary*, which actually concerns the right to vote (Article 3 Protocol 1), not Article 14 ECHR.³⁸⁴ Despite the fact that the Court does not explicitly examine Article 14, however, its analysis in *Alajos Kiss* is really about discrimination. The Court states:

The Court further considers that the treatment as a single class of those with intellectual or mental disabilities is a questionable classification, and the curtailment of their rights must be subject to *strict scrutiny*.³⁸⁵ (Emphasis added)

Thus, in both *Alajos Kiss* and *Kiyutin*, the Court indicates that it will scrutinize national authorities' decisions strictly when they limit the rights of members of particularly vulnerable groups. As a result, States have to put forward 'very weighty reasons' for the Court to accept the justification as objective and reasonable. Since neither Russia nor Hungary gave such reasons, the Court concluded that they 'overstepped the narrow margin of appreciation afforded to them.'³⁸⁶

This approach is noteworthy for a number of reasons. In the first place, it marks a willingness of the Court to explain why certain classifications are particularly problematic. In the past, the Court has seldom taken the trouble to explain why certain grounds of distinction are problematic, except to note a consensus on the topic.³⁸⁷ Distinctions on the ground of sex, for example, require very weighty reasons because 'the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe.'³⁸⁸ With the type of reasoning issued in *Alajos Kiss* and *Kiyutin*, on the other hand, the Court takes exceptional care to acknowledge the wrongs of discrimination and clarify the rationale for a narrowed margin of appreciation.³⁸⁹

Secondly, this reasoning provides a highly principled approach to justifications, since certain classifications are deemed suspect '*per se*.' Distinctions are inherently suspect when they

³⁸³ ECtHR, *Kiyutin v. Russia*, 10 March 2011 § 63.

³⁸⁴ ECtHR, *Alajos Kiss v. Hungary*, 20 May 2010 § 42.

³⁸⁵ *Ibid.* § 44.

³⁸⁶ ECtHR, *Kiyutin v. Russia*, 10 March 2011 § 74.

³⁸⁷ Gerards, J. H. and ten Napel, H.M. Th.D. De 'grondwetsherziening van Martijn' revisited: over kiesrecht en het verbod van discriminatie op grond van handicap, 35 *NTM-NJCM Bulletin* 1106 § 3 (2010) (Neth).

³⁸⁸ ECtHR (Plenary), *Abdulaziz, Cabales, and Balkandali v. United Kingdom*, 28 May 1985 § 78.

³⁸⁹ This clarification is especially welcome given the considerable amount of confusion that exists concerning the Court's use of the margin of appreciation doctrine. See generally, e.g., Letsas, George, 'Two Concepts of the Margin of Appreciation', 26 *Oxford Journal of Legal Studies* (2006) 705-732.

concern groups of people that have been historically discriminated against; such distinctions run a high risk of being based on stereotypes rather than on ‘rational’ grounds.³⁹⁰ The Court acknowledges that past discrimination reverberates in the present and contaminates actions and decisions. This highly context-sensitive approach – which is an expression of the relational character of the Court’s vulnerable-group concept – heralds a substantive (rather than purely formal) conception of equality. Moreover, by narrowing the margin of appreciation, the Court more carefully scrutinizes the possible misrecognition harms of prejudice, stigma and stereotyping, therein advancing the recognition aspect of substantive equality.

However, neither in *Alajos Kiss* nor in *Kiyutin* does group vulnerability in and of itself narrow the margin of appreciation. As we have noted above, both cases concern direct exclusions of entire groups from the enjoyment of a right. The particular nature of the restrictions in question – direct and absolute – may further explain the Court’s willingness to reduce States’ margin of appreciation. Indeed, the Court states in *Alajos Kiss*: ‘The Court cannot accept, however, that an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties, falls within an acceptable margin of appreciation.’³⁹¹ In *Kiyutin*, moreover, the Court additionally relies on the consensus to narrow the State’s margin of appreciation.³⁹²

As regards the other cases that we have examined in this Chapter, there the relationship between the margin of appreciation and group vulnerability is less clear. In fact, in the other cases, the role of the margin of appreciation principle is not very prominent. In *M.S.S.*, first of all, the principle is obviously absent (it has no role in Article 3 ECHR cases given the absolute character of this provision). In *V.C.* the principle is not explicitly mentioned at all; and in *D.H.*, *Oršuš*, and *Yordanova* the Court is ultimately not clear on the width of the margin of appreciation. *Chapman* is the exception. In that judgment the Court kept the margin deliberately wide, because the case concerned an area in which, in principle, States have a wide margin of appreciation: implementation of planning policies.³⁹³

Chapman shows that the Court does not automatically narrow the margin of appreciation when there are countervailing reasons to leave it wide (e.g., implementation of planning policies, considerations of economic and social policy). More recently, however, the Court has established a significant precedent with *Alajos Kiss*: group vulnerability may decisively narrow the margin of appreciation, even though the case concerns an area in which States are usually granted a wide margin (in this case determination of justified restrictions on the right to vote.)³⁹⁴ Future cases will have to tell how decisive group vulnerability exactly is within the set of factors that determine the margin of appreciation. In the next and final Part, we will turn to a topic that is closely associated with this one: the institutional position of the Court.

³⁹⁰ For more discussion on the wrongs of stereotyping in the context of the Strasbourg Court’s case law, see Timmer, Alexandra, ‘Toward an Anti-Stereotyping Approach for the European Court of Human Rights’, 11 *Human Rights Law Review* (2011) 707-738. .

³⁹¹ ECtHR, *Alajos Kiss v. Hungary*, 20 May 2010 § 42.

³⁹² ECtHR, *Kiyutin v. Russia*, 10 March 2011 § 65.

³⁹³ ECtHR, (GC), *Chapman v. United Kingdom*, 18 January 2001 § 92.

³⁹⁴ ECtHR, *Alajos Kiss v. Hungary*, 20 May 2010 § 41.

IV. The Concept of Vulnerable Groups and the Court's Legitimacy

The Court has recently been under fire from politicians,³⁹⁵ judges³⁹⁶ and scholars³⁹⁷ for what is perceived as its usurpation of power from the Contracting States and its neglect to take seriously its subsidiary role.³⁹⁸ Obviously, these are new variations of an old theme: courts – and supranational courts in particular – should be wary of judicial activism. In light of this type of critique, we finish by examining the institutional concerns associated with the Court's use of group vulnerability. Two related aspects of the Court's vulnerable-group reasoning, in particular, could raise concern that the Court is overstepping its proper role. The first is the Court's recognition of special positive obligations towards members of vulnerable groups,³⁹⁹ and the second is the Court's decision to narrow the margin of appreciation in Article 14 ECHR cases.⁴⁰⁰

The first type of concern has been powerfully voiced by Judge Sajó in *M.S.S. v. Belgium and Greece*. Judge Sajó raises the specter of unlimited human rights, transforming civil and political rights into social rights: 'There seems to be only a small step between the Court's present position and that of a general and unconditional positive obligation of the State to provide shelter and other material services to satisfy the basic needs of the 'vulnerable.''⁴⁰¹ This kind of reasoning, he claims, would be more appropriate for a 'constitutional court adjudicating on the basis of a national constitution that has constitutionalised the social welfare state.'⁴⁰² The President of the Belgian Constitutional Court, Marc Bossuyt, agrees with Sajó and claims that the Court has fallen through 'thin ice.'⁴⁰³

In our view, those who worry that there is a general tendency on the Court's part to read too many positive obligations into the text of the Convention – thereby putting too great of a burden on the Convention States – should not necessarily see group vulnerability reasoning as a

³⁹⁵ A prominent example is the British anger over the *Hirst* case (wherein the Strasbourg Court decided that the British rule that deprives prisoners of the right to vote constitutes a violation of the Convention). ECtHR (GC), *Hirst v. United Kingdom (No. 2)*, 6 October 2005.

³⁹⁶ Lord Hoffmann, Judicial Studies Board Annual Lecture, 19 March 19, 2009 <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.pdf> accessed 2 February 2014.

³⁹⁷ Zwart, Tom, Een steviger opstelling tegenover het Europees Hof voor de Rechten van de Mens bevordert de Rechtsstaat [A firmer position against the ECtHR enhances the rule of law], *Nederlands Juristenblad* 343 (2011) (Neth.).

³⁹⁸ See generally about the Court's institutional position: Christoffersen, Jonas and Rads Madsen, Mikael (eds.) *THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS* (Oxford University Press, 2011); and Gerards, Janneke, 'Judicial Deliberations in the European Court of Human Rights' in Nick Huls, Maurice Adams and Jacco Bomhoff (eds.) *THE LEGITIMACY OF HIGHEST COURTS' RULINGS* (Cambridge University Press, 2008) 407-436.

³⁹⁹ See *supra* Part III.A.

⁴⁰⁰ See *supra* Part III.C.

⁴⁰¹ ECtHR (GC), *M.S.S. v. Belgium and Greece*, 21 January 2011 (Sajó J., partly concurring and partly dissenting).

⁴⁰² *Ibid.* See also, Xenos, Dimitris, 'The Human Rights of the Vulnerable', 13 *International Journal of Human Rights* (2009) 591-614.

⁴⁰³ Bossuyt, Marc, 'Belgium Condemned for Inhuman or Degrading Treatment Due to Violations by Greece of EU Asylum Law, *M.S.S. v. Belgium and Greece*, Grand Chamber, European Court of Human Rights', January 21, 2011, *European Human Rights Law Review* (2011) at 597.

threat. We are of the opinion that vulnerability might actually be a useful guiding principle: in the prioritization of scarce resources, States give preference to those whose needs they consider most pressing. When reviewing States' actions on the basis of an individual complaint, the Court should have the same priority. Vulnerability can thus be viewed as a *limiting* rather than a *limitless* principle.⁴⁰⁴

The second institutional issue with the vulnerable-group concept relates to the margin of appreciation. Often, the Court's preferred tactic for guarding against accusations that it is overstepping its subsidiary role consists in applying the margin of appreciation principle.⁴⁰⁵ In the words of Judge Spielmann: in applying the margin of appreciation 'the Court imposes self-restraint on its power of review, accepting that domestic authorities are best placed to settle a dispute.'⁴⁰⁶ So what if the Court were to take the line of *Alajos Kiss* and *Kiyutin* further,⁴⁰⁷ and narrow the margin of appreciation in *all* cases that concern vulnerable groups (not just the cases that concern blanket exclusions of these groups)? We emphasize that the Court is not there yet: though it is now established case law that vulnerable groups require special protection,⁴⁰⁸ the vulnerable-group concept has by no means turned into a principle that automatically narrows the margin. We do, however, think that the Court is increasingly attaching weight to group vulnerability in determining the proper margin of appreciation. But does that erode the Court's legitimacy? What should help calm down legitimacy concerns – both with regards to positive obligations and the margin of appreciation – is the fact that the Court never uses group vulnerability as an *automatic* trigger. As we have discussed in Part III, the vulnerable-group concept is always one among a set of factors, depending on the facts of the case, which determine the proper extent of positive obligations and the width of the margin of appreciation.

Nevertheless, the concerns about the Court's supra-national institutional position are real, and they are compounded by the open-endedness of the vulnerable-group concept. One way in which the Court can navigate this problem is by taking the human rights corpus as its reference point for determining group vulnerability: when the activities of international organizations and human rights reports confirm that there is a structural failure to protect the human rights of a particular group, this should be the Court's cue. The advantage of this suggestion is that it allows the vulnerable-group concept to remain flexible: if the Court continues to base its judgments on recent international human rights reports and other authoritative materials, it can carefully follow

⁴⁰⁴ Timmer, Alexandra, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' in Martha Fineman and Anna Grear (eds.) *VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS* (Ashgate, 2013) 147-170 (describing the prioritizing role of vulnerability in the case law of the Court).

⁴⁰⁵ See generally Legg, Andrew, *THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY* (Oxford University Press, 2012); Letsas, George, 'Two Concepts of the Margin of Appreciation', 26 *Oxford Journal of Legal Studies* (2006) 705-732; and Yourow, Charles, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* (Springer, 1996).

⁴⁰⁶ Spielmann, Dean, *Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?* 1 Center for European Legal Studies Working Paper Series, Feb. 2012, available at <http://www.cels.law.cam.ac.uk/cels_lunchtime_seminars/Spielmann%20-%20margin%20of%20appreciation%20cover.pdf> accessed 2 February 2014.

⁴⁰⁷ See *supra* Part III.C.

⁴⁰⁸ See *supra* Part III.A.

developments on the ground.⁴⁰⁹ A group's vulnerability will thus not be set in stone, but re-evaluated case by case. At the same time, in this way the concept does not need to be stretched so thin as to lose all power, nor does it need to become so vague as to risk legal uncertainty.⁴¹⁰

Conclusion

Be it an asylum seeker struggling against deprivation, Roma children seeking to share classes with other children, or persons with mental disabilities wishing to exercise the right to vote, the fact is that all these cases reveal that vulnerability to human rights violations is often experienced more routinely and acutely by some than by others. Human rights law, however, has not always responded adequately to these particular vulnerabilities given the import of the liberal legal subject into its structure and the exclusion of those who do not fit the liberal archetype. We have argued that it is in response to these exclusions of human rights law that the Court has been forced to attend to the constructed disadvantage of certain groups. In so doing, the Court has deployed the concept of group vulnerability. In this light, we see the Court's reasoning as a way of opening up the human rights universal, as a step towards a more inclusive universal human rights subject. In our opinion, the Court thus enhances rather than undermines its own credibility.

Accordingly, we perceive the Court's increasing use of group vulnerability reasoning as a welcome development. It allows the Court to address several aspects of substantive equality. Yet group vulnerability reasoning carries pitfalls with it, most notably essentialism, stigmatization and paternalism. If the Court is not careful to avoid these pitfalls, it risks sustaining the problematic idea that these groups are the only, 'true' and quintessential vulnerable subjects in human rights law, thus leaving in place the notion that the 'normal' subject of human rights law is fully autonomous and independent.⁴¹¹ In other words, the concept of vulnerable groups is a double-edged tool, which should be handled with care. As Martha Minow put it in another context, the concept raises 'questions of complexity' rather than 'justifications for passivity, because failing to notice another's pain is an act with significance.'⁴¹²

⁴⁰⁹ As we have mentioned above (see *supra* Part II.B), the Court has so far used the wider human rights corpus as a reference point in all its vulnerable group cases.

⁴¹⁰ Cf. Yoshino, Kenji, 'The New Equal Protection', 124 *Harvard Law Review* (2011) at 762: ('[T]he Court can never give heightened scrutiny to classifications of, say, twenty groups without diluting the meaning of that scrutiny').

⁴¹¹ Cf. Fineman, Martha Albertson, 'The Vulnerable Subject: Anchoring Equality in the Human Condition', 20(1) *Yale Journal of Law and Feminism* (2008-2009) 1-23. See *supra* Part I.B.

⁴¹² Minow, Martha, 'Foreword Justice Engendered', 101 *Harvard Law Review* (1987) at 11.

CHAPTER II

THE (IN)VULNERABLE RELIGIOUS AND CULTURAL SUBJECT

People in power view their way of life not as culture but, rather, as the way things are just supposed to be.

-- Dorothy E. Roberts⁴¹³

Introduction

If one were to apply the group vulnerability indicators employed in *Strasbourg* over the past decade, by now there would probably be various religious, language and cultural groups considered particularly vulnerable. The vulnerable group member, however, is largely absent in the context of religion and language claims and has hardly ever appeared in meaningful ways in the context of cultural lifestyle claims.

My intention in this Chapter is not however to offer a list of the religious, language or cultural groups that the Court should count (or should have counted) as particularly vulnerable.⁴¹⁴ Rather, the purpose of this Chapter is to explore the potential of group vulnerability to advance a more substantive idea of equality in the context of religious and cultural claims. I will show that the focus of the Court's analysis has been, for the most part, unduly placed on the invulnerable religious and cultural applicant. I will then argue that group vulnerability holds out potential to turn the Court's gaze elsewhere, namely the societal arrangements that heighten the vulnerability of some group members while lessening the vulnerability of others.

The Chapter is structured as follows. After offering an overview of the state of affairs of the Court's cultural lifestyle and freedom of religion case law (the language case law is examined separately in Chapter III), I explore the capacity of the relational aspect of group vulnerability⁴¹⁵ to shift the Court's focus towards (i) the heightened vulnerability of some and (ii) the lessened vulnerability of others.

⁴¹³ Roberts, Dorothy E., 'Why Culture Matters to Law: The Difference Politics Make' in Austin Sarat and Thomas R. Kearns (eds.) *CULTURAL PLURALISM, IDENTITY POLITICS, AND THE LAW* (University of Michigan Press, 1999) at 90.

⁴¹⁴ As argued in Chapter I, the particular vulnerability of groups should not be set in stone but judged on the basis of international documents and other materials reporting developments on the ground.

⁴¹⁵ For a discussion of the relational aspect of the Court's notion of group vulnerability see Chapter I, II.B (i).

I. State of Affairs

A. Cultural Lifestyle Claims

Back in the early eighties, the European Commission of Human Rights already paved the way for recognizing the way of life of a group as part of the right to respect for private and family life under Article 8 ECHR.⁴¹⁶ The case in question was *G. and E. v. Norway* and the Commissions' recognition referred to the Sami applicants' customs of hunting, fishing and reindeer breeding.⁴¹⁷ The Commission considered that the consequences arising from the construction of a hydroelectric plant amounted to 'interference with their private life, as members of a minority, who move their herds and deer around over a considerable distance.'⁴¹⁸ The interference, however, was deemed justified and the case declared inadmissible.⁴¹⁹ Nearly two decades later, the Court followed a similar line of reasoning in a case concerning the transfer of members of the Sorbian minority, following the expansion of mining activities on their land.⁴²⁰ The interference was also considered justified and the case declared inadmissible: the transfer 'to a town approximately twenty kilometres away that is within the original Sorbian settlement area' was not a disproportionate measure.⁴²¹

It was not until 2001 that the Court effectively confirmed the links between the right to respect for private and family life and respect for minority lifestyles, in particular, between these limbs of Article 8 ECHR and a Roma applicant's occupation of her caravan.⁴²² The Court's Grand Chamber held in *Chapman v. the United Kingdom*:

The Court considers that the applicant's occupation of her caravan is an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a travelling lifestyle. ... Measures affecting the applicant's stationing of her caravans therefore have an impact going beyond the right to respect for her home. They also affect her ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition.⁴²³

⁴¹⁶ Pentassuglia, Gaetano, 'The Strasbourg Court and Minority Groups: Shooting in the Dark or a New Interpretative Ethos?', 19 *International Journal on Minority and Group Rights* (2012) at 3.

⁴¹⁷ ECmmHR. *G. and E. v. Norway*, 3 October 1983.

⁴¹⁸ *Ibid.*

⁴¹⁹ The Commission concluded that, in comparison with the vast areas in Northern Norway used for reindeer breeding and fishing, 'it is only a comparatively small area which will be lost for the applicants'. *Ibid.*

⁴²⁰ ECtHR, *Noack and Others v. Germany*, 25 May 2000.

⁴²¹ *Ibid.*

⁴²² So far, it is the case law concerning Roma applicants' traditional lifestyle that has given rise to the most promising developments in the Court's jurisprudence in the area. Ringelheim, Julie, *DIVERSITÉ CULTURELLE ET DROITS DE L'HOMME: LA PROTECTION DES MINORITÉS PAR LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME* (Bruylant, 2006) at 224.

⁴²³ ECtHR (GC), *Chapman v. the United Kingdom*, 18 January 2001 § 73. Several failed attempts to obtain recognition of Roma applicants' lifestyle under the private and family life limbs of Article 8 ECHR preceded *Chapman*. See, e.g., ECmmHR, *P. v. the United Kingdom*, 12 December 1990; and ECtHR, *Buckley v. the United Kingdom*, 29 September 1996.

The insertion of a *specific* right to respect for minority members' lifestyles under Article 8 ECHR is no doubt a major opening towards a more inclusive cultural human rights subject, especially if one considers the individualist orientation of the ECHR.⁴²⁴ This groundbreaking expansion of the scope of Article 8 ECHR has however remained largely theoretical; it has hardly ever translated into effective protection for the applicants.⁴²⁵ In fact, legal commentators seem to agree on the existence of a *gap* between the theoretical opening towards recognizing (minority) applicants' lifestyles and the actual opening in the particular cases.⁴²⁶ This gap is certainly apparent in many of the so-called 'caravan' cases.⁴²⁷ For instance, the application of 'the special consideration standard'⁴²⁸ derived from the vulnerability of the Roma minority in *Chapman* has not yet been fully realized. As discussed in Chapter I, the scope of the ensuing positive obligations remains limited.⁴²⁹

⁴²⁴ This individualist oriented character of the Convention is in fact emphasized by the Court in *Noack and Others v. Germany*. This becomes clear in the emphasis that the Court puts on the term 'everyone' used in the ECHR: 'the Court reiterates that the Convention does not guarantee rights that are peculiar to minorities and that the rights and freedoms set out in the Convention are, by virtue of Article 1 of the Convention, secured to "everyone" within the jurisdiction of the High Contracting Parties'. ECtHR, *Noack and Others v. Germany*, 25 May 2000, p. 10.

⁴²⁵ *Buckley* (29 September 1996) as well as *Chapman* and its sister cases (18 January 2001) are not the only examples of negative outcome for the Roma applicants. See also, pre-*Chapman* cases: ECmmHR, *P. v. the United Kingdom*, 12 December 1990 (inadmissible) and *Smith v. the United Kingdom*, 4 September 1991 (inadmissible) and post-*Chapman* cases: ECtHR, *Eatson v. the United Kingdom*, 30 January 2001 (inadmissible); *Harrison v. the United Kingdom*, 3 May 2001 (inadmissible); *Clark and Others v. the United Kingdom*, 22 May 2001 (inadmissible); *Codona v. the United Kingdom*, 7 February 2006 (inadmissible); *Stenegry and Adam v. France*, 22 May 2007 (inadmissible). One of the few exceptions remains ECtHR, *Connors v. the United Kingdom*, 27 May 2004 (violation of Article 8 ECHR).

⁴²⁶ See, e.g., Henrard, Kristin, 'The Added Value of the Framework Convention for the Protection of National Minorities (II): The Two Pillars of An Adequate System of Minority Protection Revisited in Verstichel, Aneelies et al. (eds.) THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES: A USEFUL PAN-EUROPEAN INSTRUMENT? (Intersentia, 2008) at 116 (claiming that the *de facto* protection offered by the Court is 'limited' when it comes to minority lifestyle claims); Farget, Doris, 'Le Droit au Respect des Modes de Vie Minoritaires et Autochtones dans les Contentieux Internationaux des Droits de l'Homme', Ph.D. Thesis, Université de Montréal, 2010 at 228 (arguing that the Court 'reconnait par principe la protection du mode de vie rom, mais ne l'applique pas nécessairement au cas d'espèce, invoquant la situation d'illégalité des requérants ou la vaste marge nationale d'appréciation'); and Ringelheim, Julie 'Chapman *Redux*: The European Court of Human Rights and Roma Traditional Lifestyle' in Eva Brems (ed.), DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR (Cambridge University Press, 2013) at 426-427 (arguing that the *Chapman* Court in the end limited the practical impact of [the recognized emerging international norms on minority protection] and [that] when reviewing the concrete facts at stake, it paid only lip service to the notion and goals of minority protection').

⁴²⁷ For an illuminating analysis of this contrast in *Chapman*, see Ringelheim, Julie 'Chapman *Redux*: The European Court of Human Rights and Roma Traditional Lifestyle' in Eva Brems (ed.), DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR (Cambridge University Press, 2013) 426-444.

⁴²⁸ Morawa, Alexander H.E., 'The European Court of Human Rights and Minority Rights: The "Special Consideration" Standard in Light of Gypsy Council', 10 *International Journal on Minority and Group Rights* (2004) at 109.

⁴²⁹ See also, Farget, Doris, 'Le Droit au Respect des Modes de Vie Minoritaires et Autochtones dans les Contentieux Internationaux des Droits de l'Homme', Ph.D. Thesis, Université de Montréal, 2010 at 336: 'la nature de la norme qui se donne à voir comme une obligation de moyens dont le contenu est imprécis et dont l'application au cas d'espèce par la Cour elle-même est restrictive'.

Moreover, many of these cases have been examined primarily in the context of Article 8 ECHR alone, even though they clearly brought up issues under Article 14 ECHR as well.⁴³⁰ Indeed, large part of these cases concerns the unequal impact of seemingly neutral regulations or practices on members of certain groups.⁴³¹ The Court's reluctance to assess these cases under Article 14 ECHR is probably part of its broader practice to avoid discrimination analysis⁴³² and might be based on reasons of procedural economy.⁴³³ Yet, at a deeper level, this reluctance may signal a formalistic view of equality; an incapacity to recognize that applicants may be differentially or disproportionately burdened by rules that appear neutral on their face.⁴³⁴ In *Chapman*, for example, the Court first signals that it will not judge the applicant as everyone else. Moreover, it recognizes that measures interfering with the stationing of her caravan affect her ability to maintain her identity as a Gypsy. It also recognizes that the vulnerable position of Gypsies as a minority means that some special consideration should be given to their needs and lifestyle. Yet the Court ends up judging Ms. Chapman as if living in her caravan was not essential to her identity and as if she did not belong to a vulnerable group. At the end of the day, the actual assessment in *Chapman* relies on a formalistic view of equality as sameness-of-treatment: 'to accord to a Gypsy who has unlawfully stationed a caravan site at a particular place different treatment from that accorded to non-Gypsies who have established a caravan site at that place or from that accorded to any individual who has established a house in that particular place would raise substantial problems under Article 14 of the Convention'.⁴³⁵

⁴³⁰ In *Chapman*, for example, having found the interference with the applicant's right under Article 8 ECHR proportionate to the legitimate aim of environment preservation, the Court quickly dismissed her Article 14 complaint. ECtHR (GC), *Chapman v. the United Kingdom*, 18 January 2001 §§ 129-130. In *Connors*, it simply found it unnecessary to further consider the applicant's Article 14 complaint. ECtHR, *Connors v. the United Kingdom*, 27 May 2004 § 97.

⁴³¹ See e.g., ECtHR, *Buckley v. the United Kingdom*, 29 September 1996; and ECtHR (GC) *Beard v. the United Kingdom*, 29 September 1996. Some of the 'caravan' cases, however, concern direct discrimination. For example, in the case of *Connors v. the United Kingdom* decided on 27 May 2004, the rule not allowing Gypsies occupying State-run sites to benefit from the procedural guarantees against evictions available to tenants of other municipal forms of housing or private gypsy sites amounted to differential treatment. See Ringelheim, Julie, DIVERSITÉ CULTURELLE ET DROITS DE L'HOMME: LA PROTECTION DES MINORITÉS PAR LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME (Bruylant, 2006) at 346.

⁴³² For critiques of this reluctance, see, e.g., Loucaides, Loukis G., 'The limitations of Human Institutions', available at <http://www.errc.org/en-research-and-advocacy-roma-details.php?page=8&article_id=3613> accessed 2 February 2014 and Rorive, Isabelle, 'Religious Symbols in the Public Space: In Search of a European Answer', 30 *Cardozo Law Review* (2009) 2669-2697.

⁴³³ The approach, however, may in some cases be 'unduly restrictive', offering only a partial picture of the situation and of its implications for the applicants. See Dissenting Opinion of Judge Keller in ECtHR, *Şükran Aydın and Others v. Turkey*, 22 January 2013.

⁴³⁴ This claim may be further confirmed by the fact that the very few times the Court has found an ECHR violation in cases involving cultural claims concerned instances of direct interference on the applicant's Article 8 ECHR right (see, e.g., ECtHR, *Connors v. the United Kingdom*, 27 May 2004) or formal differentiation (direct discrimination) of groups of people in analogous situations in the access to survivor's pension (see, e.g., ECtHR, *Muñoz Díaz v. Spain*, 8 December 2009).

⁴³⁵ ECtHR (GC), *Chapman v. the United Kingdom*, 18 January 2001, § 95. In a similar vein, see Ringelheim, Julie 'Chapman Redux: The European Court of Human Rights and Roma Traditional Lifestyle' in Eva Brems (ed.), DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR (Cambridge University Press, 2013) at 433-434. See also, Morawa, Alexander H.E., 'The European Court of Human Rights and Minority Rights;

B. Religious Claims

A similar formalistic approach prevails in the context of religious (discrimination) claims.⁴³⁶ Legal scholars appear to agree that one of the problems in the Strasbourg religious (discrimination) case law lies in the Court's inability to recognize the detrimental impact of supposedly neutral rules of general application on religious practitioners' rights.⁴³⁷ These are rules that, albeit conceived in general terms, 'in fact tend to affect only a particular group, or to affect it more than others'.⁴³⁸ Traditionally, the Court has indeed failed to recognize that facially neutral rules, criteria or practices (i) may indirectly encroach on the capacity of some to enjoy their rights effectively or (ii) to the extent that this encroachment may affect some and not others, may also be discriminatory, absent sufficient justification.⁴³⁹ This failure, as the summary that follows attempts to illustrate, manifests itself in three principal ways: (i) in not finding interference with applicants' rights in the assessment under Article 9(1) ECHR; (ii) in overlooking the consequences that facially neutral rules have for applicants in the proportionality

The "Special Consideration" Standard in Light of Gypsy Council', 10 *International Journal on Minority and Group Rights* (2004) at 104 and 105 (critiquing the Court's formalistic reading of equality in the case *The Gypsy Council et al. v. the United Kingdom*).

⁴³⁶ I bracket 'discrimination' to signal that, even though in many of these cases one significant inquiry is arguably that of discrimination and even though several of these applicants make a discrimination claim, the Court nonetheless either examines the cases under Article 9 ECHR alone or quickly dismisses the discrimination complaint. See, e.g., ECmmHR, *Konttinen v. Finland*, 3 December 1996 (no appearance of violation); ECtHR, *Dahlab v Switzerland*, 15 February 2001 (manifestly ill-founded); ECtHR (GC), *Leyla Şahin v Turkey*, 10 November 2005 (no violation); ECtHR, *Köse and 93 Others v. Turkey*, 24 January 2006 (inadmissible); ECtHR, *Mann Singh v. France* 13 November 2008 (no appearance of violation); ECtHR, *Aktas v. France, Ghazal v. France, Ranjit Singh v. France and Jasvir Singh v. France*, all of 30 June 2009 (manifestly ill founded) and ECtHR, *Francesco Sessa v. Italy*, 3 April 2012 (manifestly ill founded).

⁴³⁷ See, e.g., Martinez Torron, Javier, 'The (Un)Protection of Individual Religious Identity in the Strasbourg Case Law', *Oxford Journal of Law and Religion* (2012) 1-25; Ringelheim, Julie, *DIVERSITÉ CULTURELLE ET DROITS DE L'HOMME : LA PROTECTION DES MINORITÉS PAR LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME* (Bruylant, 2006) 321-339; Evans, Carolyn, *FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (Oxford University Press, 2001) 168-199; Henrard, Kristin, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' 5(1) *Erasmus Law Review* (2012) 59-77; and Danchin, Peter G. and Forman, Lisa, 'The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities' in Peter Danchin and Elizabeth Cole (eds.), *PROTECTING THE HUMAN RIGHTS OF RELIGIOUS MINORITIES IN EASTERN EUROPE* (Columbia University Press, 2002) at 193.

⁴³⁸ Evans, Carolyn, *FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (Oxford University Press, 2001) at 187 (footnote omitted). For the purposes of this Chapter, I follow Carolyn Evans in the understanding of seemingly neutral of general application (although she terms them 'neutral and generally applicable laws'). *Ibid.* at 168. In fact, she adopts Stephanos Stavros' definition: 'those laws which, in the process of advancing a legitimate secular public interest, have some incidental effects on some persons' religious beliefs'. Stavros, Stephanos, 'Freedom of Religion and Claims for Exemption from Generally Applicable Neutral Laws', 6 *European Human Rights Law Review* (1997) at 611.

⁴³⁹ Julie Ringelheim nicely frames the problem this way. Ringelheim, Julie, *DIVERSITÉ CULTURELLE ET DROITS DE L'HOMME : LA PROTECTION DES MINORITÉS PAR LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME* (Bruylant, 2006) at 430.

analysis under Article 9(2) ECHR; and (iii) in missing distinctions that operate beyond formal differentiations under Article 14 ECHR in conjunction with Article 9 ECHR.

(i) Non-interference

In a number of cases, the Court has not found interference with religious applicants' rights, as a result of a restrictive interpretation of interference prevailing in its freedom of religion jurisprudence. Indeed, up until recently, the rule has been that 'if a person is able to take steps to circumvent a limitation placed on his or her freedom to manifest religion or belief, there is no interference'.⁴⁴⁰

Some of the best examples illustrating this restrictive interpretation involve applicants' manifestations of religion in the workplace, in particular, those claiming conflicts between supposedly neutral rules (e.g., work schedules) and their religious duties. Many of these claims have been declared inadmissible.⁴⁴¹ The major reasons for rejecting these claims used to be that applicants voluntarily waived their religious freedom by choosing to submit to employment rules and that applicants ultimately remained free to resign from their jobs.⁴⁴² This line of reasoning, initiated in the Commission era, led some scholars to note: '[I]t seems fairly clear that work-related difficulties will not constitute an interference with the right to religious freedom.'⁴⁴³ The rejection of interference when applicants could have escaped the restriction has been applied even in recent years. *Francesco Sessa v. Italy* (2012) is a good case in point.⁴⁴⁴ The case was brought by a Jewish lawyer complaining of the scheduling of a court hearing on Yom Kippur. In a divided ruling, the Court found no interference with the applicant's freedom of religion.⁴⁴⁵ The argument was that he could have found a replacement and still been able to celebrate his holy day.⁴⁴⁶

A similar rationale for not finding interference can be found in other contexts, such as the university and the military. For example, in *Karaduman v. Turkey* – concerning a university Muslim student not allowed to get her degree certificate for refusing to appear on its picture without her headscarf – the Commission held that by choosing to pursue her higher education in

⁴⁴⁰ In 2013, the Court rejected this rationale long upheld in its Article 9 ECHR case law. See ECtHR (GC), *Eweida and Others v. the United Kingdom*, 15 January 2013 § 83.

⁴⁴¹ See, e.g., ECmmHR, *Stedman v. the United Kingdom*, 9 April 19 and ECmmHR, *Konttinen v. Finland*, 3 December 1996.

⁴⁴² For insightful critiques of this approach, see Ouald Chaib, Saila, 'Religious Accommodation in the Workplace: Improving the Legal Reasoning of the ECtHR' in Alidadi, Katayoun, Foblets, Marie-Claire and Vrielink, Jogchum (eds.) *A TEST OF FAITH? RELIGIOUS DIVERSITY AND ACCOMMODATION IN THE EUROPEAN WORKPLACE* (Ashgate, 2012) 33-58 and Vickers, Lucy, *RELIGIOUS FREEDOM, RELIGIOUS DISCRIMINATION AND THE WORKPLACE* (Hart Publishing, 2008) at 45-52.

⁴⁴³ Vickers, Lucy, *RELIGIOUS FREEDOM, RELIGIOUS DISCRIMINATION AND THE WORKPLACE* (Hart Publishing, 2008) at 88.

⁴⁴⁴ ECtHR, *Francesco Sessa v. Italy*, 3 April 2012.

⁴⁴⁵ *Ibid.* Three Judges (Tulkens, Popović and Keller) dissented.

⁴⁴⁶ *Ibid.* § 37. Moreover, the Court rejected his discrimination complaint as manifestly ill founded because he did not demonstrate that he had been treated differently from others in a comparable situation. *Ibid.* § 42.

a secular university, students submit to those rules.⁴⁴⁷ Another example is the case of *Yanasik v. Turkey*, concerning a Muslim cadet expelled from the Ankara Military Academy for breaching military discipline by participating in an alleged Muslim fundamentalist movement.⁴⁴⁸ The Commission held: ‘Training at the Military Academy, with the existing restrictions, does not therefore, as such, constitute an interference with the freedom of religion and conscience, given that *the applicant freely chose* to pursue his military career within that system’.⁴⁴⁹

Another kind of restrictive interpretation of interference has also been applied in the context of conscientious behaviour.⁴⁵⁰ For example, in *C. v. the United Kingdom*, concerning a Quaker’s refusal to pay taxes without assurance that they would not be used for military expenditure, the Commission found no interference with his freedom of religion.⁴⁵¹ It held that ‘the obligation to pay taxes is a general one which has no specific conscientious implications in itself’.⁴⁵² Moreover, the Commission appears to take for granted that minorities can obtain support in the political process without much difficulty: ‘[i]f the applicant considers the obligation to contribute through taxation to arms procurement an outrage to his conscience he may advertise his attitude and thereby try to obtain support for it through the democratic process’.⁴⁵³

Examples of a restrictive approach to interference can also be found in the school context, based on a yet different kind of rationale. For instance, in the cases of *Efstratiou v. Greece* and *Valsamis v. Greece*, the Court did not see how the requirement to attend a national commemoration parade could interfere with two Jehovah’s Witness students’ pacifist religious convictions. The argument was that the event served pacifist purposes, even though military representatives were in attendance.⁴⁵⁴ The Court additionally referred to the Commission’s findings that Article 9 ECHR does not ‘confer a right to exemption from disciplinary rules which applied generally and in a neutral manner’.⁴⁵⁵

⁴⁴⁷ ECmmHR, *Karaduman v. Turkey*, 3 May 1993. The Commission states: ‘The fact that a secular university has regulations on students’ dress and that its administrative services are subject to compliance with those regulations does not constitute an interference with the right to freedom of religion and belief’.

⁴⁴⁸ ECmmHR *Yanasik v. Turkey*, 6 January 1993 at p. 27.

⁴⁴⁹ *Ibid.* Emphasis added. See also, ECtHR, *Kalaç v. Turkey*, 1 July 1997. The case concerned the compulsory retirement of a Muslim judge working for the air force for breaching military discipline and infringing the principle of secularism.

⁴⁵⁰ See, e.g., ECmmHR, *C. v. the United Kingdom*, 15 December 1983; and ECmmHR, *H.B. v. the United Kingdom*, 18 July 1986. See also, ECtHR, *Pichon and Sajous v. France*, 2 October 2001, p. 4. The case concerned two pharmacists convicted for refusing to sell contraceptive pills on conscientious grounds. The Court concluded that the applicants’ conviction for refusal to sell contraceptives did not interfere with the exercise of their freedom of religion because they could manifest their religious beliefs outside their professional sphere.

⁴⁵¹ ECmmHR, *C. v. the United Kingdom*, 15 December 1983. See also, *H.B. v. the United Kingdom*, 18 July 1986.

⁴⁵² ECmmHR, *C. v. the United Kingdom*, 15 December 1983 at 147.

⁴⁵³ *Ibid.*

⁴⁵⁴ ECtHR, *Efstratiou v. Greece*, 18 December 1996 and *Valsamis v. Greece*, 18 December 1996. The Court has been criticized for making its own assessment on the validity and importance of the applicants’ religious beliefs. Evans, Carolyn, *FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (Oxford University Press, 2001) at 120-121.

⁴⁵⁵ ECtHR, *Efstratiou v. Greece*, 18 December 1996 and *Valsamis v. Greece*, 18 December 1996 § 37.

In summary, and as Kristin Henrard put it, '[i]n relation to demands to be exempted from laws of general application (including laws on taxation, pension schemes, compulsory vaccination, rules about the way in which animals should be slaughtered etc) which have a disproportionate impact on the adherents of a particular religion, the Court and the Commission seemed reluctant to even identify an interference with the freedom of religion'.⁴⁵⁶ Danchin and Forman have also critiqued the Court's approach in the following terms: 'The fact that the Court has fashioned and approach whereby "neutral" laws will automatically prevail, and whereby the state is under no obligation to justify that its refusal to grant exemptions from the application of such laws is a measure "necessary in a democratic society", constitutes a significant risk for the rights of minorities'.⁴⁵⁷

(ii) Failure to Consider Implications in the Proportionality and Formalistic Understanding of Equality

The Court's tendency to bypass the potentially detrimental and discriminatory effects of seemingly neutral rules has manifested itself in two other ways: (i) failure to consider the implications for applicants in the proportionality analysis and (ii) application of a formal notion of equality.

Thus, under Article 9(2) ECHR,⁴⁵⁸ the Court has dismissed a number of complaints by Sikh and Muslim students against expulsions, following their refusal to comply with secular dress codes in French State schools.⁴⁵⁹ In most of these cases, the Court found that the sanctions were necessary to protect secularism without much consideration of the impact of the rule in question on the students.⁴⁶⁰ What is more, in rejecting some of these applicants' additional discrimination claims, the Court held that the French law prohibiting conspicuous religious symbols in schools applied to *all* ostensible religious symbols.⁴⁶¹ The Court's reason for declaring this sort of discrimination claims manifestly ill founded clearly shows a concern for identical treatment rather than for the unequal effects of the norm. Indeed, the Court

⁴⁵⁶ Henrard, Kristin, 'Minority Specific Rights: A Protection of Religious Minorities Going Beyond the Freedom of Religion?' *European Yearbook on Minority Issues* (2009) at 36.

⁴⁵⁷ Danchin, Peter G. and Forman, Lisa, 'The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities', in Peter Danchin and Elizabeth Cole (eds.), *PROTECTING THE HUMAN RIGHTS OF RELIGIOUS MINORITIES IN EASTERN EUROPE* (Columbia University Press, 2002) at 212. Their basis for questioning the Court's approach is the following: 'Neutral laws of general application will usually conform to the dominant ethical values in a given society at a given point of time. Thus, they will not often conflict with majority religious values and morality. They will, however, cause conflicts with minority religious values and practices that are socially atypical'. *Ibid.*

⁴⁵⁸ In these cases, the Court does not dismiss the cases for lack of interference but because the restrictions at issue are justified, that is, they are 'necessary in a democratic society'.

⁴⁵⁹ See, e.g., ECtHR, *Aktas v. France*, *Gamaleddyn v. France*, *Ghazal v. France*, *Bayrak v. France*, *Ranjit Singh v. France* and *Jasvir Singh v. France* all from 30 June 2009. See also, ECtHR, *Dogru v. France*, and *Kervanci v. France*, both from 4 December 2008.

⁴⁶⁰ See analysis in Chapter IV, II.B.

⁴⁶¹ See, e.g., ECtHR, *Aktas v. France*, *Ghazal v. France*, *Ranjit Singh v. France* and *Jasvir Singh v. France*, all of 30 June 2009. Emphasis added. All these cases refer to the rationale in ECtHR, *Köse and 93 Others v. Turkey*, 24 January 2006.

simplistically looks at whether the law applies the same to all conspicuous symbols but remains oblivious to its differential or disproportionate impact on some group members (i.e., the Court misses the fact that the law has no effect on those religious students wearing less noticeable religious symbols).

The Court has also held inadmissible a freedom of religion claim by a Muslim teacher dismissed from a Swiss State school for refusing to take off her headscarf in compliance with the neutrality principle.⁴⁶² Again, virtually no consideration was given to any possible harmful implications of the principle for the applicant in the proportionality analysis.⁴⁶³ The Court furthermore rejected her discrimination complaint on the basis of sex. The reason given by the Court for this rejection reveals a *direct*-discrimination like mindset: ‘The Court notes in the instant case that the measure by which the applicant was prohibited, purely in the context of her professional duties, from wearing an Islamic headscarf *was not directed at her as a member of the female sex* but pursued the legitimate aim of ensuring the neutrality of the State primary-education system’.⁴⁶⁴ The measure may not have been *directed* at the applicant as a woman.⁴⁶⁵ Yet it *indirectly* impacted on her as a Muslim woman wearing a headscarf, an impact that Muslim men (and non-Muslim women) would have probably not experienced. As Maleiha Malik argues: ‘After all, Muslim women are the only targets of these prohibitions: it is they, and not Muslim men, who wear the headscarf’.⁴⁶⁶ In *Leyla Şahin v. Turkey*, a case concerning a Muslim student at a State university sanctioned for refusing to take off her headscarf, the Court’s Grand Chamber similarly dismissed her alleged violations of freedom of religion and right to education without any meaningful proportionality analysis.⁴⁶⁷ The Court found that the ban was justified on the need to protect secularism and gender equality in Turkey.⁴⁶⁸ Moreover, using the same reasoning as in *Dahlab*, the Court rejected Şahin’s discrimination claim as well.⁴⁶⁹

Cases concerning complaints against requirements to remove religious clothing during security checks at airports/consulates or during motorcycle riding have been declared manifestly ill founded with a similar dismissive treatment of applicants’ interests in the proportionality.⁴⁷⁰ For example, in *Phull v. France* and *El Morsli v. France*, the Court rejected the applicants’ Article 9 ECHR claims with the argument that the requirement to take off their religious clothing at security checks was necessary to guarantee public security.⁴⁷¹ There was no attempt, however,

⁴⁶² ECtHR, *Dahlab v. Switzerland*, 15 February 2001.

⁴⁶³ For a more detailed discussion of this aspect of the case, see analysis in Chapter VI, II.B.

⁴⁶⁴ ECtHR, *Dahlab v. Switzerland*, 15 February 2001 at 14. Emphasis added.

⁴⁶⁵ This allows the *Dahlab* Court to conclude: ‘Such a measure could also be applied to a man who, in similar circumstances, wore clothing that clearly identified him as a member of a different faith’. *Ibid.*

⁴⁶⁶ Malik, Maleiha, ‘Complex Equality: Muslim Women and the “Headscarf”’, 68 *Droit et Société* (2008) (critiquing the Court’s single-axis approach to equality, marginalizing the gender aspect).

⁴⁶⁷ ECtHR (GC), *Leyla Şahin v Turkey*, 10 November 2005. For a more detailed discussion of this aspect of the case, see analysis in Chapter VI, II.B.

⁴⁶⁸ *Ibid.* § 115.

⁴⁶⁹ *Ibid.* § 165.

⁴⁷⁰ See, e.g., ECmmHR, *X. v. the United Kingdom*, 12 July 1978; ECtHR, *Phull v. France*, 11 January 2005 and ECtHR, *El Morsli v. France*, 4 March 2008.

⁴⁷¹ ECtHR, *Phull v. France*, 11 January 2005 and ECtHR, *El Morsli v. France*, 4 March 2008. In fact, these two cases reproduce the brief reasoning in the old case of ECmmHR. *X. v. the United Kingdom*, 12 July 1978.

to weigh this State interest against any possible harm caused to the applicants' freedom of religion.

(iii) Recent Developments

Most recently, the Court appears to have been growingly aware of the effects that general and apparently neutral rules or practices may have on religious applicants. For example, in the 2010 case of *Jakóbski v. Poland* – which concerned a Buddhist male applicant denied a free-meat diet in prison – the Court found that it was not disproportionate for the prison administration to attend to his dietary requirements. According to the Court, the provision of a vegetarian diet would have not entailed 'any disruption to the management of the prison or to any decline in the standards of meals served to other prisoners'.⁴⁷²

Another example is the 2013 case of *Eweida and Others v. the United Kingdom*, which in fact covered four different cases brought by Christian applicants, complaining about restrictions on the manifestation of their religion at work.⁴⁷³ Three of these four applicants also made discrimination claims but the Court examined their cases primarily under Article 9 ECHR. In two of the four cases, the Court weighed heavily in the balance what was at stake for the applicants wishing to wear a cross visibly at work.⁴⁷⁴ Indeed, in the case of Ms. Eweida, a check-in employee at British Airways, the Court considered that the balance should have tipped in favor of the applicant.⁴⁷⁵ In the case of Ms. Chaplin, a nurse working at a State hospital, the Court concluded that the protection of health and safety outweighed the applicant's interests but not without acknowledging the importance of what was at stake for her.⁴⁷⁶

Another *Eweida* applicant, Ms. Ladele, a registrar of births, deaths and marriages at the local authority of Islington, complained under Article 14 ECHR taken in conjunction with Article 9 ECHR, rather than under Article 9 ECHR alone. Ms. Ladele argued that, as an orthodox Christian who viewed marriage as the union of a man and a woman, she was dismissed for refusing to register same-sex civil partnerships. Her claim was that, in failing to treat her differently from those who did not have a conscientious objection to registering civil partnerships, the local authority indirectly discriminated against her on the grounds of religion.

⁴⁷² *Jakóbski v. Poland*, 7 December 2010 § 52. This sort of reasoning resembles the Canadian Supreme Court's test of 'undue burden' in reasonable accommodation cases. For an analysis of this aspect of the judgment, see Ouald Chaib, Saila and Peroni, Lourdes, 'Jakóbski v. Poland: Is the Court Opening the Door to Reasonable Accommodation?' Blog 'Strasbourg Observers' (2010) available at <http://strasbourgobservers.com/2010/12/08/jak%CF%8Cbski-v-poland-is-the-court-opening-the-door-to-reasonable-accommodation/> accessed 2 February 2014.

⁴⁷³ ECtHR, *Eweida and Others v. the United Kingdom*, 15 January 2013.

⁴⁷⁴ *Ibid.* §§ 94 and 99.

⁴⁷⁵ For the Court, the company's wish, while certainly legitimate, was just given too much weight. Several factors led the Court to this conclusion, most notably: (i) the cross was 'discreet' and could not have detracted from Ms. Eweida's professional appearance; and (ii) employees were allowed to wear other religious symbols (e.g., turbans and hijabs) without evidence of any negative impact of the wearing of such symbols on the employer's brand or image. *Ibid.* § 94.

⁴⁷⁶ *Ibid.* § 99.

Interestingly – and most relevantly for the purposes of this Chapter – the Court framed her case as one of indirect discrimination. It accepted that her designation to register same-sex civil partnerships ‘had a particularly *detrimental impact* on her because of her religious beliefs’.⁴⁷⁷ The issue was therefore whether the local authority’s refusal to make an exception for the applicant and others in her situation amounted to indirect discrimination. Ladele ultimately lost the case, mostly as a result of the wide margin of appreciation applied by the Court.⁴⁷⁸ Yet, and regardless of the way in which the Court applied the margin of appreciation,⁴⁷⁹ the framing of *Ladele* as an indirect discrimination case represents a remarkable departure from its traditional reluctance to accept that neutral rules may negatively impact on some religious adherents.

The same may be said of *Bayatyan v. Armenia*, a groundbreaking 2011 case, in which the Court recognizes conscientious objection to military service under Article 9 ECHR.⁴⁸⁰ What is most relevant for present purposes is that the Court’s Grand Chamber explicitly recognizes the serious impact of the rule mandating military service on conscientious objectors: ‘[T]he system existing at the material time imposed on citizens an obligation which had potentially serious implications for conscientious objectors while failing to allow any conscience-based exceptions and penalising those who, like the applicant, refused to perform military service’.⁴⁸¹ Equally noteworthy is the Court’s rejection of the Respondent State’s request for an application of formal equality: ‘respect on the part of the State towards the beliefs of a minority religious group like the applicant’s by providing them with the opportunity to serve society as dictated by their conscience might, *far from creating unjust inequalities or discrimination as claimed by the Government*, rather ensure cohesive and stable pluralism and promote religious harmony and tolerance in society’.⁴⁸²

While all these recent developments may take the Court in a new direction, it is still too soon to draw any general conclusions or determine whether they represent any definitive shifts in the freedom of religion case law. Save these and a few earlier notable exceptions,⁴⁸³ the prevailing approach still appears to be one of ‘manifest reluctance of the Court to accommodate minority religious practice,’⁴⁸⁴ a tendency that has recently led one leading law and religion

⁴⁷⁷ *Ibid.* § 104. Emphasis added.

⁴⁷⁸ The argument for dismissing the case was the following: ‘The Court generally allows the national authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights’. *Ibid.* § 106.

⁴⁷⁹ For a critique of the use of the margin of appreciation in this case, see Smet, Stijn ‘*Eweida*, Part II: The Margin of Appreciation Defeats and Silences All’, Blog ‘Strasbourg Observers’ available at <<http://strasbourgobservers.com/2013/01/23/eweida-part-ii-the-margin-of-appreciation-defeats-and-silences-all/>> accessed 2 February 2014.

⁴⁸⁰ ECtHR (GC), *Bayatyan v. Armenia*, 7 July 2011. See particularly § 110.

⁴⁸¹ *Ibid.* § 124.

⁴⁸² *Ibid.* § 126. Emphasis added.

⁴⁸³ One of the most notable exceptions is the case of *Thlimmenos v. Greece*, discussed earlier. The case concerned a successful claim precisely against a neutral rule that, in effect, was detrimental to the applicant as a Jehovah’s Witness. ECtHR (GC), *Thlimmenos v. Greece*, 6 April 2000. The *Thlimmenos* rationale, however, has hardly ever found further application in the Court’s case law.

⁴⁸⁴ Brems, Eva, ‘Human Rights as a Framework for Negotiating/Protecting Cultural Differences: An Exploration of the Case-law of the European Court of Human Rights’ in Marie-Claire Foblets, Jean-François Gaudreault-Desbiens

scholar to speak of ‘the (un)protection of individual religious identity in the Strasbourg case law’.⁴⁸⁵

(iv) Towards Substantive Religious and Cultural Equality

Aware of the burdensome effects that general and neutral rules may have on some religious people – or, as a matter of fact, on members of groups whose ways of life differ from those of dominant groups – legal scholars have proposed several alternative approaches. Suggestions in the ECHR context have ranged from greater emphasis on indirect discrimination,⁴⁸⁶ use of the discrimination principle in Article 9 ECHR cases as ‘a matter of routine,’⁴⁸⁷ and, more and more, the notion of reasonable accommodation.⁴⁸⁸ One argument made from a minority perspective more broadly is that minority protection can be effectively achieved as long as non-discrimination opens up to substantive equality.⁴⁸⁹

In the remainder of this Chapter, I wish to supplement these scholarly efforts towards substantive equality by exploring the potential of group vulnerability. In particular, I will explore its potential to reach and challenge the unequal structures responsible for the detrimental impact on some cultural and religious groups that the Court tends to miss. I am not seeking to provide a one-size-fits-all way of ‘solving’ seemingly disparate cases. To be sure, a school is not the military. Moreover, counteracting the negative implications of a dress code for religious practitioners in a discrete environment (e.g., the workplace) may raise fewer difficulties than counteracting the same kind of implications of general tax laws. Evidently, introducing group vulnerability in the analysis will not lead to the same outcome across such an array of cases, for there are a host of other factors that enter the equation in the examination of these cases and a variety of roles for the margin of appreciation.⁴⁹⁰

and Alison Dundes Renteln (eds.) *CULTURAL DIVERSITY AND THE LAW: STATE RESPONSES FROM AROUND THE WORLD* (Bruylant, 2010) at 675.

⁴⁸⁵ Martínez-Torrón, Javier, ‘The (Un)protection of Individual Religious Identity in the Strasbourg Case Law’, *Oxford Journal of Law and Religion* (2012).

⁴⁸⁶ Rorive, Isabelle ‘Religious Symbols in the Public Space: In Search of a European Answer’, 30 *Cardozo Law Review* (2009) (in respect of rules interfering with the wearing of religious symbols) at 2669-2698.

⁴⁸⁷ Evans, Carolyn, *FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (Oxford University Press, 2001) at 199.

⁴⁸⁸ See generally, Council of Europe, *INSTITUTIONAL ACCOMMODATION AND THE CITIZEN: LEGAL AND POLITICAL INTERACTION IN A PLURALIST SOCIETY* (2009); Bribosia, Emmanuelle, Ringelheim, Julie and Rorive, Isabelle, ‘Aménager la Diversité: Le Droit de l’égalité Face a la Pluralité Religieuse’, 78 *Revue Trimestrielle des Droits de l’Homme* (2009) 319-373; and Henrard, Kristin, ‘Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality’, 5(1) *Erasmus Law Review* (2012) 59-77.

⁴⁸⁹ Henrard, Kristin, ‘A Patchwork of “Successful and “Missed” Synergies in the Jurisprudence of the ECHR’ in Kristin Henrard and Robert Dunbar (eds.) *SYNERGIES IN MINORITY PROTECTION: EUROPEAN AND INTERNATIONAL LAW PERSPECTIVES* (Cambridge University Press, 2008) at 316 (additionally arguing that expanding individual rights and non-discrimination towards substantive equality concomitantly reduces the need for minority-specific rights).

⁴⁹⁰ See, e.g., the analysis of the role of the margin of appreciation in *Chapman* in Part III.C of Chapter I.

However, introducing group vulnerability in the reasoning may change the way in which the Court ‘sees’ these cases. In particular, it will help the Court turn its gaze outward in two ways: (i) by considering how societal contexts and arrangements render some religious/cultural groups more vulnerable to discrimination and other human rights violations and (ii) by unveiling the perspectives implicitly privileged in such contexts and arrangements rendering other religious/cultural groups less vulnerable to discrimination and other human rights violations. I now turn to each of these potentials.

II. The Potential of Group Vulnerability’s Relational Character: The ‘More Vulnerable’ Side

In Chapter I, the focus of the discussion was primarily the *particular* nature of group vulnerability, as this is the aspect of the concept that has brought more concrete doctrinal implications in the Court’s case law. Indeed, as explained in Chapter I, the asymmetry introduced by the particular character of the concept has carried increased State positive obligations; increased weight of the harm in the scope and the proportionality analyses; and a narrower margin of appreciation.

In this part, I want to focus on another aspect of the Court’s notion of group vulnerability – the *relational* aspect. In particular, I will explore its potential to advance substantive equality in the context of cultural and religious claims under Articles 8 and 9 ECHR, alone and in conjunction with Article 14 ECHR. As emphasized in Chapter I,⁴⁹¹ the relational aspect of group vulnerability has enabled the Court to inquire into the broader societal and institutional contexts that create or reinforce certain groups’ vulnerabilities.⁴⁹² Understood relationally, therefore, group vulnerability has already opened the Strasbourg door to more contextual forms of inquiry into why and how it is that some groups are more vulnerable than others. This relational understanding of group vulnerability is in line with one fundamental premise of substantive equality: discrimination and inequalities are not the exclusive fault of individual perpetrators but the result of societal and institutional structures more broadly.⁴⁹³

⁴⁹¹ See Part II.B. of Chapter I.

⁴⁹² Thus, in *M.S.S.*, the relational character of group vulnerability allowed the Court to pinpoint the flaws of the Greek asylum system, which, in interaction with other factors, made asylum seekers particularly vulnerable. In *Chapman*, the relational character of group vulnerability enabled the Court to locate the vulnerability of Roma as arising primarily from the group’s minority status and from the lack of consideration of its minority lifestyle in the planning and decision-making processes.

⁴⁹³ See, e.g., Freeman, Alan David, ‘Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of the Supreme Court Doctrine’, 62 *Minnesota Law Review* (1978) 1049-1120. Freeman emphasizes ‘the need to understand discrimination as a structural rather than individual wrong.’ See Bamforth, Nicholas, Malik, Maleiha and O’Cinneide, Colm, *DISCRIMINATION LAW: THEORY AND CONTEXT* (Sweet & Maxwell, 2008) at 220.

A. Invulnerable Subject Traces

As stated earlier, the vulnerable group member is largely absent in the context of religious claims and has hardly ever made a meaningful appearance in the context of cultural claims. In fact, traces of an invulnerable subject appear to haunt the Court's case law in these two areas. By 'invulnerable subject', I mean the 'socially de-contextualized, hyper-rational, wilful individual' that Anna Grear and others have identified as imported into human rights law.⁴⁹⁴ Traces of this subject surface the Court's legal reasoning in two ways (i) applicants are sometimes viewed as self-directing, atomistic agents who fall into disadvantage as a result of their choice or individual preferences rather than as a result of societal/institutional arrangements; and (ii) applicants are sometimes construed as the 'opposite' of the invulnerable subject, that is, as oppressed by their religions or cultures, powerless, and therefore in need of paternalistic protection.

(i) Invulnerable Logic I

In the first version of the invulnerable logic, the Court views applicants as purely rationalistic and wholly autonomous individuals who should take responsibility for their 'choices'. This rationale is particularly at work in the Court's reasoning in cases concerning the manifestation of religion in the workplace, in particular, in the ideas that applicants freely accept employment rules and ultimately remain free to resign in case of conflicts between their religious and work duties. The Court's (or, more accurately, the Commission's) approach in these cases has been amply criticized for obscuring the role of 'structural constraints' on people's choices⁴⁹⁵ and the role of the State in creating the conflict with religious duties in the first place.⁴⁹⁶ Commenting on this line of case law, Malcolm Evans for instance argues that 'this approach has an enduring attraction, since it casts the applicants . . . as the author of their own misfortune, and sees the remedy as lying in their own hands'.⁴⁹⁷ The reality, however, is that 'most employees are

⁴⁹⁴ Grear, Anna, "'Sexing the Matrix: Embodiment, Disembodiment and the Law – Towards the Re-gendering of Legal Rationality' in Jackie Jones, Anna Grear, Rachel Anne Fenton and Kim Stevenson (eds.) GENDER, SEXUALITIES AND LAW (Routledge, 2011) at 44. This subject comes close to Gerard Quinn's 'masterless man'. Quinn, Gerard and Arstein-Kerlake, Anna, 'Restoring the "Human" in "Human Rights": Personhood and Doctrinal Innovation in the UN Disability Convention' in Conor Gearty and Costas Douzinas (eds.) THE CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW (Cambridge University Press, 2012) at 37 (arguing that 'human rights seem to commit us to an exaggerated caricature (a "myth system") of the human condition: the rational, self-directing, wholly autonomous individual possessing moral agency unto him/herself'). It also echoes the subject Fineman seeks to replace, that is to say, the idea of subjectivity that idealizes 'notions of independence, autonomy, and self-sufficiency that are empirically *unrealistic* and *unrealizable*'. Fineman, Martha Albertson, 'The Vulnerable Subject: Anchoring Equality in the Human Condition', 20 *Yale Journal of Law and Feminism* (2008) at 11. Emphasis added.

⁴⁹⁵ Vakulenko, Anastasia, "'Islamic Headscarves" and the European Convention on Human Rights: An Intersectional Perspective' (2007) 16(2) *Social and Legal Studies* at 187.

⁴⁹⁶ Evans, Carolyn, FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Oxford University Press, 2001) at 129.

⁴⁹⁷ Evans, Malcolm D., 'Freedom of Religion and the European Convention on Human Rights: Approaches, Trends and Tensions' in Peter Cane, Carolyn Evans and Zoe Robinson (eds.) LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT (Cambridge University Press, 2011) at 296.

financially dependent on having a job, and the option of resigning is not experienced practically as a form of freedom'.⁴⁹⁸

A recent example illustrating the workings of the first version of the invulnerable logic is *Francesco Sessa v. Italy* – the case concerning a Jewish lawyer denied the rescheduling of a court hearing originally set on Yom Kippur. In finding no interference with the applicant's freedom of religion, the Court reasoned that the applicant should have found a replacement and, in that way, still been able to observe his holy day. So, instead of asking why the apparently neutral calendar of holidays gave rise to the conflict for the applicant in the first place, the Court simply assumed that the responsibility and therefore the solution lied entirely with Mr. Sessa. A group vulnerability approach in this case would have encouraged the Court to pinpoint the kind of vulnerabilities spotted in *Chapman*: power differentials and the subsequent inability to include the concerns of the group members in question in the rule (in the *Sessa* case, in an official judicial calendar). Martha Fineman argues that '[a] vulnerability inquiry proposes a more thorough and penetrating equality analysis – one that considers structural and institutional arrangements in assessing the state's response to situations of vulnerability before indicting the individual'.⁴⁹⁹ This is precisely what happens in *Francesco Sessa*: the individual was immediately indicted without even interrogating the institutional arrangements that provoke the schedule conflict.⁵⁰⁰

A similar logic underlies the Court's legal reasoning – albeit admittedly to a lesser extent⁵⁰¹ – in cases concerning applicants' expulsion from schools for refusing to take off items of religious clothing. In several of these cases, the Court easily assumed that the applicants could ultimately move to a private school or take classes by correspondence.⁵⁰² At no point was there an attempt to consider what it was that was forcing some students to move to another school in the first place. Nor was an attempt to consider the possible negative implications of having to transfer to a private school (e.g., disruption of the applicants' studies, financial burdens). Again, a group vulnerability approach in these cases would have invited the Court to more thoroughly

⁴⁹⁸ Vickers, Lucy, *RELIGIOUS DISCRIMINATION IN THE WORKPLACE* (Hart Publishing, 2008) at 90.

⁴⁹⁹ Fineman, Martha Albertson, 'The Vulnerable Subject: Anchoring Equality in the Human Condition', 20(1) *Yale Journal of Law and Feminism* (2008-2009) at 18.

⁵⁰⁰ This kind of thinking reveals the liberal import into the human rights subject. Liberalism, as Barbara Flagg notes, with its emphasis on abstract individualism, fails to acknowledge the harms inflicted by certain institutional or cultural supremacies (referring to white supremacy). Flagg, Barbara J., 'Was Blind, But Now I See: White Race Consciousness and the Law', 91 *Michigan Law Review* (1993) 953-1017.

⁵⁰¹ It is true that, at the end of the day, this element did not appear decisive in the Court's reasoning. It was brought up at the very end, as an additional element in the proportionality analysis and thus served to confirm rather than to influence the outcome.

⁵⁰² See, e.g., ECtHR, *Ranjit Singh v. France*, 30 June 2009: 'Dans ces conditions, la Cour estime que, à l'issue d'une période de dialogue, la sanction de l'exclusion définitive d'un établissement scolaire public n'apparaît pas disproportionnée. Elle constate par ailleurs que *l'intéressé pouvait poursuivre sa scolarité dans un établissement d'enseignement à distance ou dans un établissement privé*, ce qu'il fit en l'espèce'. Emphasis added. See also, ECtHR, *Dogru v. France*, 4 December 2008 § 76: 'The Court considers, having regard to the foregoing, that the penalty of expulsion does not appear disproportionate, and notes that the applicant was able to continue her schooling by correspondence classes'.

investigate the arrangements at the root of the problem before expecting the individuals to simply deal with the consequences of such arrangements.

Another example of the first version of invulnerability is, ironically, *Chapman* itself – the case that gave origin to the notion of group vulnerability. The Grand Chamber’s judgment is plagued by ambivalence. On the one hand, the Court recognizes the vulnerability of the Roma minority.⁵⁰³ On the other hand, when the time comes to examine the justification of the interference of the planning regulations with her minority lifestyle, the Court extracts the applicant from her group identity/context and turns her into an individual who simply wished to settle.⁵⁰⁴ As a result, she is no longer considered a ‘proper’ Gypsy (and, therefore a ‘proper’ vulnerable group member). Her case thus becomes one of simple choice or individual preference rather than one of vulnerability reinforced by disadvantageous norms.⁵⁰⁵ I analyze this aspect of the *Chapman* judgment at greater length in Chapter VI. For now, all I want to point out is that the invulnerable logic is also present in *Chapman*. Applied consistently, a group vulnerability analysis would have inquired into the rule that was putting Ms. Chapman at a disadvantage, especially under Article 14 ECHR analysis. Group vulnerability may not have ultimately changed the outcome – as the Court appeared clearly unwilling to go all the way in finding a violation.⁵⁰⁶ Still, a group vulnerability approach may have made for a more coherent legal reasoning. It would have at least closed the gap between the group-vulnerability-based principles and their actual application in the case. In practice, this would have meant a more thorough appraisal of the harm caused to Ms. Chapman – i.e., the disadvantageous effects of the planning norms on her lifestyle – even when her interests may have ultimately been outweighed by those of the State.⁵⁰⁷

⁵⁰³ ECtHR (GC), *Chapman v. the United Kingdom*, 18 January 2001 § 96: ‘As intimated in *Buckley*, 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’.

⁵⁰⁴ *Ibid.* § 105: ‘It would appear that the applicant does not in fact *wish* to pursue an itinerant lifestyle. She was resident on the site from 1986 to 1990, and between 1992 and these proceedings. Thus, the present case is not concerned as such with the traditional itinerant Gypsy lifestyle’. Emphasis added.

⁵⁰⁵ As Julie Ringelheim argues in this respect, ‘[the Court first reduces] the wish of Ms. Chapman to live in a caravan to a question of mere individual preference. Second, it refuses to see her plight as one instance of a collective and systemic problem’. Ringelheim, Julie ‘Chapman *Redux*: The European Court of Human Rights and Roma Traditional Lifestyle’ in Eva Brems (ed.), *DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR* (Cambridge University Press, 2013) at 433. For a critique of the group-stripped analysis in the *Buckley* case, see O’Nions, Helen, *MINORITY RIGHTS PROTECTION INTERNATIONAL LAW: THE ROMA OF EUROPE* (Ashgate, 2007) at 223: ‘The rights of one individual were simply balanced against the interests of the majority without significant regard to her status as a member of the Gypsy minority’.

⁵⁰⁶ Ringelheim, Julie, *DIVERSITÉ CULTURELLE ET DROITS DE L’HOMME: LA PROTECTION DES MINORITÉS PAR LA CONVENTION EUROPÉENNE DES DROITS DE L’HOMME* (Bruylant, 2006) at 243 (arguing that the Court is torn between the willingness to integrate international minority protection developments and the reluctance to impose on the State far-reaching obligations. The result is a judgment full of incoherence.).

⁵⁰⁷ Unsurprisingly, *Chapman* attracted large scholarly criticism. See, e.g., Ringelheim, Julie ‘Chapman *Redux*: The European Court of Human Rights and Roma Traditional Lifestyle’ in Eva Brems (ed.), *DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR* (Cambridge University Press, 2013) at 426; Benoît-Rohmer, Florence, ‘La Cour de Strasbourg et la Protection de l’intérêt Minoritaire: Une Avancée Décisive sur le Plan des Principes?’, 48 *Revue Trimestrielle des Droits de l’homme* (2001) 999-1015; Rosenberg, Dominique, ‘L’indifférence du Juge Européen aux Discriminations Subies par les Roms’, 48 *Revue Trimestrielle des Droits de l’homme* (2001)

Admittedly, one of the main manifestations of the first version of the invulnerable logic – the one prevailing in cases concerning the manifestation of religion at work – has recently been called into question by the Court itself. In the case of *Eweida and Others v. the United Kingdom*, the Court held that ‘where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate’.⁵⁰⁸ This is no doubt a significant step towards erasing one of the most problematic ‘invulnerable subject’ traces. For now, however, it remains to be seen whether the approach will be confirmed in further case law.

(ii) Invulnerable Logic II

The second version of the invulnerable logic is illustrated in the Court’s reasoning in some of the so-called ‘headscarf’ cases. In these instances, the Court constructs applicants as the binary opposite (or ‘other’) of the invulnerable subject: the applicants are not wholly autonomous and self-directing – as liberal thought archetypically conceives of the subject. Instead, the applicants are viewed as lacking the capacity to make choices and as being determined or ‘oppressed’ by their religion. The two examples have been introduced earlier: *Dahlab v. Switzerland* and *Leyla Şahin v. Turkey*: both of them concern Muslim women seeking to wear the headscarf.⁵⁰⁹

There are many aspects to the Court’s reasoning in these cases. For present purposes, however, what interests me is the way in which the Court accepts the gender equality justification invoked by the States in support of the bans. In *Dahlab*, for example, the Court endorses the State’s argument and characterizes ‘the’ headscarf as apparently ‘imposed on women by a precept which is laid down in the Koran’ and as therefore ‘hard to square with the principle of gender equality’.⁵¹⁰ Implicit in the Court’s characterization of ‘the headscarf’ is the negative stereotype that Muslims are oppressed.⁵¹¹ This stereotype is by now well-established in the Court’s case law, following its incorporation into the general principles of the Grand Chamber judgment in *Leyla Şahin*.⁵¹² In fact, the stereotype was part of the actual assessment of the facts in *Leyla Şahin* and instrumental in finding that the ban was justified under Article 9(2) ECHR in the name of gender equality.⁵¹³

1017-1033; and Ringelheim, Julie, DIVERSITÉ CULTURELLE ET DROITS DE L’HOMME : LA PROTECTION DES MINORITÉS PAR LA CONVENTION EUROPÉENNE DES DROITS DE L’HOMME (Bruylant, 2006) at 242-247.

⁵⁰⁸ ECtHR, *Eweida and Others v. the United Kingdom*, 15 January 2013 § 83.

⁵⁰⁹ See Part I.B (ii) of this Chapter.

⁵¹⁰ ECtHR, *Dahlab v. Switzerland*, 15 February 2001 at p. 13

⁵¹¹ Evans, Carolyn, ‘The “Islamic Scarf” in the European Court of Human Rights’, 7 *Melbourne Journal of International Law* (2006) at 73. For further critiques of the Court’s use of stereotypes in these cases, see Fernandez, Sonya, ‘The Crusade over the Bodies of Women’ in Maleiha Malik (ed.) *ANTI-MUSLIM PREJUDICE: PAST AND PRESENT* (Routledge, 2010) at 64-65 and Malik, Maleiha, ‘Complex Equality: Muslim Women and the “Headscarf”’, 68 *Droit et Société* (2008) at 149-150.

⁵¹² ECtHR (GC), *Leyla Şahin v. Turkey*, 10 November 2005 § 111.

⁵¹³ *Ibid.* § 115.

I examine the Court's use of negative stereotypes and the harmful implications in these cases in Chapter VI. For the moment, however, I wish to highlight that this depiction of Muslim women serves to re-affirm the invulnerable subject as the standard.⁵¹⁴ Indeed, based on implicit dichotomies – agency/victimization⁵¹⁵ and reason/culture⁵¹⁶ – that value one side and devalue the other, the Court implicitly imbricates Muslim women with the devalued side (victimization/culture), thereby assigning them a subordinate status. The implicit construction of Muslim women as oppressed thus functions as the 'other' (culturally determined, victimized) necessary to re-affirm the 'normalcy' (autonomous/rational agent) of the invulnerable subject.⁵¹⁷ The move has profound dehumanizing effects. As Leti Volpp notes, '[b]ecause the Western definition of what makes one human depends on the notion of agency and the ability to make rational choices, to thrust some communities into a world where their actions are determined only by culture is deeply dehumanizing'.⁵¹⁸

A group vulnerability approach in this area of the Court's case law could serve to spot and bring to closer scrutiny any prejudices and negative stereotypes underlying States' reasons to justify restrictions on applicants' religious practices.⁵¹⁹ Thus, once it is established that the applicants belong to a particularly vulnerable group traditionally subject to prejudice and stereotyping,⁵²⁰ the Court may become more skeptical – and, as a result, more searching in its scrutiny – of justifications based on such prejudices or stereotypes. As argued in Chapter I, this is a consequence of the asymmetry introduced by the particular character of group vulnerability: heightened scrutiny or narrowed margin of appreciation when the rule or practice in question

⁵¹⁴ See discussion *infra* in Part III.B of this Chapter.

⁵¹⁵ For a critique of the victimization/agency dichotomy in the gender context, see Schneider, Elizabeth M., 'Feminism and the False Dichotomy of Victimization and Agency', 38 *New York Law School Law Review* (1993) at 396 (arguing that '[w]omen's victimization and agency are each understood to exist as the absence of the other – as if one must be either pure victim or pure agent – when in fact they are profoundly interrelated').

⁵¹⁶ For a critique of the reason/culture dichotomy and the racial stereotypes it gives rise to, see Volpp, Leti, 'Feminism versus Multiculturalism', 101(5) *Columbia Law Review* (2001) at 1191: 'Non-western people are assumed to be governed by cultural dictates, whereas the capacity to reason is thought to characterize the West'.

⁵¹⁷ This is because, as Schneider argues, '[t]raditional views of agency are based on notions of individual choice and responsibility, individual will and action: perceptions of a world composed of atomized individuals, acting alone, unconstrained by social forces, unmediated by social structures and systemic hardship'. *Ibid.* This is precisely the idea underlying the first version of the invulnerable subject. Moreover, as Peter Danchin argues, the idea that the headscarf is *imposed* on Muslim women says more about a particular liberal notion of religious subjectivity than about coercion in Islamic practices. Danchin, Peter G., 'Islam in the Secular *Nomos* of the European Court of Human Rights', 32 *Michigan Journal of International Law* (2011) at 725.

⁵¹⁸ Volpp, Leti, 'Feminism versus Multiculturalism', 101(5) *Columbia Law Review* (2001) at 1192.

⁵¹⁹ This approach has been advocated in the Written Comments of the Human Rights Centre of Ghent University, 9 July 2012 submitted in the case of *S.A.S. v. France* currently pending before the Court's Grand Chamber.

⁵²⁰ There are ample materials pointing to the use of stereotypes and prejudices against the Muslim minority in Europe, in particular against Muslim women. See, e.g., Hammarberg, Thomas, HUMAN RIGHTS IN EUROPE: NO GROUNDS FOR COMPLACENCY (Council of Europe, 2011) at 36-39 and 47-88; Group of Eminent Persons of the Council of Europe, 'Living Together: Combining Diversity and Freedom in 21st-century Europe' (Council of Europe, 2011) at 15-16; Parliamentary Assembly of the Council of Europe (PACE), Resolution 1743 'Islam, Islamism and Islamophobia in Europe' (Council of Europe, 2010) p. 1; and European Commission against Racism and Intolerance (ECRI), General Policy Recommendation No. 5 'On Combating Intolerance and Discrimination against Muslims', 16 March 2000.

affects stereotyped or stigmatized groups.⁵²¹ A group vulnerability approach may come particularly handy in cases where the neutrality of the norm is in fact misleading – that is, when in reality it is either conceived with the idea of restricting certain groups’ religious practices⁵²² or applied in a discriminatory fashion while remaining neutral on its face.⁵²³

Crucially, and as argued in Chapter I, group-vulnerability analysis should be applied with particular care if it does not want to end up reinforcing the very discriminatory attitudes and misplaced paternalism it seeks to remedy. Thus, if the concept is to retain its ability to remedy such wrongs, it is first of all crucial to avoid conceiving of vulnerability as inherently located *in* the group rather in the social context. As suggested in Chapter I, this means that the concept should not be employed as a label that fixes a group trait (e.g., vulnerable). Moreover, the analysis should make sure to go hand in hand with an analysis of the individual applicant’s actual circumstances and abilities. Otherwise, group vulnerability analysis risks overshadowing the agency of the applicants concerned and justifying misplaced paternalistic interventions rather than tackling social prejudice and hostility towards them.

B. Towards Unmasking Heightened Vulnerability

The basic yet fundamental suggestion arising from this part is that the Court should routinely ask: Does this particular applicant belong to a particularly vulnerable group as established in international and domestic documents? This simple question will diminish the likelihood of examining the case within a ‘miniature frame’, which writes off the contextual circumstances that give meaning to applicants’ claims and excludes a thorough appreciation of any harm from the picture.⁵²⁴

⁵²¹ In fact, the Court has recently recognized in clear and explicit terms the suspect character of ‘religion’ by demanding ‘very weighty reasons’ when it comes to differentiations made on this ground. See ECtHR, *Vojnity v. Hungary*, 12 February 2013, § 36 (concerning the denial to a father of access rights to his child on the basis of his religious beliefs). This case, however, concerns formal differentiation on the basis of religion (direct discrimination). Moreover, the approach differs from the group-vulnerability approach in that it applies stricter scrutiny to all distinctions made on the basis of religion (symmetrical approach to equality). Group vulnerability, instead, would apply stricter scrutiny only when the differentiation at issue affects certain religious groups – those who have suffered from past prejudice or disadvantage (asymmetrical approach to equality).

⁵²² A good example of this kind of deceptive neutrality is the so-called ‘burqa ban’ passed in several European countries, such as France and Belgium. As Brems, Vrieling and Ouald Chaib argue: ‘the background of the bans as well as the reasons advanced to support them . . . unambiguously indicate that in both states the legislators were concerned primarily with the Islamic face veil, the neutral formulation being chosen mainly to avoid claims of direct discrimination’. Brems, Eva, Vrieling, Jogchum and Ouald Chaib, Saïla, ‘Uncovering French and Belgian Face Covering Bans’, 2 *Journal of Law, Religion and State* (2013) at 74.

⁵²³ Evans, Carolyn, *FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (Oxford University Press, 2001) at 169 (making the point that neutral and general laws may sometimes be deceptive and merely create an impression of generality and neutrality). An example of application of general and neutral laws in a discriminatory way is ECtHR, *Manoussakis and Others v. Greece*, 26 September 1996 (violation of Article 9 ECHR) See particularly § 48.

⁵²⁴ I borrow the term ‘miniature frame’ and the subsequent idea of exclusion from the picture of the surrounding circumstances and of group-based harm from Kenneth Karst. Karst, Kenneth ‘Religious Freedom and Equal Citizenship’, 69 *Tulane Law Review* (1994) at 361. Karst argues: ‘The judge who inquires seriously into historical

Here, there is a role to be played by third-party interveners. One of the lessons that James Goldston draws from the experience of Roma rights litigation is ‘the importance of documenting the widespread, often systemic nature of the violations at issue, even in a legal context that does not formally recognize class actions or group remedies’.⁵²⁵ Referring to the Roma cases decided in Strasbourg he observes: ‘By the time the case of *D.H. v. Czech Republic* reached the Grand Chamber in 2007, the Court had been saturated for the better part of a decade with documentation of anti-Roma prejudice and discrimination’.⁵²⁶ Information of the sort Goldston points out may thus facilitate the Court’s assessment of whether certain religious or cultural groups either in the region or in certain Council of Europe Member States are particularly vulnerable. The vulnerability of these groups would thus be established on an *ad hoc* basis, influenced by specific contexts.

Alternatively, the Court could rule in a more general and principled fashion that religious and cultural minorities are by definition particularly vulnerable. One of the arguments traditionally made in favor of this kind of approach is that, while majorities are likely to have their concerns addressed in general rules, minorities are likely to have theirs ignored as a result of power differentials in the political process. In the ECHR context, Carolyn Evans for example argues that ‘the groups that tend to be the most vulnerable to being overlooked in the legislative drafting process are small communities with little political influence, possibly living somewhat marginalized from the wider society’.⁵²⁷ In fact, this seems to be rationale underlying the Court’s group vulnerability reasoning in *Chapman*, as noted in Chapter I.⁵²⁸

This sort of recognition, of course, does not necessarily mean that minorities will always be entitled to exemptions.⁵²⁹ Indeed, the concerns of vulnerable group members might be defeated by public interests under Articles 8(2) or 9(2) ECHR. States may sometimes find it difficult to adapt their laws to the myriad ways in which they may interfere with different people’s cultural and religious beliefs or practices. Moreover, the Court can always rely on the margin of appreciation as regards the appropriate means of achieving recognition of the vulnerable group members’ rights. Indeed, exceptions to general rules are not the only way in which States may make sure that their norms do not restrict applicants’ cultural and religious

and social context is apt to discover whether the official action has resulted from the politics of group status domination – just as his or her concern about status harm is apt to translate into an inquiry into context’. *Ibid.* at 372.

⁵²⁵ Goldston, James A., ‘The Struggle for Roma Rights: Arguments that Have Worked’, 32(2) *Human Rights Quarterly* (2010) at 323.

⁵²⁶ *Ibid.* at 324.

⁵²⁷ Evans, Carolyn, *FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (Oxford University Press, 2001) at 197. Relying on a similar rationale, Laurens Lavrysen makes a similar argument in relation to the poor. See Lavrysen, Laurens, ‘Poverty and Human Rights: A European Perspective’ (manuscript on file with author) and Marie-Benedicte Dembour and Tobias Kelly with respect to migrants in Dembour, Marie-Benedicte and Kelly, Tobias, ‘Introduction’ in Marie-Benedicte Dembour and Tobias Kelly (eds.) *ARE HUMAN RIGHTS FOR MIGRANTS?: CRITICAL REFLECTIONS ON THE STATUS OF IRREGULAR MIGRANTS IN EUROPE AND THE UNITED STATES* (Routledge, 2011) at 11 (arguing that rights are only ever achievable through political struggle and immigrants face particular problems in political organization).

⁵²⁸ See Chapter I, Part II.A.

⁵²⁹ See similarly, Evans, Carolyn, *FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (Oxford University Press, 2001) at 199.

practices disproportionately. Other means may include group consultation with vulnerable minority groups, more restrictive drafting of norms⁵³⁰ and other strategies that allow discretion to States in how to fulfill this responsibility.

III. The Potential of Group Vulnerability's Relational Character: The 'Less Vulnerable' Side

In explaining the rationale of her vulnerability thesis – which, as noted earlier, is understood as a shared human condition rather than as a condition of certain groups – Martha Fineman argues:

Of course, we must continue to consider how some individuals and groups are uniquely disadvantaged, rendered unequally and oppressively vulnerable, by the structures and ideological predispositions of our system. However, the inquiry cannot stop there. We must also explore why and how some, often only a few, but also frequently a majority, are and have been advantaged and privileged by that system. The question, then, is not only who is harmed, but also who benefits by the organization of society and the structure of our institutions, including the state.⁵³¹

In fact, anti-discrimination scholars have sometimes been criticized for putting too much emphasis on only 'one portion of the power system' (subordination) while obfuscating the other (domination).⁵³² Inspired by the concerns raised by Fineman and other critics of traditional ways of looking at inequality and discrimination, the question I ask in this part is therefore: Can – and should – a group vulnerability approach serve the larger purpose of addressing the advantage (re-)produced in societal and institutional arrangements? This is one of the crucial challenges for the Court's group-based vulnerability approach: to bring the privileged or advantaged – and not just a defined vulnerable group – within its gaze. In this regard, I want to put forward the following argument: group vulnerability – provided that it is applied with the dynamism of the Court's post-*Chapman* line of case law and with the caution advocated in Chapter I – has the potential to reach the privilege side Fineman and others are concerned with.

The group-vulnerability concept in its relational dimension already switches attention from the individual to the environment that puts her at a disadvantage. I agree with Fineman that the inquiry need not – and should not – stop here. In this regard, I do not see why the concept could not go further and *also* ask how the same environment that is *disadvantaging* some is simultaneously *privileging* others. Or, to use vulnerability language, group vulnerability can investigate not only what is making some *more* vulnerable but *also* what is making others *less* vulnerable. In fact, as shown in Chapter I, the Court tends to refer to certain groups as

⁵³⁰ *Ibid.* at 206.

⁵³¹ Fineman, Martha Albertson, 'Equality Still Elusive After All These Years' in Linda C. McClain and Joanna L. Grossman (eds.) *GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP* (Cambridge University Press, 2009) at 263.

⁵³² Wildman, Stephanie M., 'Language and Silence: Making Systems of Privilege Visible', 35(3) *Santa Clara Law Review* (1995) at 895 (arguing that many members affiliated with the dominant side gain much from it). *Ibid.* at 891.

‘particularly vulnerable’ rather than as just ‘vulnerable’. The term ‘particularly’ emphasizes a difference of degree. Framed this way, the concept implicitly acknowledges the possibility of not just heightened (more vulnerable groups) but also lessened vulnerability (less vulnerable groups).

A. Unmasking Privilege

The claim that law ‘knows no culture and recognizes no identity’ – a hallmark of the formal approach to equality – has been challenged in different bodies of legal scholarship.⁵³³ Thus, while critical race scholars have long exposed the ‘whiteness’ embedded in the law, feminist scholars have famously revealed its ‘maleness’. For example, Catharine MacKinnon observes: ‘[T]he male standpoint dominates civil society in the form of the objective standard – that standpoint which, because it dominates in the world, does not appear to function as a standpoint at all’.⁵³⁴ Similarly, in advocating an intersectional analysis based on sex and race to account for the experience of discrimination of African American women, Kimberle Crenshaw argues: ‘Race and sex . . . become significant only when they operate to explicitly disadvantage the victims, because the privileging of whiteness or maleness is implicit, it is generally not perceived at all’.⁵³⁵

What both groups of scholars ultimately share is the claim that ‘blindness masks a posture that is, in fact, gendered and raced’.⁵³⁶ They both point to the familiar concern about the fact that the universal is actually not the universal but the particular.⁵³⁷ Approaches such as this ‘seek to expose the cultural bias hidden in law not to search for a “truly” objective or neutral

⁵³³ Sarat, Austin and Kearns, Thomas R., ‘Responding to the Demands of Difference: An Introduction’ in Austin Sarat and Thomas R. Kearns (eds.) *CULTURAL PLURALISM, IDENTITY POLITICS, AND THE LAW* (The University of Michigan Press, 1999) at 13.

⁵³⁴ Mackinnon, Catharine, *TOWARD A FEMINIST THEORY OF THE STATE* (Harvard University Press, 1989) at 237 quoted in Gear, Anna, *REDIRECTING HUMAN RIGHTS: FACING THE CHALLENGE OF CORPORATE LEGAL HUMANITY* (Palgrave Macmillan, 2010) at 93.

⁵³⁵ Crenshaw, Kimberle, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’, *University of Chicago Legal Forum* (1989) at 151. Critical race scholars have searched ‘to make explicit the unacknowledged whiteness of facially neutral criteria of decision’. See Flagg, Barbara J., ‘Was Blind, But Now I See: White Race Consciousness and the Law’ 91 *Michigan Law Review* (1993) at 957. See also, Flagg, Barbara J., ‘Whiteness: Some Critical Perspectives’, 18 *Washington University Journal of Law and Policy* (2005) 1-11

⁵³⁶ Sarat, Austin and Kearns, Thomas R., ‘Responding to the Demands of Difference: An Introduction’ in Austin Sarat and Thomas R. Kearns (eds.) *CULTURAL PLURALISM, IDENTITY POLITICS, AND THE LAW* (The University of Michigan Press, 1999) at 13.

⁵³⁷ For similar concerns over the privileging of the perspectives of dominant cultural groups in norms, see debates within multiculturalism, including Kymlicka, Will, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (Oxford University Press, 1996) and Parekh, Bhikhu, *RETHINKING MULTICULTURALISM: CULTURAL DIVERSITY AND POLITICAL THEORY* (Palgrave Macmillan, 2000). See also, Young, Iris Marion, *JUSTICE AND THE POLITICS OF DIFFERENCE* (Princeton University Press, 1991) at 66-67. Young dubs ‘cultural imperialism’ one of the faces of oppression and describes it in the following way: ‘Cultural imperialism involves the universalization of a dominant group’s experience and culture, and its establishment as the norm’. *Ibid.* at 66.

position, from which to make legal decisions but, rather, to hold law accountable'.⁵³⁸ The problem, however, is that these particular perspectives are often so entrenched in societal and legal norms that people, especially those whose perspectives are therein embraced, do not get to notice them. In the context of culture, Dorothy E. Roberts for example shows the ways in which the dominant culture is embedded in the law and still not viewed as 'culture' but as the way things just naturally happen to be.⁵³⁹ Becoming aware of the points of reference submerged in 'natural' arrangements therefore facilitates recognizing those who are included in, and therefore advantaged by, the norm.⁵⁴⁰

In fact, more and more, courts ruling on diversity claims as well as legal scholars writing on these issues are becoming aware of the presence of these submerged perspectives in facially neutral rules. Julie Ringelheim, for example, argues that, given that institutions and norms are – for social and historical reasons – imbued with the majority's traditions, only non-dominant cultural expressions are rendered *visible* and problematic while the dominant ones remain *invisible*.⁵⁴¹ Ringelheim's concerns echoes what Barbara Flagg calls the 'transparency phenomenon', albeit in the context of race: the dominant view is so pervasive that it remains invisible or transparent.⁵⁴² Other scholars have gotten more specific and unmasked the particular (Christian) perspective implicit in certain constructs, most notably European secularism. Foblets and Alidadi, for instance, argue: 'the "secular norm" seems to be very coloured Christian normalcy that is being challenged by mainly newcomers whose integration in various respects is

⁵³⁸ Sarat, Austin and Kearns, Thomas R., 'Responding to the Demands of Difference: An Introduction' in Austin Sarat and Thomas R. Kearns (eds.) *CULTURAL PLURALISM, IDENTITY POLITICS, AND THE LAW* (University of Michigan Press, 1999) at 14.

⁵³⁹ Roberts, Dorothy E., 'Why Culture Matters to Law: The Difference Politics Make' in Austin Sarat and Thomas R. Kearns (eds.) *CULTURAL PLURALISM, IDENTITY POLITICS, AND THE LAW* (University of Michigan Press, 1999) 85-110. One crucial claim she makes in this respect is that the cultural unnoticed view is the result of power relationships: 'the transparent cultural standard hidden in the law got there as a result of social inequities'. *Ibid.* at 90.

⁵⁴⁰ See generally, Minow, Martha, 'Foreword Justice Engendered', 101 *Harvard Law Review* (1987) 10-95.

⁵⁴¹ Ringelheim, Julie, *DIVERSITÉ CULTURELLE ET DROITS DE L'HOMME: LA PROTECTION DES MINORITÉS PAR LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME* (Bruylant, 2006) at 429-432. In the ECHR context, see also, Ringelheim, Julie 'Chapman *Redux*: The European Court of Human Rights and Roma Traditional Lifestyle' in Eva Brems (ed.), *DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR* (Cambridge University Press, 2013) at 432 (arguing that 'the problem [in *Chapman*] lies with the fundamental inequality of treatment of their traditional way of life compared to that of the majority who lives in sedentary houses: *planning legislation and policies only take into account the lifestyle of the majority, considered as the norm*, and ignore the needs of the Roma minority.). Emphasis added. See also, Van den Brink, Marjolein, 'Equals in Faith – Faith in Equality: Equality as an Additional Standard for Decisions on the Accommodation of Religious Practices' in Titia Loenen and Jenny E., Goldschmidt (eds.) *RELIGIOUS PLURALISM AND HUMAN RIGHTS IN EUROPE* (Intersentia, 2007) 211-217 (highlighting the need to unmask privilege as an equality concern). In other contexts, see Moon, Richard, 'Introduction' in Richard Moon (ed.) *LAW AND RELIGIOUS PLURALISM IN CANADA* (University of British Columbia Press, 2008) at 9. Commenting on the judgment in *Syndicat Northcrest v. Amselem* of the Supreme Court of Canada, Moon observes: '[T]he erection of any structure on the balcony ... reflects a particular aesthetic vision that fails to take account of the religious practices of Orthodox Jewish residents. The exemption is granted in these cases because the law reflects the cultural practices of the dominant community and fails to take into account the needs, interests and understandings of religious minorities'.

⁵⁴² Flagg, Barbara J., 'Was Blind, But Now I See: White Race Consciousness and the Law', 91 *Michigan Law Review* (1993) 953-1017.

considered problematic. As a consequence, “demands” or “requests” are frequently met with defensive attitudes, affirming the abnormal condition of the minorities’.⁵⁴³

Another example, this time from the Court’s peer in South Africa, comes from the decision in *Kwazulu-Natal and Others v. Pillay*.⁵⁴⁴ The case concerned a Hindu female student not allowed to express her religion/culture by wearing a nose stud in a public school. The student successfully challenged the school dress code. The South African Court framed the case as one of discrimination (on the grounds of culture/religion) and acknowledged the privilege embedded in an apparently neutral norm in the following terms:

The norm embodied by *the Code is not neutral, but enforces mainstream and historically privileged forms of adornment*, such as ear studs which also involve the piercing of a body part, at the expense of minority and historically excluded forms. It thus places a burden on learners who are unable to express themselves fully and must attend school in an environment that does not completely accept them.⁵⁴⁵

Group vulnerability can serve as a door to a broader inquiry into possible privileged views that come to define ‘neutral’ norms in exclusionary ways. At a minimum, this should require not accepting neutrality at face value⁵⁴⁶ and, instead, scrutinizing the reasons offered by States in favor of privileging certain groups. This, of course, does not mean that privilege will be unjustifiable. As Fineman states: ‘[a] vulnerability approach . . . means that if the state confers privilege or advantage, there is an affirmative obligation for it to either justify the disparate circumstances or remedy them’.⁵⁴⁷ Once privileges are unveiled, an argument from non-discrimination should be relatively straightforward: since the rule already favors the practices of certain groups, it should be difficult for States to reject demands for equal inclusion without an objective and reasonable justification.⁵⁴⁸ I agree with authors like Van den Brink that there is a crucial role here for Article 14 ECHR.⁵⁴⁹ In fact, Article 14 ECHR is probably the most natural

⁵⁴³ Alidadi, Katayoun and Foblets, Marie-Claire, ‘Framing Multicultural Challenges in Freedom of Religion Terms: Limitations of Minimal Human Rights for Managing Religious Diversity in Europe’, 30(4) *Netherlands Quarterly of Human Rights* (2012) at 414.

⁵⁴⁴ *Kwazulu-Natal and Others v. Pillay* (CCT 51/06) [2007] ZACC 21, 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007).

⁵⁴⁵ *Ibid.* at p. 21. Emphasis added.

⁵⁴⁶ Flagg, Barbara J., ‘Was Blind, But Now I See: White Race Consciousness and the Law’, 91 *Michigan Law Review* (1993) at 973.

⁵⁴⁷ Fineman, Martha Albertson, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’, 20(1) *Yale Journal of Law and Feminism* (2008-2009) at 22.

⁵⁴⁸ See, e.g., Laborde, Cécile, ‘Equal Liberty, Non-Establishment and Religious Freedom’, *Journal of Legal Theory* (forthcoming): ‘Admittedly, when majority interests but not minority interests are exempted by the law, and there is a clear analogy between the opportunity set granted or denied their members, the argument for accommodation is relatively straightforward. This is the case when the law specifically makes provisions for members of majorities both to practice their religion and meet professional demands; yet denies minority members the same opportunity set’.

⁵⁴⁹ Van den Brink, Marjolein, ‘Equals in Faith – Faith in Equality: Equality as an Additional Standard for Decisions on the Accommodation of Religious Practices’ in Titia Loenen and Jenny E., Goldschmidt (eds.) *RELIGIOUS PLURALISM AND HUMAN RIGHTS IN EUROPE* (Intersentia, 2007) 211-217.

context for conducting the inquiry into the privileges embedded in the norms, practices or criteria.⁵⁵⁰

B. Avoiding ‘Difference’

One assumption usually following from taking for granted arrangements that appear ‘natural’ is that those who do not fit tend to be deemed ‘different’ or ‘deviant’.⁵⁵¹ Difference theorists have magnificently exposed this and other unstated assumptions usually underlying the legal analysis of what has been aptly called the ‘dilemma of difference’. Martha Minow, arguably its main exponent, explains:

The dilemma of difference grows from the ways in which this society assigns individuals to categories and, on that basis, determines whom to include in and whom to exclude from political, social, and economic activities. Because the activities are designed, in turn, with only the included participants in mind, the excluded seem not to fit because of something in their own nature’.⁵⁵²

‘Difference’, therefore, becomes salient not ‘because of a trait intrinsic to the person but because the dominant institutional arrangements were designed without that trait [but with other traits] in mind’.⁵⁵³ Thus, a key insight from theorists of difference is that it is crucial to eschew locating the problem ‘in the identity group rather than in the social relations that produce identity groupings’.⁵⁵⁴ Group vulnerability, as we have seen, does already take a crucial step in that direction by focusing the gaze outward, that is, by stating that some group members are particularly vulnerable in society as a result of historical prejudice, stigma, stereotypes and institutional arrangements rather than as something (‘wrong’) inherent in their nature.

Now, fully tackling the problem further requires that group vulnerability go further and scrutinize any particular perspective implicitly privileged in the law that may be rendering a broad array of others ‘visible’, ‘different’ or ‘deviant’. Focusing attention on the (cultural or religious) specificities of certain groups without seeing the (cultural or religious) specificities of those already accommodated in the norm leaves in place a hierarchical relationship between the two: only the former are viewed as ‘different’, and therefore, as having ‘specific’, ‘particular’ or

⁵⁵⁰ Equality, then, should work either as an additional standard or as the principal standard for evaluating claims seeking recognition of particular religious and cultural aspects. *Ibid.*

⁵⁵¹ Minow, Martha, ‘Foreword Justice Engendered’, 101 *Harvard Law Review* (1987) at 52.

⁵⁵² Martha Minow explains the dilemma in the following terms: ‘The problems of inequality can be exacerbated both by treating members of minority groups the same as members of the majority and by treating the two groups differently’. Either ignoring or addressing ‘difference’ carries such dangers. Minow, Martha, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* (Cornell University Press, 1990) at 20-21.

⁵⁵³ *Ibid.* at 70.

⁵⁵⁴ Minow, Martha, *NOT ONLY FOR MYSELF: IDENTITY, POLITICS AND THE LAW* (The New York Press, 1997) at 56. Minow insists on ‘the need to turn attention to the failures in the broader environment rather than to defects in themselves’. *Ibid.* at 89.

‘special’ needs.⁵⁵⁵ As a result, only the former may be perceived as ‘accommodated’ while the latter may be viewed as ‘accommodators’.⁵⁵⁶ In short, accommodating some on the basis of their specificities without regard to the specificities of those already included in the norm may paradoxically leave in place the hierarchies at the root of the exclusion.⁵⁵⁷ It is therefore crucial to stay away from formulations that never quite disturb the exclusionary character of the rule and that never quite reach equality.⁵⁵⁸

One suggestion emerging from this part of the analysis is therefore that the Court should keep emphasizing the idea that some group members are *more* vulnerable than others (while being aware that there are others *less* vulnerable).⁵⁵⁹ The Court should thus make sure to keep using the term ‘particularly’ when referring to vulnerable groups or, perhaps even better, ‘groups with heightened vulnerabilities’.⁵⁶⁰ In fact, it is the increased character of vulnerability and not just their vulnerability that triggers stronger protection. In alluding to the possibility of different degrees of vulnerability or varying vulnerabilities across groups, formulations of this sort avoid positing some of these groups as the only, quintessential vulnerable subjects.

⁵⁵⁵ The risks embedded in ‘specificity’ strategies – that is, in strategies that suggest that some groups’ particular needs or specificities require differential treatment have been extensively addressed in feminist literature. *See, e.g.*, Otto, Dianne, ‘Disconcerting “Masculinities”: Reinventing the Gendered Subject(s) of International Human Rights Law’ in Doris Buss and Ambreena Manji (eds.) *INTERNATIONAL LAW: MODERN FEMINIST APPROACHES* (Hart Publishing, 2005) at 123-124: ‘The extensive cataloguing of women’s injuries and disadvantages, while progressive in many ways and clearly necessary for making women’s human rights abuses legally cognizable, continues to affirm the masculinity of the universal subject who needs no special enumeration of his gender-specific injuries’.

⁵⁵⁶ Rejecting the language of reasonable accommodation given the hierarchies between the giver and the taker embedded in the term, Lori Beaman, expresses a similar concern: ‘when framed in the language of reasonable accommodation, the issues seem to be whether or not a special exception should be made to an otherwise neutral law or whether the rights of the religious individual or group should prevail over the rights or interests of the public. Yet no one is disputing that weapons should be banned from the schoolyard.’ Beaman, Lori G., ‘Defining Religion: The Promise and the Peril of Legal Interpretation’ in Richard J. Moon (ed.) *LAW AND RELIGIOUS PLURALISM IN CANADA* (University of British Columbia Press, 2009) at 8.

⁵⁵⁷ Otto, Dianne, ‘Disconcerting “Masculinities”: Reinventing the Gendered Subject(s) of International Human Rights Law’ in Doris Buss and Ambreena Manji (eds.) *INTERNATIONAL LAW: MODERN FEMINIST APPROACHES* (Hart Publishing, 2005) at 123-124 (arguing that ‘the practice of including women by way of drawing attention to their specificities serves to reproduce their marginalization by resurrecting protective and imperial subjectivities, rather than challenging the hierarchies of gender’). The argument I make in this part is inspired by Otto’s concerns.

⁵⁵⁸ Beaman, Lori G., ‘Defining Religion: The Promise and the Peril of Legal Interpretation’ in Richard J. Moon (ed.) *LAW AND RELIGIOUS PLURALISM IN CANADA* (University of British Columbia Press, 2009) at 8. As she argues in the context of reasonable accommodation in Canada, ‘[w]hen we “accommodate” someone, we grant an exception to the rule, rather than questioning the inclusiveness of the rule itself’.

⁵⁵⁹ Dianne Otto is right to insist that we need to be distrustful of legal constructions that restage long-standing hierarchies. Otto, Dianne, ‘Disconcerting “Masculinities”: Reinventing the Gendered Subject(s) of International Human Rights Law’ in Doris Buss and Ambreena Manji (eds.) *INTERNATIONAL LAW: MODERN FEMINIST APPROACHES* (Hart Publishing, 2005) at 129 (encouraging feminist human rights advocates ‘to be wary of legal constructions that cast women as victims in need of protection.’).

⁵⁶⁰ The European Committee of Social Rights appears to have coined this term. *See, e.g.*, European Committee of Social Rights, *International Federation for Human Rights (FIDH) v. Belgium*, Complaint No. 75/2011, 18 March 2013.

Conclusion

In this Chapter, I have made the case for extending group vulnerability analysis to religious and cultural claims. Introducing group vulnerability reasoning in cases where the Court finds it established that it is dealing with a member of a particularly vulnerable group is likely to take the Court out of the ‘miniature frame’ within which it tends to examine claims of freedom of religion, religious discrimination and respect for cultural ways life. Moreover, the Court should take the opportunity to expand the focus of group vulnerability and scrutinize any potential privilege or advantage embedded in the rule, as this may facilitate equality analysis and reduce the risks of reinstating hierarchical relations that stand on the way to meaningful equality. In the next Chapter, and since I have not examined language claims yet, I show what group vulnerability analysis may look like in practice by rewriting a Court’s judgment in the context of a language-related claim.

CHAPTER III

THE ELEPHANT IN THE (COURT)ROOM: A VULNERABLE GROUP*

Introduction

As an instrument of civil and political rights protection, the ECHR does not guarantee language rights as such. Save a few exceptions inherent in the protection against arbitrary detention and the right to a fair trial provided by Articles 5 § 2⁵⁶¹ and 6 § 3 (a) and (e),⁵⁶² the ECHR ‘does not *per se* guarantee the right to use a particular language in communications with public authorities or the right to receive information in a language of one’s choice’.⁵⁶³ The only other explicit reference to language in the ECHR is the prohibition of discrimination on the basis of language (Article 14 ECHR). What is more, the margin of appreciation granted to States in this sphere is ‘particularly wide’, as Contracting States’ language policies are influenced by a multitude of historical and cultural factors that make it difficult for the Court to find a common denominator.⁵⁶⁴

Yet, and despite the Court’s caution in this domain, a State language policy can be the object of supervision insofar as it conflicts with an ECHR right.⁵⁶⁵ Notwithstanding the lack of recognition of language rights in the ECHR, the Court has progressively recognized the language components of some rights and established that language measures may interfere with the

* This Chapter is based on Peroni, Lourdes, ‘Erasing Q, W and X, Erasing Cultural Differences’ in Eva Brems (ed.) *DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR* (Cambridge University Press, 2012) 445-469. My thanks to Eva Brems, Laurens Lavrysen, Stijn Smet and Alexandra Timmer for their helpful comments on earlier versions of this Chapter. I have made some modifications to the version appearing in the edited volume. The most substantial additions are reflected in the first seven paragraphs of the Introduction of this Chapter. They are aimed at situating the issues herein addressed within the Court’s broader language-related case law.

⁵⁶¹ The right of persons to be informed promptly, in a language they understand, of the reasons for their arrest.

⁵⁶² The right of persons to be informed promptly, in a language they understand, of the nature and cause of the accusation against them and the right to have the assistance of an interpreter if they cannot understand or speak the language used in court

⁵⁶³ ECtHR, *Şükran Aydın and Others v. Turkey*, 22 January 2013 § 50. See also, ECtHR, *Kozlovs v. Latvia*, 10 January 2002 (‘l’exigence d’utiliser la langue officielle de l’Etat devant les tribunaux civils n’est pas, en tant que telle, contraire à l’article 6 § 1 de la Convention’); and ECtHR, *Birk-Levy v. France*, 21 September 2010, p. 11 (‘La Cour rappelle qu’aucun article de la Convention ne consacre expressément la liberté linguistique en tant que telle’). Thus, the ECHR does not guarantee the right to use a particular language in communications with public authorities for electoral purposes. See, e.g., ECmmHR, *Fryske Nasjonale Partij and Others v. the Netherlands*, 12 December 1985 (Article 3 of Protocol 1 ‘is not restricted by a requirement that candidates enroll in a particular language’) and *Association “Andecha Astur” v. Spain*, 7 July 1997 (‘The right to stand for parliamentary elections is not restricted by a requirement that candidates should be registered in a particular language’). Moreover, the Court has held that the choice of a parliamentary assembly’s working language falls outside the scope of Article 10 ECHR. See, e.g., ECtHR, *Birk-Levy v. France*, 21 September 2010.

⁵⁶⁴ See, e.g., ECtHR, *Şükran Aydın and Others v. Turkey*, 22 January 2013 § 50.

⁵⁶⁵ Ringelheim, Julie, *DIVERSITÉ CULTURELLE ET DROITS DE L’HOMME: LA PROTECTION DES MINORITÉS PAR LA CONVENTION EUROPÉENNE DES DROITS DE L’HOMME* (Bruylant, 2006) at 219.

exercise of other ECHR rights.⁵⁶⁶ This has most frequently occurred in the context of Article 8 ECHR (respect for family life, private life and correspondence) and Article 10 ECHR (freedom of expression) as well as in the context of Article 2 of Protocol 1 (the right to education) and Article 3 of Protocol 1 (the right to free elections).

Article 10 ECHR, for example, does not guarantee the right to use the language of one's choice in administrative matters.⁵⁶⁷ However, the provision 'encompasses the freedom to receive and impart information and ideas in any language that allows persons to participate in the public exchange of all varieties of cultural, political and social information and ideas'.⁵⁶⁸ The Court has said that in such contexts 'language as a medium of expression undoubtedly deserves protection under Article 10'.⁵⁶⁹ Likewise, although Article 2 of Protocol 1 'does not specify the language in which education must be conducted, the right to education would be meaningless if it did not imply in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages, as the case may be'.⁵⁷⁰ Moreover, 'requiring a candidate for election to the national parliament to have sufficient knowledge of the official language pursues a legitimate aim' but the removal of her name from the list of candidates for lack of language proficiency may be disproportionate if the procedure offers no guarantee of objectivity, procedural fairness and legal certainty.⁵⁷¹ In the context of Article 8 ECHR, the Court has examined language concerns arising from interferences with prisoners' correspondence, including decisions to withhold letters written in certain languages.⁵⁷² The Court has also examined language concerns in its Article 8 ECHR name case law; in particular, complaints against requirements to adapt names to official language policies (the object of discussion of this Chapter).

⁵⁶⁶ *Ibid.* at 179 and 218.

⁵⁶⁷ See, e.g., ECmHR, *A Group of Inhabitants of Sint-Pieters-Leeuw v. Belgium*, 16 December 1968.

⁵⁶⁸ ECtHR, *Şükran Aydın and Others v. Turkey*, 22 January 2013 § 52. The case concerned a blanket prohibition on the use of any language other than the official language (Turkish) in election campaigning. The Court distinguished this case from others in that it did not concern the use of an unofficial language in the context of communications with public authorities or before official institutions. It found a violation of Article 10 ECHR given that, notwithstanding the national authorities' margin of appreciation, 'the ban in question did not meet a pressing social need and was not proportionate to the legitimate aim adduced by the Government'. *Ibid.* § 56. Other examples of Article 10 ECHR cases with language implications include ECtHR, *Ulusoy and Others v. Turkey*, 3 May 2007 (concerning the prohibition to perform a piece of theater in Kurdish); and ECtHR, *Association Ekin v. France*, 17 July 2001 (concerning discretionary power to ban the book 'Euskadi at war' given its foreign origin or foreign-language character).

⁵⁶⁹ ECtHR, *Şükran Aydın and Others v. Turkey*, 22 January 2013 § 52.

⁵⁷⁰ ECtHR (GC), *Catan and Others v. Moldova and Russia*, 19 October 2012 § 137. See also, ECtHR (Plenary), *Case relating to certain aspects of the law on the use of languages in education in Belgium v. Belgium*, 23 July 1968, p. 28.

⁵⁷¹ ECtHR, *Podkolzina v. Latvia*, 9 April 2002 §§ 34 and 36. The case concerned a Latvian national, member of the Russian-speaking minority initially eligible for the national Parliament. The Court found a violation of Article 3 of Protocol No. 1: 'the Court concludes that the decision to strike the applicant out of the list of candidates cannot be regarded as proportionate to any legitimate aim pleaded by the Government'.

⁵⁷² See, e.g., ECtHR, *Mehmet Nuri Özen and Others v. Turkey*, 11 January 2011 (concerning prison restriction on letters written in a language other than Turkish) and ECtHR, *Senger v. Germany*, 3 February 2009 (concerning the stoppage of the letters in Russian by prison authorities). The Court found a violation of Article 8 ECHR in *Mehmet Nuri Özen* and declared *Senger* inadmissible.

In general, the Court has been ‘reluctant to deduce meaningful language rights from other provisions’.⁵⁷³ Most recently, however, it has shown greater concern for the needs of linguistic minorities, especially in the sphere of public education.⁵⁷⁴ Indeed, in *Catan and Others v. Moldova and Russia*, concerning a complaint by children and parents from the Moldovan community in Transdnistria against banning the use of Latin script in schools and requiring that Moldovan be written in the Cyrillic script, the Court’s Grand Chamber found a violation of Article 2 of Protocol 1 in respect of the Russian Federation.⁵⁷⁵ The Court’s conclusion was that ‘the “MRT”’s language policy, as applied to these schools, was intended to enforce the Russification of the language and culture of the Moldovan community living in Transdnistria’.⁵⁷⁶

Earlier in 2001, in *Cyprus v. Turkey*, concerning the children of Greek-Cypriot parents in northern Cyprus wishing to pursue a secondary education in Greek, the Court held: ‘Having assumed responsibility for the provision of Greek-language primary schooling, the failure of the “TRNC” authorities to make continuing provision for it at the secondary-school level must be considered in effect to be a denial of the substance of the right at issue’.⁵⁷⁷ Moreover, unlike in many other cases, where language is taken into account in an instrumental way – that is, as a way to guarantee the effectiveness or meaningfulness of the right in question – in *Cyprus v. Turkey* the Court appears to take into account the applicants’ language wishes as such.⁵⁷⁸ The Court says for example: ‘The authorities must no doubt be aware that it is the wish of Greek-Cypriot parents that the schooling of their children be completed through the medium of the Greek language’.⁵⁷⁹

The picture is however less bright when it comes to language-related claims under Article 8 ECHR, alone or in conjunction with Article 14 ECHR. These claims have most frequently come from minority applicants wishing to preserve the linguistic integrity of their names. Usually, the Court has dismissed this kind of claims without regard to the language aspect involved in the protection of names under Article 8 ECHR. Moreover, as regards the Article 14 ECHR part of these claims, the Court has tended to apply a formal equality rationale: it has been

⁵⁷³ Henrard, Kristin, ‘The European Convention on Human Rights and the Protection of the Roma as a Controversial Case of Cultural Diversity’, *European Diversity and Autonomy Papers* EDAP 5/2004 at 15-16 (arguing that in *Cyprus v. Turkey*, the Court seems to be moving away from its rigid stance in the *Belgian Linguistics Case*). See also, Ringelheim, Julie, *DIVERSITÉ CULTURELLE ET DROITS DE L’HOMME: LA PROTECTION DES MINORITÉS PAR LA CONVENTION EUROPÉENNE DES DROITS DE L’HOMME* (Bruylant, 2006) at 181 (arguing that there has been an evolution in the Court’s case law towards greater attention to the effects of language regulations on the exercise of certain rights, in particular in the domain of public education).

⁵⁷⁴ See Ringelheim, Julie, *DIVERSITÉ CULTURELLE ET DROITS DE L’HOMME: LA PROTECTION DES MINORITÉS PAR LA CONVENTION EUROPÉENNE DES DROITS DE L’HOMME* (Bruylant, 2006) at 181.

⁵⁷⁵ What is further noteworthy about the *Catan* judgment is that six dissenting judges also found violation of Article 8 ECHR. The dissenters read into the right to respect for private and family life ‘the right to the recognition of one’s language as a component of cultural identity’. See Partly Dissenting Opinion of Judges Tulkens, Vajić, Berro-Lefèvre, Bianku, Poalelungi and Keller in ECtHR (GC), *Catan and Others v. Moldova and Russia*, 19 October 2012 § 2.

⁵⁷⁶ ECtHR (GC), *Catan and Others v. Moldova and Russia*, 19 October 2012 § 144.

⁵⁷⁷ ECtHR (GC), *Cyprus v. Turkey*, 10 May 2001 § 278.

⁵⁷⁸ Ringelheim, Julie, *DIVERSITÉ CULTURELLE ET DROITS DE L’HOMME: LA PROTECTION DES MINORITÉS PAR LA CONVENTION EUROPÉENNE DES DROITS DE L’HOMME* (Bruylant, 2006) at 218-219.

⁵⁷⁹ ECtHR (GC), *Cyprus v. Turkey*, 10 May 2001 § 278.

concerned with whether the rule or practice in question is applied identically to all rather than with its actual impact on members of certain linguistic groups.⁵⁸⁰

One case in which the Court misses the language and equality aspects of Article 8 ECHR/Article 14 ECHR claims is *Kemal Taşkın and Others v. Turkey*.⁵⁸¹ *Kemal Taşkın* concerned the refusal to register the applicants' Kurdish names on the basis that the letters 'q', 'w' and 'x' do not exist in the Turkish alphabet. In this Chapter, I wish to explore what group-vulnerability reasoning can add to this type of cases. To this end, I engage in a rewriting exercise of the *Kemal Taşkın* judgment, showing how both the reasoning and the outcome of the case would have been different, had the Court incorporated vulnerable-group analysis.

At first glance, the case is just about names and letters. A thorough examination reveals nonetheless the great complexity and substance that may lie behind symbols. Three characters and eight names can embody power and culture. This contention is far from being a novelty. Yet it is remarkable to see some of the fundamental challenges of diversity all at once in three letters. Private-public intersection and equality are only some of these challenges. It is hard to think of any other name case where the Strasbourg Court could have integrated a group-vulnerability-sensitive perspective more naturally into its legal reasoning. Instead, the Court turned away from the real issues at stake and missed the chance to break new ground in its name case law.

If I had to capture my argument in one sentence, I would say this Chapter seeks to make a case against the illegitimate and unjustified suppression of differences. The argument requires making visible what is ultimately at stake for members of language minorities. It further requires meaningfully scrutinizing States' purposes behind name-related policies in search of any 'assimilationist bias'.⁵⁸² Albeit different, both routes cut in the same direction: they seek to protect what applicants regard as a symbol of their cultural background. One route entails recognizing the importance of applicants' cultural symbols. The other involves unveiling unjustified attempts to suppress them.

My full argument will come into view through five proposals. I suggest introducing two of them in the analysis under Article 8 ECHR (the right to respect for private and family life) and the other two in the assessment under Article 14 ECHR (prohibition of discrimination), together with Article 8 ECHR. The last and fifth proposal cuts across both sets of analysis. My first suggestion seeks to bring the *cultural dimension* of language minorities' names to the foreground

⁵⁸⁰ There is no doubt that language is an element intrinsic to the organization and functioning of a State; courts and national parliaments have to work in a specific language(s). See Ringelheim, Julie, DIVERSITÉ CULTURELLE ET DROITS DE L'HOMME: LA PROTECTION DES MINORITÉS PAR LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME (Bruylant, 2006) at 174. Any expectation of non-establishment or non-endorsement of a particular language(s) is therefore unrealistic. Yet where various language groups live together, the consequences of language choices are not innocuous for those whose language is not that of the State. *Ibid.* at 431. To the extent that these policies advantage some and disadvantage others, they can be challenged on the basis of equality. *Ibid.*

⁵⁸¹ ECtHR, *Kemal Taşkın and Others v. Turkey*, 2 February 2010. Hereinafter, *Kemal Taşkın*.

⁵⁸² I borrow the expression 'assimilationist bias' from Kenji Yoshino in Yoshino, Kenji, 'Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"' 108 *Yale Law Journal* (1998-1999) 485-571.

of Article 8 ECHR analysis.⁵⁸³ My second proposal, drawing on Kenji Yoshino's work, emphasizes the need to reject attempts to turn the claim that a group can change a certain trait into the claim that it should do so without further investigating why.⁵⁸⁴ The third and fourth proposals aim to expose the possible discriminatory implications of official language policies for members of vulnerable linguistic groups in plurilingual societies. These proposals attempt to draw attention to a common misconception underlying governments' arguments: the neutral and innocuous character of such policies. My last and crosscutting proposal highlights the need to pay greater attention to *context* and to the *group vulnerability* arising from past and continuing disadvantageous practices. I apply group vulnerability analysis to (i) bring to the fore the applicants' historical disadvantage and (ii) to unmask and challenge the language privilege embedded in the law.

In the following pages, I introduce and explain each of these elements and indicate why and how the Court should have integrated them into its analysis. First, I present the facts of the case, outline the Court's judgment and situate the decision in the wider name case law. Then, I examine what a cultural inquiry in minority name cases may look like. I underscore the relevance of historical context in assessing the significance that name changes may have for members of non-dominant groups and in evaluating the reasons lying beneath States' name policies. I next turn to the backdrop against which *Kemal Taşkın* should have been examined and, drawing on the European Court of Human Rights' case law on 'vulnerable groups', argue for introducing group-vulnerability analysis into the case. I subsequently underline the impossibility of neutrality of State language choices and their disadvantageous effects on non-dominant linguistic groups. Finally, after offering some brief conclusions, I attempt to show through the redrafted judgment how my proposals may unfold in practice.

I. Eight Applicants in Search of a *Kurdish* Name: The Arguments, the Judgment and the Case Law

A. The Parties' Arguments

Following the lifting of legal naming restrictions in Turkey in 2003,⁵⁸⁵ eight Turkish nationals of Kurdish origin applied for registration of their Kurdish names containing the letters 'q', 'w' and 'x'. The applicants were known by these names in their inner circles but were officially registered under other names due to restrictions in force at the time of their birth. The applications were rejected on the ground that the letters in the names they requested did not exist

⁵⁸³ Julie Ringelheim emphasises this 'cultural dimension' of names. Ringelheim, Julie, *DIVERSITÉ CULTURELLE ET DROITS DE L'HOMME: LA PROTECTION DES MINORITÉS PAR LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME* (Bruylant, 2006) at 192.

⁵⁸⁴ Yoshino, Kenji, 'Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of 'Don't Ask, Don't Tell,''' 108 *Yale Law Journal* (1998-1999) at 506 and Yoshino, Kenji, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (Random House, 2007) at 138.

⁵⁸⁵ Law 1587 on civil status registries prohibited the registration of names incompatible with the 'national culture'. The reference to 'national culture' was eliminated by Law 4928 of 15 July 2003. *Kemal Taşkın* § 26.

in the Turkish alphabet.⁵⁸⁶ Law 1353, adopted on 1 November 1928, requires the use of the Turkish alphabet in official documents. All applicants' requests were therefore denied on this basis except for one of them, which was partly admitted. In this one case, domestic courts ordered the registration of the applicant's name as 'Baver' instead of 'Bawer', as originally written in Kurdish. The Kurdish 'w' was thus replaced by what the Turkish authorities considered its closest phonetic equivalent in Turkish. Following the registration refusals, the applicants turned to the European Court alleging a violation of their right to respect for private life (Article 8 ECHR) and of the prohibition of discrimination on the basis of their affiliation to an ethnic minority (Article 14 ECHR in conjunction with Article 8 ECHR). They argued that, whereas non-nationals and dual-nationals were able to register their names with characters inexistent in the Turkish alphabet, they, as nationals of Kurdish origin, were denied such a possibility. The applicants further claimed that the letters 'q', 'w' and 'x' were also used in commercial products.

The Turkish government justified the restrictions on the applicants' right to respect for private life on the grounds of order and defense of the rights of others through the establishment of an official language. According to the government, the obligation to transpose the names following the rules of the national alphabet did not constitute a failure to respect the applicants' right to private life. In the government's view, the inconvenience suffered by the applicants was not of sufficient importance, as they could have simply transposed their names using the letters of the national alphabet – i.e., 'k', 'ks' and 'v' – which, when pronounced, produce the same sounds as the letters 'q', 'x', and 'w', respectively. As for the alleged discrimination, the Turkish government said that the rule requiring names to be registered with the letters of the Turkish alphabet was applied to all citizens without distinction. All other signs foreign to Turkish, the government claimed, were similarly rejected.

B. The Court's Judgment

The Court did not find a violation of Article 8 ECHR. The main reason was that, at the relevant time, the applicants did have the possibility of registering their Kurdish names provided that they did so in accordance with the Turkish alphabet. The Strasbourg Court pointed out that, thanks to the phonetic transcription, it was possible within the Turkish system to register names with letters whose exact written matches did not exist in the Turkish alphabet. Moreover, the Court remarked that there was no indication that the applicants' names, if spelled with Turkish letters, would acquire a vulgar or ridiculous meaning, likely to cause them inconvenience in their social life or create any obstacle to their personal identification.

The Court also rejected the alleged violation of Article 14 ECHR, coupled with Article 8 ECHR. For the Court, nothing suggested that the Turkish authorities would have reached a different decision if the request to spell a name with letters non-existent in the Turkish alphabet came from non-Kurds. As for the inclusion in the civil registry of names of persons with civil

⁵⁸⁶ Article 3 of Turkey's Constitution grants Turkish the status of official language.

status documents issued by other States with characters absent in the Turkish alphabet, the Court held that this practice was based on an international convention aimed at introducing uniformity in the matter, which in itself could not be considered an unreasonable aim. Moreover, the Court was not sure whether the applicants, as individuals wishing to change their names, were in a situation analogous to that of those with civil documents issued by other States under their own rules.

C. The Court's (Minority) Name Case Law

Disputes over names, the Court has time and again affirmed, fall within the scope of Article 8 ECHR in relation to both 'private life' and 'family life'.⁵⁸⁷ Not surprisingly, the applicability of this provision was not contested in *Kemal Taşkın*. The Court reaffirmed the principle that names, as means of personal identification and links to a family, concern private and family life.⁵⁸⁸ *Kemal Taşkın* was however particularly challenging in that, like in other cases concerning the adaptation of names according to official language rules, name changes could not be dissociated from State language policies.⁵⁸⁹ In this respect, the Court's established principle is that each Contracting Party is 'at liberty to impose and regulate the use of its official language or languages in identity papers and other official documents' on condition that the Convention rights are respected.⁵⁹⁰ Moreover, the margin of appreciation given to States in the area of recognition and regulation of names is particularly wide, as a range of historical, linguistic, religious and cultural factors in each of these countries influence the use of names.⁵⁹¹

II. A Rewriter in Search of the Real Issues and Reasons: Cultural Symbols and Assimilationist Bias (Article 8 ECHR)

A. Preliminary Considerations

The outcome in *Kemal Taşkın* does not come as a surprise. It is determined, in large part, by the wide margin of appreciation granted to States in the area. Even though Turkey has not signed the FCNM, one could still go as far as arguing that the European consensus on minority protection is substantial enough to call for narrowing States' margin of appreciation. The Court has accepted in its wider case law the existence of an emerging international consensus amongst the Council of Europe's Member States recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle.⁵⁹² Reducing States' discretion as a result of the

⁵⁸⁷ See, e.g., ECtHR, *Burghartz v. Switzerland*, 22 February 1994 § 24 and *Sijerna v. Finland*, 25 November 1994 § 37.

⁵⁸⁸ *Kemal Taşkın* § 45.

⁵⁸⁹ See, e.g., ECtHR, *Kuharec alias Kuhareca v. Latvia*, 7 December 2004 and *Mentzen v. Latvia*, 7 December 2004.

⁵⁹⁰ See, e.g., ECtHR, *Bulgakov v. Ukraine*, 11 September 2007 § 43(a).

⁵⁹¹ See, e.g., ECtHR, *Kuharec alias Kuhareca v. Latvia*, 7 December 2004, p. 17 and *Mentzen v. Latvia*, 7 December 2004.

⁵⁹² See, e.g., ECtHR, *Muñoz Díaz v. Spain*, 8 December 2009 § 60.

growing European consensus may sound desirable. However, the actual application of this line of reasoning remains unrealistic.⁵⁹³ What is more, although in the past the Court has referred to the FCNM in its minority-name case law even when respondent States have not signed or ratified it, the reference has been merely formal.⁵⁹⁴ The FCNM has become relevant in the Court's actual legal reasoning when it has been ratified by the Respondent State.⁵⁹⁵ Where ratification has not taken place, the FCNM has tended to remain background information.⁵⁹⁶

For these reasons, I do not challenge the margin of appreciation standard in the Court's Article 8 ECHR name case law based on the consensus argument. My main disagreements in this first part lie with the Court's application in *Kemal Taşkın* of an instrumentalist approach to names (names as means of personal identification)⁵⁹⁷ and with its disregard for historical/contextual elements in the proportionality analysis. Once the former is abandoned and the latter is embraced, it becomes clear that the implications for historically vulnerable minorities may be serious enough to amount to disproportionate interference with their private and family lives. *Kemal Taşkın* is not the first minority name case decided by the European Court.⁵⁹⁸ It is, however, one of the cases that has most clearly offered strong contextual elements to push for reconsideration of the Court's approach toward ethno-linguistic minorities in its name case law. The judgment itself offers enough background information attesting to the historical vulnerability of the Kurdish minority in Turkey and casting doubts on the motivations underlying the restriction. For the same reasons, *Kemal Taşkın* made a strong case for broadening the analytical scheme applied in the name case law so as to expressly include cultural concerns alongside others like personal identity and practical ones.

⁵⁹³ In *Chapman v. the United Kingdom*, decided in 2001, the Court did not view this consensus as 'sufficiently concrete' to draw any guidance and, as a result, remained reluctant to narrow the state's margin of appreciation. ECtHR (GC), *Chapman v. the United Kingdom*, 18 January 2001 § 94. In the 2009 case of *Muñoz Díaz v. Spain*, although the Court no longer held the consensus was 'not sufficiently concrete', it did not go on to discuss the implications of the consensus for states' margin of appreciation. ECtHR, *Muñoz Díaz v. Spain*, 8 December 2009.

⁵⁹⁴ See, e.g., ECtHR, *Kuharec alias Kuhareca v. Latvia*, 7 December 2004, pp. 9-10 and *Baylac-Ferrer and Suarez v. France*, 25 September 2008, p. 8. France has not signed the FCNM and Latvia had not yet ratified it at the time the decision was handed down.

⁵⁹⁵ See, e.g., ECtHR, *Bulgakov v. Ukraine*, 11 September 2007 § 48. Of particular relevance for minority-name case law is Article 11 § 1 of the FCNM: 'The Parties undertake to recognise that every person belonging to a national minority has the right to use his or her surname (patronymic) and first names in the minority language and the right to the official recognition of them, according to modalities provided for in their legal system'.

⁵⁹⁶ See, e.g., ECtHR, *Kuharec alias Kuhareca v. Latvia*, 7 December 2004 and ECtHR, *Baylac-Ferrer and Suarez v. France*, 25 September 2008.

⁵⁹⁷ On understanding names beyond 'instrumental' or 'functionalist' concerns, see, e.g., Ringelheim, DIVERSITÉ CULTURELLE ET DROITS DE L'HOMME (Bruylant, 2006) at 192 and Tirosh, Yofi, 'A Name of One's Own: Gender and Symbolic Legal Personhood in the European Court of Human Rights', 33 *Harvard Journal of Law and Gender*, (2010) at 300-306.

⁵⁹⁸ See, e.g., ECtHR, *Kuharec alias Kuhareca v. Latvia*, 7 December 2004; ECtHR, *Bulgakov v. Ukraine*, 11 September 2007; and ECtHR, *Baylac-Ferrer and Suarez v. France*, 25 September 2008.

B. What's at Stake in a Minority Member's Name?

At the heart of the applicants' complaints lies an attempt to maintain what they see as a symbol of their cultural background. The linguistic and cultural attachment to their names is clear from both the applicants' arguments and the historical context of the case. All of the applicants were originally registered under other names due to restrictions in force at the time of their birth. All of them requested the registration of their Kurdish names as soon as such restrictions were lifted. One of them, Doğan Genç, claimed that keeping his Kurdish name 'Ciwan' as originally spelled would enable him to better affirm himself. The Court, however, fails to see that the impact of the restrictive measures goes beyond any practical difficulties, ridicule, or personal identification problems. Indeed, for the Court, the applicants did not demonstrate that their Kurdish names, if spelled according to the Turkish alphabet, would take a vulgar or ridiculous meaning likely to cause them inconveniences in their social life or to create personal identification obstacles. By focusing on questions that are simply not relevant in *Kemal Taşkın*, the Court turns away from what is fundamentally at stake in the case.

Kemal Taşkın seems to pose what Yofi Tirosh calls 'legal challenges to the functionalist approach to names'.⁵⁹⁹ In a study of the European Court's name case law, Tirosh explains how applicants' more complex narratives are forced to fit into 'the available categories of legal reasoning'.⁶⁰⁰ The author argues that, when 'the narrative does not fit, the Applicant loses'.⁶⁰¹ My sense is that this is exactly what happened in *Kemal Taşkın*. The framework applied by the Court in this case did not recognize the applicants' cultural attachment to their Kurdish-spelled names. The Court's fault thus lies with the application of an inadequate analytical scheme – that is to say, of an instrumentalist approach – to a more complex reality.⁶⁰² Perhaps, had the Court realized what was really at stake for the applicants, it would have searched for alternative frameworks capable of addressing the core of the problem more adequately. Various cases in the Court's wider name jurisprudence show that a more complex framework is possible. In some instances, the Court has assessed applicants' personal attachment to a name.⁶⁰³ In others, it has even shown itself sensitive to the name's affective dimension.⁶⁰⁴ Minorities' linguistic or cultural attachment to their names remains however, for the most part, unaddressed in the Court's case law.⁶⁰⁵ At times, the Court simply overlooks the fact that applicants belong to a minority even

⁵⁹⁹ Tirosh, Yofi, 'A Name of One's Own: Gender and Symbolic Legal Personhood in the European Court of Human Rights', 33 *Harvard Journal of Law and Gender* (2010) at 300.

⁶⁰⁰ *Ibid.* at 305

⁶⁰¹ *Ibid.*

⁶⁰² For a critique of courts' reliance on rigid doctrinal categories 'in the face of complexity,' see Minow, Martha, 'The Supreme Court 1986 Term: Justice Engendered', 101 *Harvard Law Review* (1987) at 82-6.

⁶⁰³ See, e.g., ECtHR, *Stjerna v. Finland*, 25 November 1994 § 43. In this case, however, the Court ends up holding that the applicant's ancestors 'lived so far back in time that no significant weight can be given to those links for the purposes of paragraph 1 of Article 8'.

⁶⁰⁴ See, e.g., ECtHR, *Daróczy v. Hungary*, 1 July 2008 § 33.

⁶⁰⁵ See, e.g., ECtHR, *Kuharec alias Kuhareca v. Latvia*, 7 December 2004; ECtHR, *Bulgakov v. Ukraine*, 11 September 2007; and ECtHR, *Baylac-Ferrer and Suarez v. France*, 25 September 2008. One case showing a more minority-sensitive stance is *Güzel Erdagöz*. The outcome was favorable to the minority applicant but the reasoning did not revolve around minority concerns. ECtHR, *Güzel Erdagöz v. Turkey*, 21 October 2008.

though their claims are explicitly framed in those terms.⁶⁰⁶ At others, the Court acknowledges this factor without however attaching any weight to it.⁶⁰⁷

Kemal Taşkın should thus serve to show that, where names are viewed by the applicants as indicators of their links with a certain ethno-linguistic community or as symbols of their cultural background, the focus of the analysis should shift from names as mere means of personal identification to names as symbols of one's ties to a linguistic/cultural community or as carriers of cultural meaning.⁶⁰⁸ The crucial questions should revolve around whether the disputed measures impair or diminish applicants' ability to maintain what they claim to be an aspect of their culture and to lead their private and family lives in accordance with that cultural tradition.⁶⁰⁹ From this perspective, and especially in view of disadvantageous circumstances like the ones faced by the Kurdish applicants in the past, the symbolic value of respecting the original spelling of ethnic minorities' names may take particular significance.

The redrafted judgment intends to address this first concern by acknowledging the importance of what was truly at stake for the applicants, by bringing the cultural dimension of the name to the fore of Article 8 ECHR analysis,⁶¹⁰ and by weighing it heavily in the balance in view of the historical disadvantage suffered by the Kurdish minority in Turkey (see paragraphs 71.1, 71.2, 72 and 73 of the redraft). I try to show that spelling changes in applicants' names – even though the modifications are minimal and even though the names retain their original pronunciation – may still be of such significance so as to affect cultural aspects of members of non-dominant groups. Keeping the original spelling may have a strong symbolic value for members of groups showing historical vulnerability, as I attempt to show in greater detail in the second part of this Chapter.

C. What's behind the Demand to Fit?

In *Kemal Taşkın*, the Court does not only overlook what is really at stake for the applicants. It also stops short of inquiring into the government's reasons for demanding the changes in their Kurdish names. True, except for two of the applicants, the rest did not react to the Turkish government's argument that the obligation to transpose their names according to the rules of the national alphabet would not constitute an inconvenience of sufficient importance, as certain letters of the Turkish alphabet produce the same sounds as the Kurdish letters 'q', 'w' and 'x'. At first glance, one may be under the impression that this was the reason behind the Court's

⁶⁰⁶ See, e.g., ECtHR, *Baylac-Ferrer and Suarez v. France*, 25 September 2008.

⁶⁰⁷ See, e.g., ECtHR, *Kuharec alias Kuhareca v. Latvia*, 7 December 2004.

⁶⁰⁸ Julie Ringelheim argues that surnames do not only have an instrumental role but also an affective and cultural dimension; just as they indicate individuals' link to a family, names can similarly point to links with a national or a cultural group. Ringelheim, Julie, *DIVERSITÉ CULTURELLE ET DROITS DE L'HOMME: LA PROTECTION DES MINORITÉS PAR LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME* (Bruylant, 2006) at 192.

⁶⁰⁹ I draw on, *mutatis mutandis*, ECtHR (GC), *Chapman v. the United Kingdom*, 18 January 2001 § 73.

⁶¹⁰ Ringelheim, Julie, *DIVERSITÉ CULTURELLE ET DROITS DE L'HOMME: LA PROTECTION DES MINORITÉS PAR LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME* (Bruylant, 2006) at 192.

reluctance to conduct any further inquiry: most applicants did not dispute the government's argument explicitly.

A closer look at the Court's judgment reveals, nonetheless, that this first impression may not be completely right. First, two of the applicants did explain why they did not want to pursue the path suggested by the government. The first of them alleged that the new version of his name would take the meaning of 'appointment' or 'assembly'. The other applicant argued that his name, if spelled according to the Turkish alphabet, would be meaningless in Kurdish. Both of them mentioned the difficulties that the change would represent in their relations with other members of their group. In my view, the arguments of these two applicants gave the Court enough elements to engage in a more serious or substantive inquiry into the government's motives to demand the changes in the written versions of the applicants' names.

Second, and applicants' arguments aside, what ultimately seemed to stop the Court from going any further was the implicit confirmation of an idea embedded in the government's argument: the fact that applicants can change their names may suffice to justify the demand for change. American scholar, Kenji Yoshino, has identified different kinds of what he calls 'assimilationist bias' in the 'immutability' and 'visibility' factors in US equal protection jurisprudence.⁶¹¹ One of these biases, he claims, is 'converting', which in essence means asking members of a group to change defining traits.⁶¹² 'The immutability and visibility factors', Yoshino explains, 'presume that legislation is less problematic if it burdens groups that can assimilate into mainstream society...'⁶¹³ As a result, courts are 'more likely to withhold heightened scrutiny from groups that can change or conceal their defining trait'.⁶¹⁴ Yoshino argues that groups' ability to assimilate should not stop courts from exploring the reasons behind demands to assimilate.⁶¹⁵ His main concern thus seems to be with 'state-sponsored assimilation that fails adequately to question whether the assimilation in question is appropriate'.⁶¹⁶ Although the possible 'assimilationist bias' in *Kemal Taşkın* may take a form different from the ones identified by Yoshino in the US equal protection context, it embeds a similar idea: those who can change may be required to do so without further questioning why they should do it. In order to avoid turning the 'descriptive claim' that applicants can assimilate into the 'normative claim' that they must do so, the Court should insist on asking why change is demanded.⁶¹⁷

⁶¹¹ The 'immutability' and 'visibility' factors, Yoshino explains, comprise one prong of the heightened scrutiny test in U.S. equal protection jurisprudence. These factors ask whether the classification in question relies on immutable and visible group characteristics, respectively. Yoshino, Kenji, 'Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"' 108 *Yale Law Journal* (1998-1999) at 493-498.

⁶¹² *Ibid.* 500.

⁶¹³ *Ibid.* 504.

⁶¹⁴ *Ibid.* 490.

⁶¹⁵ *Ibid.* 504-505. See also, Yoshino, Kenji, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (Random House, 2007) at 136.

⁶¹⁶ Yoshino, Kenji, 'Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"' 108 *Yale Law Journal* (1998-1999) at 506.

⁶¹⁷ *Ibid.* See also, Yoshino, Kenji, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (Random House, 2007) at 138.

What is more, the historical context of *Kemal Taşkın* should have been enough to alert the Court of the need to take its inquiry further. A contextual analysis would have soon brought out a series of elements calling into question the credibility and relevance of the justification put forward by the government. In some cases, a contextual evaluation of the reasons given by a State to support its demand to conform may prove crucial to unveil any undue assimilationist attempt implicit in State naming policies affecting cultural or linguistic minorities. As various authors show, assimilation or repression of minority groups' cultural identity may sometimes underlie State name practices in multi-ethnic societies.⁶¹⁸ Teresa Scassa, for example, maintains: 'Because names can reflect ethnic identity, governments reacting to ethnic minorities within their territory have often struck at names as a means of either heightening the stigma attached to the ethnic group or as a means of assimilation'.⁶¹⁹ In turn, in a study of the European Court of Human Rights' name case law, Aeyal Gross shows how names regarded by the State as 'divergent' may be common among members of ethnic or linguistic minority groups.⁶²⁰ Barring these names, he argues, 'may be a tool for the repression of cultural identity or reflect an attempt to maintain the hegemony of a certain culture in the face of the changing ethnic composition of a society'.⁶²¹

In the rewritten judgment, I attempt to address this second concern by paying attention to context and by meaningfully inquiring into the government's reasons for its restriction (see paragraph 72 of the redraft). Thus, in the justification analysis, I look at the context within which the challenged measure was applied, weighing up a mix of elements taken from the background information offered by the judgment itself, from the applicants' submissions not disputed by the government and from documents prepared by international organizations.

III. A Rewriter in Exploration of Crosscutting Paths: Context and Group Vulnerability

Kemal Taşkın begs for the examination of a crucial contextual factor: historical vulnerability affecting a particular group. The judgment itself contains sufficient elements to undertake a contextual approach and get a fuller understanding of the impact of the disputed measure on the applicants as nationals of Kurdish origin. For example, under 'Relevant Domestic Law and Practice', the Court includes legal background information, which clearly shows the restrictive character of the government's practices toward Kurdish names in the past.⁶²² Nevertheless, the Court does not attach any consequences to this contextual factor in the analysis of the merits.⁶²³

⁶¹⁸ See, e.g., Scassa, Teresa, 'National Identity, Ethnic Surnames and the State', 11 *Canadian Journal of Law and Society* 1996) at 167-190. Drawing mostly on examples from Canada and the U.S., Scassa demonstrates how state surname policies 'have tended to reflect certain national identity objectives' including assimilation. *Ibid.* at 167.

⁶¹⁹ *Ibid.* at 174.

⁶²⁰ Gross, Aeyal M., 'Rights and Normalization: A Critical Study of European Human Rights Case Law on the Choice and Change of Names', 9 *Harvard Human Rights Journal* (1996) at 274.

⁶²¹ *Ibid.*

⁶²² *Kemal Taşkın* § 26.

⁶²³ In contrast, and in a remarkable concurring opinion, Judge András Sajó nicely incorporates in his analysis what is undoubtedly the most important element of the historical context in *Kemal Taşkın*: past ban on Kurdish names and decrease of restrictive administrative practices. *Ibid.* p. 21.

The long ban on Kurdish names is a key contextual element, which shows that the restriction in question touches upon an area in which nationals of Kurdish origin have suffered significant disadvantage in the past as a consequence of the government's restrictive laws and practices.

A look at international organizations' resolutions and reports, including those issued by the Council of Europe Parliamentary Assembly,⁶²⁴ the European Commission⁶²⁵ and the European Commission against Racism and Intolerance,⁶²⁶ clearly point to the vulnerable position of the Kurds as a result of historically disadvantageous laws and practices aimed at suppressing the expression of aspects of their culture. International non-governmental organizations have raised similar concerns.⁶²⁷

Based on these reports and on the background information included in the Court's judgment, I therefore suggest to (1) take into account the broader context of disadvantage affecting the Kurds in Turkey; (2) explore the links between their historical disadvantage and their present vulnerability; and (3) underscore the particularly harmful effects that the disputed restriction may have on the applicants given their vulnerable status. My analysis draws on the European Court of Human Rights' case law on 'vulnerable groups', which, I must admit, has taken clearer shape in the months following the *Kemal Taşkın* judgment.

All the factors arising from the background of *Kemal Taşkın* point to the harm of *misrecognition*: the Kurds in Turkey have historically been rendered 'inferior, excluded, wholly other, or simply invisible', to borrow Nancy Fraser's language.⁶²⁸ Indeed, the international documents referred to above show that the group has been historically harmed by both stereotyping and repeated suppression of aspects of their linguistic and cultural traditions. More specifically at issue in the concrete case of *Kemal Taşkın* is the kind of group vulnerability present in *Chapman*: minority status and a framework designed only with the (in this case language) concerns of the dominant group in mind. In fact, as I will show in Part IV, *Kemal*

⁶²⁴ See, e.g., Parliamentary Assembly of the Council of Europe (PACE) Resolution 1256 (2001) concerning the Honouring of Obligations and Commitments by Turkey, para. 16 k) and Resolution 1380 (2004) concerning the Honouring of Obligations and Commitments by Turkey, para. 21.

⁶²⁵ See, e.g., European Commission, Turkey 2010 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council, 9 November 2010, p. 20; Turkey 2005 Progress Report, 9 November 2005, p. 38; 2004 Regular Report on Turkey's Progress towards Accession, 6 October 2004, p. 50. Particularly relevant for the case of *Kemal Taşkın* is the European Commission's 2003 Progress Report stating: 'The Civil Registry Law was amended to permit parents to name their children as they desire, provided that such names are considered to comply with "moral values" and do not offend the public. The reference to "politically" offensive names has been removed from the law. However, a circular was issued in September 2003 restricting the scope of this amendment by *banning the use of names including the letters q, w and x, commonly used in Kurdish*'. European Commission, 2003 Regular Report on Turkey's Progress towards Accession, p. 37. Emphasis added.

⁶²⁶ See, e.g., European Commission against Racism and Intolerance (ECRI), Third Report on Turkey adopted on 25 June 2004, para. 78. In this report, ECRI recommended that the Turkish authorities 'combat the prejudice and stereotyping to which Kurds are subject'. *Ibid.* para. 81.

⁶²⁷ See, e.g., Minority Rights Group International, 'Minorities in Turkey, Submission to the European Union and the Government of Turkey', July 2004, p. 24 (highlighting how restrictive name registration practices affected only Kurdish names) and Human Rights Watch, Report 'Questions and Answers: Freedom of Expression and Language Rights in Turkey, 19 April 2002, available at <www.hrw.org/legacy/press/2002/08/turkeyqa041902.htm> accessed 2 February 2014 (reporting prosecutions against families who had given their children Kurdish names).

⁶²⁸ Fraser, Nancy, 'Rethinking Recognition', 3 *New Left Review* (2000) at 113.

Taşkın concerns the type of discrimination that operates to assimilate the group in question into the dominant mold, thereby rendering it invisible.

As shown in Chapter I, one of the fundamental consequences that group-vulnerability reasoning has carried in the Court's case law is the narrowing of States' margin of appreciation when it comes to restrictions or differentiations affecting vulnerable groups.⁶²⁹ The re-written judgment could thus call for a narrower margin of appreciation with the argument that the interference in question affects a particularly vulnerable group: the Kurds in Turkey. This approach would make particular sense in the discrimination analysis: the history of discrimination experienced by certain groups usually makes the differentiation in question suspect. Another approach – reflected in *Yordanova v. Bulgaria* and described in detail in Part III.B of Chapter I – consists in simply including group vulnerability as an element of considerable weight in the proportionality analysis. In the redraft, I opt for this second approach not because I do not find the first one (narrowing the margin of appreciation) sensible but because the second remains largely unexplored.⁶³⁰ I thus include context and group vulnerability in the proportionality assessment under Article 14 ECHR, in conjunction with Article 8 ECHR – more precisely in the examination of the particularly harmful implications the differential treatment may have on the applicants (see paragraph 86 of the redraft) and under Article 8 ECHR alone – particularly in the assessment of the symbolic value that preserving the original written name may have for the applicants (see paragraphs 71.1 and 71.2 of the redraft).

IV. A Rewriter in Pursuit of Substantive Equality (Articles 14 and 8 ECHR)

The choice of an official language, as several authors argue, is not a neutral choice.⁶³¹ In contexts of linguistic plurality, such a decision may favor some and disfavor others.⁶³²

As Fernand de Varennes points out:

One of the most frequent misconceptions involving non-discrimination is the belief that a state measure imposing a single language for all signifies that everyone is treated the same and that therefore no differentiation is made between individuals.⁶³³

⁶²⁹ *Ibid.*

⁶³⁰ An additional reason for going for the second option is because it fits well with the role of proportionality in the Court's case law. The Court has recognized that proportionality is 'inherent in the Convention as a whole'. See, e.g., ECtHR (GC), *N. v. the United Kingdom*, 27 May 2008 § 44. The Court applies a proportionality analysis to examine whether interference with Articles 8, 9, 10 or 11 ECHR is 'necessary in a democratic society'.

⁶³¹ See, e.g., De Varennes, Fernand, 'The Protection of Linguistic Minorities in Europe and Human Rights: Possible Solutions to Ethnic Conflicts?' 2 *Columbia Journal of European Law* (1996) at 114-115 and Ringelheim, Julie, *DIVERSITÉ CULTURELLE ET DROITS DE L'HOMME: LA PROTECTION DES MINORITÉS PAR LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME* (Bruylant, 2006) at 175.

⁶³² Ringelheim, Julie, *DIVERSITÉ CULTURELLE ET DROITS DE L'HOMME: LA PROTECTION DES MINORITÉS PAR LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME* (Bruylant, 2006) at 175.

⁶³³ De Varennes, Fernand, 'The Protection of Linguistic Minorities in Europe and Human Rights: Possible Solutions to Ethnic Conflicts?' 2 *Columbia Journal of European Law* (1996) at 111.

This misconception is implicit in the Turkish government's argument in *Kemal Taşkın*. The government claimed that, in applying the rule requiring names to be spelled according to the Turkish alphabet to all citizens without distinction, it was treating everyone equally.⁶³⁴ In reality, however, the identical application of the rule forced only non-dominant linguistic groups (like those of Kurdish origin) to use in their names letters of an alphabet that is not theirs while allowing the Turkish majority to keep their names' spelling in accordance with the letters of their own. This is not the first time a government claims to be applying its name-related policies to everyone equally when in effect it is not.⁶³⁵ In *Kemal Taşkın*, the Court responded to this sort of claim by noting that there was no indication that the Turkish authorities would have reached a different decision had the requests to spell names with letters absent in the Turkish alphabet come from non-Kurds.⁶³⁶ The Court, however, fails to ask why non-Kurds like the Turkish majority members would actually request to register names with letters that do not exist in Turkish. The fact that the Turkish majority will hardly suffer from this problem is a factor that illustrates how Turkey's language policy privileges the majority's concerns in the norm while disregarding those of the Kurds (see paragraph 82 of the redraft).

A State's choice of a particular language does, then, involve a distinction on the basis of language.⁶³⁷ The first stage is, therefore, confronting the fact that language choices inevitably involve favoring some over others in several respects.⁶³⁸ This, of course, does not mean that any language-based distinction is discriminatory.⁶³⁹ It will only be so if it is not objectively and reasonably justified. The next and closely interconnected stage is acknowledging the negative implications language policies may carry for linguistic minorities in practice. One central question that substantive equality asks is 'whether the effect of the law is to perpetuate disadvantage, discrimination, exclusion, or oppression'.⁶⁴⁰ As highlighted in Chapter I, among the several dimensions of substantive equality, Sandra Fredman identifies one that emphasizes the need to remove the detrimental consequences attached to differences rather than differences themselves.⁶⁴¹ Substantive equality, as she puts it, 'does not therefore aim to treat all individuals

⁶³⁴ *Kemal Taşkın* § 74.

⁶³⁵ See, e.g., ECtHR, *Bulgakov v. Ukraine*, 11 September 2007 § 56 and ECtHR, *Baylac-Ferrer and Suarez v. France*, 25 September 2008, p. 13.

⁶³⁶ *Kemal Taşkın* § 78.

⁶³⁷ De Varennes, Fernand, 'Ethnic Conflicts and Language in Eastern European and Central Asian States: Can Human Rights Help Prevent Them?' 5 *International Journal on Minority and Group Rights* (1997) at 136.

⁶³⁸ I am by no means arguing for 'linguistic disestablishment' – which various authors rightly call an 'illusion'. Rather, and more modestly, I am arguing for awareness of the non-neutral character of state language choices. See, e.g., Patten, Alan and Kymlicka, Will 'Introduction Language Rights and Political Theory: Context, Issues, and Approaches' in Will Kymlicka and Alan Patten (eds.), *LANGUAGE RIGHTS AND POLITICAL THEORY* (Oxford University Press, 2003) at 32.

⁶³⁹ De Varennes, Fernand, 'The Protection of Linguistic Minorities in Europe and Human Rights: Possible Solutions to Ethnic Conflicts?' 2 *Columbia Journal of European Law* (1996) at 112.

⁶⁴⁰ O'Connell, Rory, 'Substantive Equality in the European Court of Human Rights?' 107 *Michigan Law Review First Impressions* (2009) at 129.

⁶⁴¹ Fredman, Sandra, *DISCRIMINATION LAW* (Oxford University Press, 2011) at 30.

identically, but to affirm and accommodate differences'.⁶⁴² The Court's Grand Chamber has embraced this rationale in the case of *Thlimmenos v. Greece* by requiring that different situations be treated differently, unless there are objective and reasonable justifications for not doing so.⁶⁴³

I attempt to introduce all these concerns in the redrafted judgment in the analysis under Article 14 ECHR in conjunction with Article 8 ECHR (see paragraphs 81 through 87 of the redraft). In my view, one set of comparison arising from *Kemal Taşkın* – besides the one between nationals of Kurdish origin and non-nationals/dual nationals brought up by the applicants – concerns Turkish-speaking-majority nationals and Kurdish-speaking-minority nationals. In all fairness to the Court, I must make clear that the applicants did not complain of the difference in treatment with regard to the Turkish-speaking majority. In a sense, then, the Court cannot be blamed for not having addressed this concern. Still, I include such alternative reasoning in the redraft, driven largely by a need to address what seems to be a recurrent and misconceived argument of respondent governments, including Turkey in *Kemal Taşkın*. Most fundamentally, I include this alternative reasoning to show how group vulnerability may simultaneously serve to scrutinize both the disadvantage of some (Kurdish-speaking minority) and the advantage of others (Turkish-speaking majority) granted by the law. In this alternative reasoning in the redraft, I wish to flag this sort of argument and encourage the Court to confront it in its future case law. I leave out of my rewritten judgment the analysis of the alleged discrimination with respect to non-nationals/dual nationals, as this would have meant addressing a whole array of issues diverging from the primary concern and focus of this Chapter. The analysis would have most likely revolved around the interpretation of a convention of a technical nature⁶⁴⁴ and the subsequent comparability of the applicants' situation with that of non-nationals and dual-nationals.

In my redraft, therefore, I first try to show that the government is in fact treating its nationals of Kurdish origin differently from its Turkish majority on the basis of language (see paragraphs 81 and 82 of the redraft). I then find the distinction unjustified (see paragraphs 84, 85 and 86 of the redraft). For the reasons indicated in the previous part, I do not propose to narrow the margin of appreciation usually left to States in this area. This does not mean that I do not find this approach sensible. I believe that notwithstanding the Court's considerable deference toward States' language policy choices – in particular, toward those related to 'official language' designations⁶⁴⁵ – an argument can be made against this wide margin of appreciation in cases where vulnerable groups that have known historical disadvantage are particularly affected by a certain language policy. Name policies and official language choices may generally attract a wide margin of appreciation, but when a discrimination claim is at issue there may be additional elements justifying a narrowing of this margin, such as group vulnerability. Indeed, historical

⁶⁴² Fredman, Sandra, 'Facing the Future: Substantive Equality under the Spotlight', University of Oxford Legal Research Paper Series, Paper No 57/2010, July 2010 at 6.

⁶⁴³ ECtHR (GC), *Thlimmenos v. Greece*, 6 April 2000.

⁶⁴⁴ International Commission on Civil Status (ICCS) Convention No. 14 on the Recording of Surnames and Forenames in Civil Status Registers signed on 13 September 1973.

⁶⁴⁵ See, e.g., *Kemal Taşkın* § 57.

disadvantage and discrimination explains why the Court should apply stricter scrutiny than what would be the case under a wide margin of appreciation.

Conclusion

The concerns of vulnerable language minority applicants rarely surface the Court's reasoning in its name case law. In this regard, the *Kemal Taşkın* judgment is no exception; the Court overlooks what is truly at issue for the Kurdish applicants and shows nearly complete disregard for their concerns when balancing the competing interests. In this Chapter, I have offered various proposals, including adding a group-vulnerability perspective to the Court's analysis in its name jurisprudence. None of these proposals offers a drastic departure from fundamental principles of the Court's case law. On the contrary, some of the suggested ways in which the Court could take vulnerable groups more seriously draw on its own jurisprudence. The Court's case law already offers several analytical tools capable of ensuring that the concerns of members of these groups are taken into account more adequately. The rewritten judgment is an attempt to bring some of them together and put them into practice. The proportionality analysis – under both Article 8 ECHR alone and Articles 14 and 8 ECHR together – is where most of my proposals play out.

In addition, I have sought to expose and challenge the inadequate conceptual frameworks and problematic assumptions underwriting the Court's reasoning in *Kemal Taşkın* and its minority name case law more broadly. *Kemal Taşkın* is possibly one of the best examples attesting to the inadequacy of a model to address the complexity posed by minority members' name claims. The alternative model I have proposed seeks to add a cultural dimension of names to the existing framework. I believe that this expanded conceptual scheme, along with a greater commitment to substantive equality, holds potential to discern unjustified suppression of differences. Eliminating differences instead of the disadvantageous treatment attached to them is not what real equality is about.⁶⁴⁶ The rewritten judgment that follows⁶⁴⁷ is a call for not making conformity 'a price for equal treatment'.⁶⁴⁷

V. Rewriting *Kemal Taşkın and Others v. Turkey*⁶⁴⁸

Passages in regular black font: original judgment

Passages in bold: redrafted judgment

Passages in ~~strike through~~: deleted from the original judgment

(...)

⁶⁴⁶ Fredman, Sandra, 'Facing the Future: Substantive Equality under the Spotlight', University of Oxford Legal Research Paper Series, Paper No 57/2010, July 2010 at 6.

⁶⁴⁷ Sandra Fredman argues that 'formal equality demands conformity as a price for equal treatment'. *Ibid.*

⁶⁴⁸ The judgment is available in French only. The original paragraphs kept in the re-written judgment are the author's own translation.

ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

(...)

2. Did the interference pursue a ‘legitimate aim’?

(...)

55. [Fragment deleted]. According to **the government**, considering the important role of the State’s official language, the impugned interference primarily pursued the legitimate aims of protecting the rights and freedoms of others and the protection of order.

(...)

57. [Fragment deleted] The Court considers that the interest of each State in ensuring that its own institutional system functions normally is incontestably legitimate (*Podkolzina v. Latvia*, no. 46726/99, § 34, ECHR 2002-II). It has already held that most Contracting States have chosen to grant one or more languages the status of official language or State language and that they have recognized them as such in their constitutions (*Mentzen*, supra). The same holds for the choice of a national alphabet. This is a choice of the national legislature, linked to historical and political considerations that are particular to the State in question (*Baylac-Ferrer and Suarez*, decision cited above).

58. In the decision *Mentzen or Mencena v. Latvia* (no. 71074/01, 7 December 2004) the Court has held that a language ‘is not in any sense an abstract value. It cannot be divorced from the way it is actually used by its speakers. Consequently, by making a language its official language, the State undertakes in principle to guarantee its citizens the right to use that language both to impart and to receive information, without hindrance not only in their private lives, but also in their dealings with the public authorities. In the Court’s view, it is first and foremost from this perspective that measures intended to protect a given language must be considered’ (see also, *Bulgakov v. Ukraine*, no. 59894/00, 11 September 2007, § 43 b). In other words, the Court considers that, implicit in the notion of an official language is the existence of certain subjective rights for the speakers of that language (see, *Kuharec alias Kuhareca v. Latvia*, no. 71557/01, 7 December 2004, p. 16). Thus, in the majority of cases, it may be accepted that a measure intended to protect and promote a national language corresponds to the protection of the ‘rights and freedoms of others’, within the meaning of Article 8 § 2 of the Convention (see, *Bulgakov v. Ukraine*, no. 59894/00, 11 September 2007, § 43 b).

~~58.~~ **59.** Accordingly, the Court concludes that the interference in question had as objectives the defence of order and the protection of the rights of others.

3. Was the interference ‘necessary in a democratic society’?

(...)

62. For the government, the obligation to transpose the names according to the rules of the national alphabet does not constitute a failure to respect the applicants' right to private life given that the inconvenience suffered by them would not be of sufficient importance. In addition, it argues that certain letters of the Turkish alphabet, i.e., ‘k’, ‘ks’ and ‘v’, when pronounced, produce the same sounds as the letters ‘q’, ‘x’ and ‘w’, respectively. In particular, citing the example of Mr Sünbül, who was able to register the name he asked to use – ‘Bawer’, spelled with a ‘v’ instead of a ‘w’, in accordance with the national alphabet – [the government] considers that the applicants could have transposed their names without any problem with the letters of the national alphabet.

63. The applicants Mr Taşkın, Mr Alp kaya and Mr Fırat did not submit observations on this point within due time. As for Mr Anğ, Mr Şimşek and Mr Sünbül, they submitted no argument about any inconvenience eventually suffered as a result of the refusal at issue (compare with *Daniela Fornaciari, Claudio Gianettoni and Francesco Fornaciari v. Switzerland*, n° 22940/93, Commission’s Decision of 12 April 1996).

64. In what concerns Mr Genç and Mr Yöyler, they do not really contest the government's assertion that the Kurdish names can be written with the letters of the Turkish alphabet. However, they argue that this practice distorts the meaning of their names. For example, Mr Genç explains that the name ‘Civan’, which in Kurdish means ‘beautiful and young’, when transcribed into ‘Civan’ without using the ‘w’, takes the meaning of ‘appointment’ or ‘meeting’. Similarly, Mr. Yöyler argues that, when the name ‘Xweşbin’ (‘optimistic’ in Kurdish) is spelled with the letters of the Turkish alphabet as ‘Heşbin’, it becomes a term with no precise meaning in Kurdish.

65. Mr Genç also emphasizes that, as a human rights activist, he is in permanent contact with people of Kurdish origin, who would reproach him, as a result of his Turkish-like name, for not being a proper Kurd. Mr Yöyler presents similar arguments. According to him, the refusal to register his name in Kurdish is an unjustified interference with his cultural and ethnic identity. This restriction, which requires him to use a name of Arabic origin, ‘Celalettin’, would aim to create an obstacle in establishing relations with other Kurdish groups. He refers to the Court’s jurisprudence in the area of personal autonomy and affirms that the Kurdish language should benefit from increased protection.

66. Insofar as Mr Genç and Mr Yöyler allege that the refusal in question constitutes an unjustified interference with their ethnic identity, [fragment deleted] **the Court cannot overlook the fact that the use of Kurdish names has long been banned in Turkey. In such circumstances, the identity concerns of people, whose right to respect for private life has**

been restricted, are the more relevant and their sensitivities particularly important.⁶⁴⁹ In view of the historical context, the inconvenience caused by the refusal to use the Kurdish characters in the applicants' names can be said to be real and relevant.⁶⁵⁰

67. [Fragment deleted] The Court observes that, as illustrated in the case of Mr Sünbül where the 'w' has been replaced by a 'v', in the Turkish system it is possible to proceed, thanks to the phonetic transcription, to the inscription in the civil registry of names containing sounds, whose exact match does not exist in the Turkish alphabet (for other examples, see paragraph 30 above). **The applicants do not contest this thesis. The Court then accepts that the applicants' Kurdish names, if spelled with the best matching script of the Turkish alphabet, will not lose their phonetic value. The Court notes however that the applicants did not want to pursue this route. One of them, Mr Sünbül, – whose name was registered as 'Baver' instead of 'Bawer' – appealed the decision. Two others, Mr Genç and Mr Yöyler, raised cultural concerns in an attempt to explain why they did not choose that path. The question is, therefore, whether the mere alteration to the original *written* version of the applicants' names – which would apparently not alter the original *oral* form – is *per se* sufficient to cause them identification difficulties or acquire a meaning likely to cause them inconvenience in their social relations.**

(...)

[Paragraph 69 deleted]

69. **The Court will first address Mr Genç's complaint. According to the applicant, his name 'Civan', which in Kurdish means 'beautiful and young', when transcribed into 'Civan' without using the 'w', takes the meaning of 'appointment' or 'meeting'. The government did not dispute this. The Court then concludes that Mr Genç's name, if spelled with the letters of the Turkish alphabet, would have a ridiculous meaning likely to cause him an inconvenience of sufficient importance in his social life. As for the other applicants, they have not demonstrated that the written modification of their names would represent either an obstacle to their personal identification or a basis for ridicule.**

(...)⁶⁵¹

71.1. Nevertheless, names do not only have an instrumental character but also an affective and cultural dimension.⁶⁵² They may reflect a person's specific linguistic and ethnic background⁶⁵³ and may thus be essential to lead her private and family life in

⁶⁴⁹ This part draws on Judge András Sajó's concurring opinion in *Kemal Taşkın*, p. 21.

⁶⁵⁰ This part draws on *ibid.* p. 22.

⁶⁵¹ Paragraph 70 and 71 are unchanged.

⁶⁵² Ringelheim, Julie, *DIVERSITÉ CULTURELLE ET DROITS DE L'HOMME: LA PROTECTION DES MINORITÉS PAR LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME* (Bruylant, 2006) at 192.

⁶⁵³ Scassa, Teresa, 'National Identity, Ethnic Surnames and the State', 11 *Canadian Journal of Law and Society* (1996) at 167.

accordance with such background. Therefore, the additional question the Court faces in this particular case is whether the changes in the graphical representation of the bearers' names may be said to be of such importance so as to affect what the applicants claim to be their ethnic and cultural identity. From this perspective, the Court cannot deny the strong symbolic value that keeping the original written version of a name may have for members of a non-dominant group willing to express their linguistic affiliation and maintain their cultural heritage, especially when, according to numerous international organizations' resolutions and reports, such a group's cultural expression has suffered from past disadvantage as a consequence of the government's restrictive practices.

71.2. While the requirement to spell names in accordance with the Turkish alphabet enables people with a command of Turkish to pronounce the names concerned correctly and to include it effortlessly in phrases of everyday language, it inevitably entails an alteration to the names' written form (see, *Mentzen or Mencena v. Latvia*, no. 71074/01, 7 December 2004). On one side of the balance are then the rights of others – the majority of the population – to understand and use the official language correctly and without difficulties. This is reflected in the need to bring the written form of a name in line with its pronunciation in the official language. On the other side, are the rights of the applicants for whom, as members of a vulnerable group that have suffered considerable disadvantage in the past (see, *mutatis mutandis*, *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, 13 November 2007, § 182; *Alajos Kiss v. Hungary*, no. 38832/06, 20 May 2010, § 42 and *Kiyutin v. Russia*, no. 2700/10, 10 March 2011, § 63), keeping the original Kurdish spelling may be all the more relevant in the preservation of what they regard as symbols of their cultural and linguistic tradition. With this in mind, the Court will examine whether the official language and order considerations relied on by the government can be said to outweigh the cultural concerns claimed by members of a vulnerable group under Article 8 of the Convention.

[Paragraph 72 deleted]

72. The Court first notes that the main reason offered by the government for demanding the alteration of the applicants' names is the possibility of changing their original spellings without major inconvenience. In this regard, the Court believes that the fact that applicants can easily change or adapt their names does not automatically mean that they should do so. The Court needs to further inquire into the motivation or rationale behind the government's demand to change. The government has articulated none apart from the mere formal and general invocation of the protection of order and the rights of others through its official language. What is more, several contextual elements arising from both the facts of the case and international organizations' resolutions/reports point to past and continuing discriminatory practices in the use of Kurdish names in Turkey. Unlike the Latvian government in *Mentzen or Mencena* and *Kuharec alias Kuhareca*, the Turkish government has not contended that spelling the applicants' names with the Kurdish letters

would have any negative consequences in the preservation of the Turkish language. In addition, the Court attaches particular importance to the fact that the use of the letters ‘q’, ‘w’ and ‘x’ cannot be regarded as exactly ‘new’ in Turkey (see, *mutatis mutandis Johansson v. Finland*, no. 10163/02, 6 September 2007, § 38). They are in fact used by the government itself (Ministries’ Websites), by commercial products (see paragraph 34 of original judgment) whose presence is more visible in everyday life and, lastly, by dual and non-nationals who are allowed to keep their original written forms of their names even if they include unavailable letters. While it is true that the latter group is permitted such registration on different grounds based on an international convention, the example nonetheless serves, along with the others, to weaken the government’s thesis that accepting the Kurdish letters will undermine the official language. With respect to the protection of order, the examples further serve to show that there is *de facto* no practical unfeasibility likely to disrupt such order. Under these circumstances, any prejudice caused by the Kurdish letters in the applicants’ names to the Turkish language or order cannot be said of sufficient significance to outweigh the cultural concerns of members of a group whose names had been banned in the past and for whom keeping the original spelling may have a strong symbolic value.

73. In the Court's view, the official language and order considerations relied on by the government cannot outweigh the interests claimed by the applicants under Article 8 of the Convention. A fair balance has therefore not been struck. There has thus been a violation of Article 8.

ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 8

~~73.~~ **74.** The applicants also contend that the refusal violated Article 14 of the Convention, combined with Article 8. [Fragment deleted].

~~74.~~ **75.** The Government contests this thesis. The rule questioned by the applicants applies to all citizens without distinction. According to **the Government**, all other signs and written characters foreign to the Turkish language are similarly refused.

(...)

78. [Fragments deleted] **The Court** recalls [fragment deleted] that, in its decision *Baylac-Ferrer and Suarez* (cited above), it has regarded as objective and reasonable a justification based on the linguistic unity in the relations with the administration and public services.

(...)

Nationals belonging to the Turkish-speaking majority and Nationals of Kurdish Origin

1. Whether there was a difference in treatment

81. The Turkish government contends that the rule questioned by the applicants apply to all citizens without distinction. The Court observes, however, that the rule requiring all names to be registered according to the Turkish alphabet in practice affect a segment of the national population (in this case those of Kurdish origin) differently from the Turkish-speaking majority. The latter is not forced to take letters of an alien alphabet but allowed to spell their names with the letters of their own, i.e., the Turkish alphabet. At the same time, and unlike the majority of their co-nationals, citizens of Kurdish origin – whose alphabet contains the letters ‘q’, ‘w’ and ‘x’ and whose names are more likely to include these letters as a consequence – are the ones forced to either have their names spelled with characters of an alphabet other than their own or choose from a narrower set options i.e., from a group of Kurdish names not containing the officially unavailable letters. The latter was not however an option to the applicants who have already been known in their inner circles by their Kurdish names containing those letters.

82. In sum, the disputed rule does not proscribe Kurdish names or letters. Nor does it stipulate, in itself, different consequences for the nationals of Kurdish origin. The differentiation lies in the failure to make a distinction for nationals of Kurdish origin. As for the Turkish government’s argument that all other signs and written characters foreign to the Turkish language are similarly refused, the Court would like to add that the chance that members of the dominant linguistic group (Turkish-speaking majority) will request the registration of names containing letters foreign to their own Turkish alphabet seems rather slim. Therefore, requests for registration of names with non-Turkish characters from members of the majority-speaking language are much less likely than requests from members of non-dominant linguistic groups whose names are more likely to contain letters inexistent in the Turkish alphabet.

83. The Court thus concludes that dissimilar treatment on the grounds of language exists in this case. But, since not all differentiations are necessarily discriminatory, the Court will now turn to the examination of whether the distinction at issue has in this case an objective and reasonable justification.

2. Whether the difference in treatment had an objective and reasonable justification

84. The Court has said that the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is not only violated when States treat differently persons in analogous situations without providing an objective and reasonable justification but also when States, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different (see, *Thlimmenos v. Greece* [GC], no. 34369/97, 6 April 2000, § 44). The Court will therefore examine whether

the failure to treat the applicants differently pursued a legitimate aim. If it did, the Court will have to examine whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realized.

85. The Court recalls that, in its decision *Baylac-Ferrer and Suarez* (cited above), it regarded a justification based on the linguistic unity in the relations with the administration and public services as reasonable and objective. In the present case, however, such a basis cannot provide similarly valid justification. On the one hand, evidence shows that non-Turkish letters are already used by the government itself (Ministries' websites),⁶⁵⁴ by commercial products and by non-nationals who are allowed to register their names as originally spelled even if they include unavailable letters. The example of the latter – even though they may not be in a comparable situation – serves however to show, along with the other instances, that letters foreign to the Turkish alphabet are already available and used in the Turkish administration and public life. Furthermore, the examples serve to indicate that there is *de facto* no impediment to incorporate the applicants' names' letters.

86. On the other hand, the Court notes that the restriction may have particularly harmful effects on the applicants. In fact, although the case at issue concerns the individual situation of the applicants, the Court cannot ignore that they are members of a non-dominant group who have become particularly vulnerable as a result of disadvantage and discrimination in the past (see, *mutatis mutandis*, *D.H.*, *Alajos Kiss* and *Kiyutin* cited above). Numerous organizations and institutions, including the Council of Europe, the European Commission and the European Commission against Racism and Intolerance, have consistently reported past restrictive and discriminatory measures against the Kurdish population, as a consequence of which they have become a particularly vulnerable group in Turkey. Furthermore, the areas in which nationals of Kurdish origin have been historically disadvantaged include precisely those of concern in the present case. The bans on Kurdish names, which had been in place for decades in Turkey, is exactly one example of such disadvantageous practices (see, paragraphs 66 and 70 above). In view of this past disadvantage and of the group's subsequent vulnerability to further discriminatory harms, it thus seems reasonable to assume that the differential treatment to which they have been subjected has had particularly severe impact on the applicants.

87. For the reasons given above, the Court finds that the failure to treat different situations differently was not reasonably justified in the circumstances of this case. There

⁶⁵⁴ See also, Report of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe, 17 March 2004, para. 243. The report highlights that the 'w' must feature on the keyboards of Turkish computers to access the Internet and hopes the government will show some flexibility when registering names containing letters not available in Turkish.

has thus been a violation of Article 14, in conjunction with Article 8, with respect to the Turkish-speaking majority.

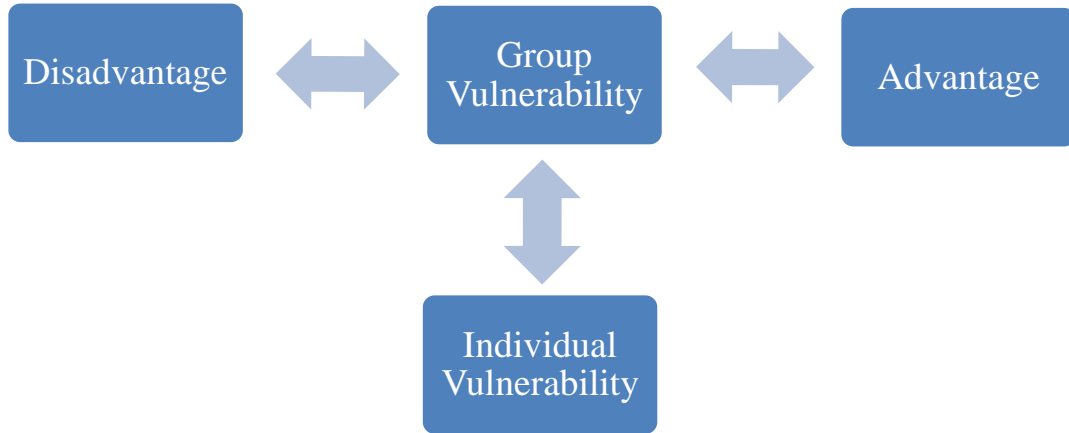
* * *

In the past decade, group vulnerability has emerged as a promising concept in the construction of a more inclusive human rights subject in Strasbourg. Yet the concept has largely bypassed religious and cultural groups. In this Part, I have argued that group vulnerability holds out the promise to push the Court away from the formal conception of equality it is still stuck with in some areas of its cultural and religious diversity case law towards a more substantive notion of equality. I have illustrated how this promise may be fulfilled in practice in the context of a minority language claim.

The vulnerable-group concept, however, needs to be deployed reflectively if it is to retain its full potential. Thus, group vulnerability should not only investigate the disadvantage part (who has been rendered more vulnerable and why) but also the advantage part (who has been rendered less vulnerable and why). Moreover, and in order to avoid further stigmatization of members of particularly vulnerable groups, the concept should (i) recognize the heightened or particular character of vulnerability of certain groups while acknowledging the lessened and also particular character vulnerability of other groups and (ii) demonstrate why certain factors make the particular individual more vulnerable or why s/he should be considered and treated as a vulnerable member of that group in the particular case. The first part of this second inquiry seeks to avoid positing some groups as *the* archetypal and *only* vulnerable groups. The second part aims to avoid obscuring the agency of members of particularly vulnerable groups and their sources of resilience in the face of vulnerabilities.

In closing Part I, I want to offer a scheme of what the overall group vulnerability inquiry may look like.

VULNERABILITY INQUIRY



PART II

OPENING UP THE ECHR RELIGIOUS AND CULTURAL SUBJECT

Anyone who deviates from the official norm, whatever that is, anyone who fails to bear likeness to the Standard Product, is simply not viewed as fully human, and then becomes at best invisible, at worst a threat to the national security.

-- Giles Gunn⁶⁵⁵

In the previous part, I have focused on the exclusions within the *abstract human rights subject*. I have argued that, while the emergence of the concept of ‘vulnerable groups’ represents a promising step towards a more inclusive ECHR subject, the concept has yet to be extended to cultural and religious groups. In this part, I focus on exclusions within the *abstract religious and cultural human rights subject*, that is, on exclusions across religious and cultural groups. Following a familiar form of critical analysis, I unveil the implicit points of reference embedded in the Court’s notions of religion and family life and then challenge their presumed neutrality.⁶⁵⁶ I argue that the two constructs are founded on assumptions that inherently advantage certain religious and cultural groups over others.

Thus, by positing interiority and disembodiment in what is known as the *‘forum internum’* as the primary characteristics of ‘religion’, the Court implicitly articulates a conception that is largely Protestant and that, as a result, is inherently exclusionary of a host of religious ‘others’ who do not conceive of religion this way. Similarly, by positing the nuclear family model as *the* standard form of family life, the Court articulates a conception of family life associated with a notion idealized in some parts of Western Europe. As a result, family life similarly produces and excludes a series of cultural ‘others’ for whom family life is not necessarily about the ‘core’ family. In both instances – religion and family life – the Court implicitly uses *particular* conceptions of religion or family as the basis for the *‘universal’*: the two conceptions come laden with culturally and religiously specific elements.

I do not challenge the inherent validity of these dominant conceptions. They, like other forms of family lifestyle and religiosity, deserve consideration. What I do challenge is their position of privilege or dominance. My goal is therefore not to replace these conceptions with others. Instead, my goal is to confront the naturalization or normalization of privileged conceptions that render a whole range of group members invisible, ‘deviant’, and ultimately,

⁶⁵⁵ Gunn, Giles, *THE INTERPRETATION OF OTHERNESS: LITERATURE, RELIGION AND THE AMERICAN IMAGINATION* (Oxford University Press, 1979) at 177 quoted in Minow, Martha, ‘The Supreme Court 1986 Term: Justice Engendered’, 101 *Harvard Law Review* (1987) at 39.

⁶⁵⁶ Minow, Martha, ‘The Supreme Court 1986 Term: Justice Engendered’, 101 *Harvard Law Review* (1987) at 45 (explaining this form of critique in these two steps).

unequal.⁶⁵⁷ As Stephanie Wildman puts it, ‘normalization of privilege means that members of society are judged, and succeed or fail, measured against the characteristics that are held by those privileged. The privileged characteristic comes to define the norm. Those who stand outside are the aberrant or “alternative”’.⁶⁵⁸ As discussed in Chapter II,⁶⁵⁹ assumptions of this sort are so powerfully embedded in these conceptions that they are hardly perceived – especially by those benefited by such assumptions⁶⁶⁰ – as particular but rather as natural and normal, and therefore, universal. Barbara Flagg calls this type of phenomenon, albeit in the context of race, ‘the transparency phenomenon’.⁶⁶¹ The result is that only those who do not fit are frequently viewed as culturally or religiously distinctive.

Thus, in the two Chapters that follow, I do not just look at the cultural/religious particularity of those marginalized by the ‘standard’ but, crucially, at the particularity of the beneficiaries submerged in the ‘standard’.⁶⁶² My enterprise is one of exposing the real contours of notions that, on the surface, appear ‘general, empty of content, universally available to all’⁶⁶³ but that, on closer inspection, turn out to be particular, full of content and only available to some.

Methodology

In Chapters IV and V, I use several devices apt to expose and challenge the Court’s assumptions underlying the constructions of family life and religion. These insights and methods allow me to be critical of usually taken-for-granted assumptions informing the Court’s reasoning.

Feminist Method of Critique

The analysis in the two following Chapters benefits from a form of critique traditionally – though not exclusively – applied in feminist legal scholarship. As briefly discussed in Chapter II, feminist scholars have long been suspicious of the unstated norms behind law’s language of objectivity and neutrality.⁶⁶⁴ They have shown that the ‘neutral norm’ against which women tend to be regarded as ‘different’ has often been the norm of the ‘white, able-bodied Christian

⁶⁵⁷ I draw inspiration from an incisive form of feminist critique, which seeks to expose ‘the dominance of conceptions of human nature that take men as the reference point and treat women as “other”, “different”, “deviant” or “exceptional”’. Minow, Martha, ‘Feminist Reason: Getting It and Losing It’, 38 *Journal of Legal Education* (1988) at 49. See also, Bartlett, Katharine T., ‘Feminism and Family Law’, 33(3) *Family Law Quarterly* (1999) at 475 (arguing that feminists ‘have challenged the “naturalness” and unmasked the hypocrisy of purportedly neutral constructs’).

⁶⁵⁸ Wildman, Stephanie M, ‘Language and Silence: Making Systems of Privilege Visible’, 35(3) *Santa Clara Law Review* (1995) at 890.

⁶⁵⁹ See Chapter II, Part II A and B.

⁶⁶⁰ Wildman, Stephanie M, ‘Language and Silence: Making Systems of Privilege Visible’, 35(3) *Santa Clara Law Review* (1995) at 890 (arguing that privilege ‘is rarely seen by the holder of the privilege’).

⁶⁶¹ Flagg describes the phenomenon as ‘the tendency of whites not to think about whiteness, or about norms, behaviors, experiences or perspectives that are white-specific’. Flagg, Barbara J., ‘Was Blind, But Now I See: White Race Consciousness and the Law’ 91 *Michigan Law Review* (1993) at 957.

⁶⁶² I borrow the notion of the submerged beneficiary from Grear, Anna, *REDIRECTING HUMAN RIGHTS: FACING THE CHALLENGE OF CORPORATE LEGAL HUMANITY* (Palgrave Macmillan, 2010) at 58.

⁶⁶³ MacKinnon, Catharine A., ‘Points against Postmodernism’, 75 *Chicago-Kent Law Review* (2000) at 690.

⁶⁶⁴ Bartlett, Katharine T., ‘Feminist Legal Methods’, 103 *Harvard Law Review* (1990) at 831.

man'.⁶⁶⁵ This is usually one aspect of what is known as the method of 'Asking the Woman Question': 'looking beneath the surface of law to identify the gender implications of rules and the assumptions underlying them'.⁶⁶⁶ This 'primary method of feminist critique',⁶⁶⁷ in short, seeks to expose bias in the law. Katharine Bartlett explains: 'In exposing the hidden effects of laws that do not explicitly discriminate on the basis of sex, the woman question helps to demonstrate how social structures embody norms that implicitly render women different and thereby subordinate'.⁶⁶⁸ The inquiry commonly involves a set of questions, in particular, 'what assumptions are made by law (or practice or analysis) about those whom it affects? Whose point of view do these assumptions reflect? Whose interests are invisible or peripheral? How might excluded viewpoints be identified and taken into account?'.⁶⁶⁹

The method ultimately encourages deeper forms of inquiry: it calls for 'rethinking everything'⁶⁷⁰ or questioning everything.⁶⁷¹ It is fundamentally this critical stance towards the law that I take from this method. The use of this form of critique has been advocated in other contexts than gender, including religion, race, sexual orientation, and class.⁶⁷²

Deconstruction and Religious Studies

As it will become evident in this part, the assumptions underpinning the Court's conceptions of religion and family life operate differently. In the family life case law, the bias is apparent to the naked eye, overt. It is explicitly articulated in the use of the notion of 'core' family as the standard to determine the existence of family life of non-nationals. In the freedom of religion case law, on the other hand, the Court's conception of religion arises from a series of operating assumptions that distinguish the *forum internum* from the *forum externum*. These assumptions work more subtly or covertly. For this reason, I use additional tools of critical analysis and insights from another discipline to bring these assumptions into the open. Indeed, in addition to the insights from feminist legal scholarship, the examination in Chapter IV incorporates insights from Derrida's practice of 'deconstruction'⁶⁷³ and from religious studies. A combination of deconstruction and feminist-like legal analysis provides me with the critical tools necessary to recognize the underlying assumptions that privilege certain forms of religion while

⁶⁶⁵ Minow, Martha, 'The Supreme Court 1986 Term: Justice Engendered', 101 *Harvard Law Review* (1987) at 32.

⁶⁶⁶ Bartlett, Katharine T., 'Feminist Legal Methods', 103 *Harvard Law Review* (1990) at 843.

⁶⁶⁷ *Ibid.* at 837.

⁶⁶⁸ *Ibid.* at 843.

⁶⁶⁹ *Ibid.* at 848. See also, Wishik, Heather Ruth, 'To Question Everything: The Inquiries of Feminist Jurisprudence', 1 *Berkeley Women's Law Journal* (1985) at 73-75: 'What assumptions, descriptions, assertions and/or definitions of experience – male, female, or ostensibly gender neutral – does the law make? What is the area of mismatch, distortion or denial created by the differences between women's life experiences and the law's assumptions or imposed structures? What interests are served by the mismatch?'

⁶⁷⁰ MacKinnon, Catharine A., 'Points against Postmodernism', 75 *Chicago-Kent Law Review* (2000) at 690.

⁶⁷¹ Wishik, Heather Ruth, 'To Question Everything: The Inquiries of Feminist Jurisprudence', 1 *Berkeley Women's Law Journal* (1985) 64-77.

⁶⁷² See most notably, Minow, Martha, 'The Supreme Court 1986 Term: Justice Engendered', 101 *Harvard Law Review* (1987) 10-95.

⁶⁷³ See generally Balkin, Jack M. 'Deconstruction's Legal Career' 27 *Cardozo Law Review* (2005) 719-740; and Balkin, Jack M., 'Deconstructive Practice and Legal Theory', 96 *Yale Law Journal* (1987) 743-786.

deemphasizing others. Religious studies, in turn, provide me with the knowledge necessary to identify the emphasized or de-emphasized aspects of religion and the legally constructed religions that emerge as a result.

In its most basic form, deconstruction challenges fixed binary constructions (e.g., rational/emotional, mind/action, subjective/objective) that create an oppositional and hierarchical relationship between the terms of the binary.⁶⁷⁴ One term is thereby considered dominant (e.g., primary, central) and the other subordinate (e.g., secondary, peripheral). A deconstructive exercise shows how, far from being opposites, the two terms are actually interdependent: the dominant term in fact depends on the subordinate just as much as the subordinate depends on the dominant. So, none of them is actually dominant or prior, as both depend on and derive their meaning from each other. Deconstruction thus involves a double process: ‘identification of hierarchical oppositions, followed by a temporary reversal of the hierarchy’.⁶⁷⁵ The point is not to reverse the hierarchies permanently but simply ‘to investigate what happens when the given, the “common sense” arrangement is reversed’.⁶⁷⁶

What deconstructive techniques ultimately show is that apparently dichotomous terms are ‘not natural but constructed oppositions, constructed for particular purposes in particular contexts’.⁶⁷⁷ The deconstructive critique enables us to avoid mistaking ‘the dominant or privileged vision of people and society for real “present” human nature’.⁶⁷⁸ Deconstruction is not foreign to legal analysis but particularly relevant to it: ‘[I]aw is full of conceptual oppositions because it is full of distinctions’.⁶⁷⁹ In fact, deconstructive arguments have been used in several areas of legal scholarship, especially in critical race theory, feminist scholarship and critical legal studies.⁶⁸⁰ The arguments have come in particularly handy in attempts to show how the ideologies underlying certain legal doctrines ‘marginalized or suppressed important features of human life’.⁶⁸¹

In the next pages, I organize my discussion as follows. In Chapter IV, I challenge the Court’s *forum internum/forum externum* dichotomy for privileging the former and, in the process, failing to attend to a variety of religious aspects and many applicants’ forms of religiosity. In Chapter V, I call into question the Court’s privileging of the nuclear family model when assessing the existence of migrant applicants’ family life. The two Chapters thus offer a

⁶⁷⁴ *Ibid.*

⁶⁷⁵ Balkin, Jack M., ‘Deconstructive Practice and Legal Theory’, 96 *Yale Law Journal* (1987) at 746.

⁶⁷⁶ *Ibid.* at 746-747.

⁶⁷⁷ Scott, Joan W., ‘Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism’, 14 *Feminist Studies* (1988) at 38.

⁶⁷⁸ Balkin, Jack M., ‘Deconstructive Practice and Legal Theory’, 96 *Yale Law Journal* (1987) at 762.

⁶⁷⁹ Balkin, Jack M. ‘Deconstruction’s Legal Career’ 27 *Cardozo Law Review* (2005) at 724.

⁶⁸⁰ *Ibid.* For examples of the use of deconstruction as a tool of critique in feminist legal scholarship, see Dalton, Clare, ‘An Essay in the Deconstruction of Contract Doctrine’, 94 *Yale Law Journal* (1985) 997-1114; Scott, Joan W., ‘Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism’, 14 *Feminist Studies* (1988) 33-50; Olsen, Frances, ‘The Sex of Law’ in David Kairys (ed.), *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (Basic Books, 1998) 692-707. For examples in critical legal scholarship, see Frug, Gerald E., ‘The Ideology of Bureaucracy in American Law’, 97 *Harvard Law Review* (1984) 1276-1388 and Peller, Gary, ‘The Metaphysics of American Law’, 73 *California Law Review* (1985) 1151-1290.

⁶⁸¹ Balkin, Jack M. ‘Deconstruction’s Legal Career’ 27 *Cardozo Law Review* (2005) at 736.

critique of the Court's case law. Both of them suggest nonetheless strategies for rethinking prevailing constructions of religion and family life in order to more fully achieve equality and inclusiveness in the Court's freedom of religion and family life case law.

CHAPTER IV

DECONSTRUCTING 'LEGAL' RELIGION IN STRASBOURG*

[T]he future of the Muslim minority in Europe depends not so much on how the law might be expanded to accommodate its concerns but on a larger transformation of the cultural and ethical sensibilities of the majority Judeo-Christian population that undergird the law.

-- Saba Mahmood⁶⁸²

Introduction

Though several human rights instruments guarantee religious freedom, none of them defines religion.⁶⁸³ Yet in determining what constitutes freedom of religion, courts can never wholly avoid establishing what 'counts' as religion for legal purposes or, in other words, what counts as 'legal' religion.⁶⁸⁴ Thus, 'any attempt to define the scope and content of the right to religious liberty will necessarily involve assumptions about the underlying nature of religion itself.'⁶⁸⁵ The danger is that, in the process, certain orthodoxies may be imposed while other dimensions of religion may be overlooked and denied legal protection.⁶⁸⁶

* I am greatly thankful to Eva Brems, Laurens Lavrysen, Saila Ouald Chaib, Stijn Smet and Alexandra Timmer for their helpful comments on earlier versions of this Chapter. This Chapter is based on Peroni, Lourdes, 'Deconstructing "Legal" Religion in Strasbourg', *Oxford Journal of Law and Religion* (2013) 1-23. I have made some changes to the version appearing in this Journal. The substantive additions made to this Chapter are paragraphs 4-7 of the Introduction. These additions have been made to better situate the issues herein addressed within the broader academic debates on freedom of religion in the ECHR.

⁶⁸² Mahmood, Saba, 'Religious Reason and Secular Affect: An Incommensurable Divide?' 35 *Critical Inquiry* (2009) at 860.

⁶⁸³ Gunn, T. Jeremy, 'The Complexity of Religion and the Definition of "Religion" in International Law', 16 *Harvard Human Rights Journal* (2005) at 190.

⁶⁸⁴ Sullivan, Winnifred Fallers, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* (Princeton University Press, 2005) at 3. I borrow the term 'legal religion' from Winnifred Fallers Sullivan. *Ibid* 4. See also, Beaman, Lori G., 'The Courts and the Definition of Religion: Preserving the Status Quo through Exclusion,' in Arthur L. Greil and David G. Bromley (eds.) *DEFINING RELIGION: INVESTIGATING THE BOUNDARIES BETWEEN THE SACRED AND SECULAR* (JAI, 2003) at 203 and Beaman, Lori G. 'Conclusion' in Lori G. Beaman (ed.) *REASONABLE ACCOMMODATION: MANAGING RELIGIOUS DIVERSITY* (University of British Columbia Press, 2012) at 217 ('Although the courts have traditionally stated that they will not adjudicate on religious matters, they in fact do so very time a claim related to religious freedom is made'.)

⁶⁸⁵ Danchin, Peter G., 'Islam in the Secular *Nomos* of the European Court of Human Rights,' 32 *Michigan Journal of International Law* (2011) at 676.

⁶⁸⁶ Berger, Benjamin, 'Key Theoretical Issues in the Interaction of Law and Religion: A Guide for the Perplexed', 19 *Constitutional Forum* (2011) at 47 (summarizing in this way Sullivan's argument in Sullivan, Winnifred Fallers, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* [Princeton University Press, 2005]). Sullivan argues in the U.S. context that courts have privileged a protestant 'private, voluntary, individual, textual and believed' model of religion over a 'public, coercive, communal, oral and enacted' one, creating a hierarchy of orthodoxy. Sullivan, Winnifred Fallers, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* (Princeton University Press, 2005) at 8.

This Chapter addresses this danger in the freedom of religion case law of the Strasbourg Court. Incorporating insights from religious studies and employing deconstructive analysis, I challenge the ‘legal’ religion that the Court has (re)produced in Strasbourg. To be sure, the Court has not attempted a formal and comprehensive definition of religion. Yet background assumptions about religion as primarily a matter of conscience or belief appear throughout its freedom of religion case law.⁶⁸⁷ The Court has construed freedom of religion in terms of a binary opposition between belief and practice⁶⁸⁸ – or between the *forum internum* and the *forum externum*, as it is known in Strasbourg jargon.

I argue against this dichotomous way of reasoning about freedom of religion. Part of my argument is that legally imagining belief and practice in binary terms gives rise to a sharp and fixed opposition and to hierarchical relations between the religious forms associated with one term or the other. Indeed, the Court valorizes disembodied, autonomous, and private forms of religiosity identified with mainstream Protestantism, while sidelining embodied, habitual, and public forms. The main reason for rejecting sharp dichotomization therefore lies in the inegalitarian risks it embeds. In order to counteract these risks, I propose that the relationship between the two sides be reconceived in more interconnected ways. My argument here is that, the more the Court considers belief and practice interrelatedly, the less likely it is to produce hierarchical and inegalitarian relations between religions – or, in other words, the more likely it is to produce a more inclusive account of ‘legal’ religion.

The analysis in this Chapter may be located within growing broader discussions questioning the deeply ingrained assumptions underpinning the Court’s understandings of religion and freedom of religion. A significant part of this literature revolves around the meanings of State neutrality and secularism.⁶⁸⁹ Indeed, many of these critiques are directed at revealing the ways in which neutrality, as understood by the Court in certain lines of its case law, in fact reflects secularist ideals that view religion as private⁶⁹⁰ and therefore invisible in the

⁶⁸⁷ See Evans, Carolyn, ‘Religious Freedom in European Human Rights Law: The Search for a Guiding Conception’ in Mark W., Janis and Carolyn Evans (eds.), *RELIGION AND INTERNATIONAL LAW* (Martinus Nijhoff, 1999) 385-400.

⁶⁸⁸ I use the term ‘practice’ in a broad sense, to refer to external manifestations of belief or external behaviour. At times, however, there will be some overlap with the sense in which the term is used in Article 9(1) ECHR, that is, as one particular form of ‘manifestation’ among others (i.e., teaching, worship and observance).

⁶⁸⁹ See generally, Evans, Malcolm and Petkoff, Peter, ‘A Separation of Convenience? The Concept of Neutrality in the Jurisprudence of the European Court of Human Rights 36(3) *Religion, State & Society* (2008) at 205 (arguing that neutrality as developed in the Court’s case law ‘is often used to display a bias towards a particular world view or societal paradigm, rather than representing unbiased perspectives of legal reasoning’); Leigh, Ian, ‘The European Court of Human Rights and Religious Neutrality’ in Gavin D’Costa et al. (eds.) *RELIGION IN A LIBERAL STATE* (Cambridge University Press, 2013) 38-65 (arguing that the Strasbourg Court ‘seems sometimes to have behaved as though the Convention required strict separation of religion and the state’) at 62; and Thorson Plesner, Ingvill, ‘The European Court on Human Rights between Fundamentalist and Liberal Secularism’, Paper for the Seminar on The Islamic Headscarf Controversy and the Future of Freedom of Religion or Belief, Strasbourg, France 28-30 July 2005 at 15-16 available at <<http://www.jus.uio.no/smr/om/aktuelt/arrangementer/historikk/forum/plesnerpaper.pdf>> accessed 2 February 2014 (arguing that the Court’s stance in the headscarf cases moves towards a ‘fundamentalist’ approach to secularism that calls for a greater degree of privatization of religious expression).

⁶⁹⁰ See, e.g., Ringelheim, Julie ‘Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory’ in Camil Ungureanu and Lorenzo Zucca (eds.) *LAW, STATE AND RELIGION IN THE NEW EUROPE: DEBATES AND DILEMMAS* (Cambridge University Press, 2012) 283-306.

public sphere.⁶⁹¹ Some of these critics point to the specific (Christian) contours underpinning this understanding of secularism and to its inability to ‘host’ religions outside mainstream Christianity. Peter Danchin, for example, argues that the Court has constructed ‘narratives of secularism’ that implicitly incorporate Christian norms into Article 9 ECHR, jeopardizing the freedom of religion claims of Muslim and other religious minorities.⁶⁹²

In the process of addressing the ways in which the Court’s understanding of the secular corresponds to a certain understanding of the religious, these critiques offer a relevant insight: one that points to religion and religious subjectivity as largely private. Yet the entry point of these scholarly analyses remains secularism.⁶⁹³ As a result, most of these critiques take only tangential issue with the Court’s characterization of religion as primarily an issue of internal belief. Scholarly critique of ECHR freedom of religion jurisprudence appears to have paid only scant, indirect attention to secularism’s ‘twin’⁶⁹⁴ – that is to say, to religion as such.⁶⁹⁵ Some authors have offered the additional insight that the Court generally shows ‘much greater deference and respect’ to traditional than to non-traditional religions.⁶⁹⁶ However, these authors rarely explore the deeper assumptions along the Court’s different understandings of religion

⁶⁹¹ See, e.g., Martinez Torron, Javier, ‘The (Un)Protection of Individual Religious Identity in the Strasbourg Case Law’, *Oxford Journal of Law and Religion* (2012) at 20-25 (arguing that at times the Court has indirectly supported a secularist view of neutrality aimed at erasing religion from the public sphere).

⁶⁹² Danchin, Peter G., ‘Islam in the Secular *Nomos* of the European Court of Human Rights’, 32 *Michigan Journal of International Law* (2011) at 715. In fact, the Christian legacy in the construction of European secularism has been highlighted in broader law and religion debates. See, e.g., Mancini, Susanna, ‘The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence’, 30(6) *Cardozo Law Review* (2009) at 2665 (arguing that ‘secularism corresponds to a Christian outlook, being the product of the historical process of separation between European States and Christian churches’) and Ferrari, Silvio, ‘Law and Religion in a Secular World: A European Perspective’, 14(3) *Ecclesiastical Law Journal* (2012) at 361 (arguing that ‘once European secularism is placed in its [historical] context, its Christian roots become evident and prevent the claim of the neutrality of the secular public sphere from being taken seriously’).

⁶⁹³ Some notable examples are Danchin, Peter G., ‘Islam in the Secular *Nomos* of the European Court of Human Rights’, 32 *Michigan Journal of International Law* (2011) 663-747 and Ringelheim, Julie ‘Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory’ in Camil Ungureanu and Lorenzo Zucca (eds.) *LAW, STATE AND RELIGION IN THE NEW EUROPE: DEBATES AND DILEMMAS* (Cambridge University Press, 2012) 283-306. Both authors bring up to light the Court’s tacit assumptions of religion as a matter of individual conscience as defining the shape and content of Article 9 ECHR.

⁶⁹⁴ Asad, Talal, ‘Thinking about Religion, Beliefs and Politics’ in Robert A. Orsi (ed.), *THE CAMBRIDGE COMPANION TO RELIGIOUS STUDIES* (Cambridge University Press, 2012) at 39. Asad refers to religion and secularity as twins.

⁶⁹⁵ Scholars in other contexts such as Canada and the United States have engaged with secularity’s twin in a more direct and thorough fashion. See, e.g., Beaman, Lori G., ‘Is Religious Freedom Impossible in Canada?’, 8(2) *Law, Culture and the Humanities* (2010) 266-284; Berger, Benjamin L., ‘Law’s Religion: Rendering Culture’, 45(2) *Osgoode Hall Law Journal* (2007) 278-314 and Sullivan, Winnifred Fallers, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* (Princeton University Press, 2005).

⁶⁹⁶ See, e.g., Cumper, Peter, ‘The Rights of Religious Minorities: The Legal Regulation of New Religious Movements’ in Peter Cumper and Steven Charles Wheatley (eds.), *MINORITY RIGHTS IN THE ‘NEW’ EUROPE* (Martinus Nijhoff, 1999) at 173. See also, Danchin, Peter G. and Forman, Lisa, ‘The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities’ in Peter Danchin and Elizabeth Cole (eds.), *PROTECTING THE HUMAN RIGHTS OF RELIGIOUS MINORITIES IN EASTERN EUROPE* (Columbia University Press, 2002) at 204 (arguing that the Court’s Article 9 ECHR case law ‘reveals a bias toward protecting traditional and established religions and a corresponding failure to protect the rights of minority, nontraditional, or unpopular religious groups’).

apart from pointing to a possible Christian bias. In fact, the sharply dichotomized distinction between the *forum internum* and the *forum externum* – which, as I will show, lies at the heart of the Court’s problematic assumptions – is probably one of the most taken-for-granted features of freedom of religion.

Over the past few years, however, some authors have problematized this distinction and the assumptions about religion and religious subjectivity that flow from it. One of the most notable efforts is Carolyn Evans’.⁶⁹⁷ Evans calls into question that the Court gives primacy to internal beliefs or conscience (*forum internum*) without specification of its content and justification for this primacy.⁶⁹⁸ She critiques the emphasis the Court thereby places on ‘the cerebral, the internal and theological’ at the expense of ‘the active, the symbolic and the moral dimensions’ of religion.⁶⁹⁹ Her argument is that this emphasis does not reflect the ways in which many religions view themselves or the religious diversity in the region.⁷⁰⁰ In a similar vein, Silvio Ferrari has argued most recently that the Court has difficulties understanding notions of religion that stress ‘identity and practice over those of a freely chosen belief’.⁷⁰¹ Ferrari thus adds a crucial element to existing discussions on the Court’s implicit assumptions about religion: the dividing lines may not necessarily run between religions (e.g., Islam and Christianity) but between ‘two different ways of conceiving and experiencing religion, one more focused on the *forum internum* and the other on the *forum externum*’.⁷⁰²

My analysis in this Chapter builds on and seeks to contribute to this ongoing critique. The Chapter is divided into four parts. In the first two parts, I unpack the aspects of religious life that the Court emphasizes or de-emphasizes in the process of privileging the belief side over the practice side of the dichotomy. In the following part, relying on religious studies, I challenge the assumptions underpinning the Court’s implicit account of religion for their inegalitarian implications. In the last part, applying deconstructive analysis, I recover the practice side by showing how the belief side depends on it. I conclude by arguing that the Strasbourg Court should embrace belief and practice more equally.

⁶⁹⁷ Evans, Carolyn, ‘Religious Freedom in European Human Rights Law: The Search for a Guiding Conception’ in Mark W. Janis and Carolyn Evans (eds.), *RELIGION AND INTERNATIONAL LAW* (Martinus Nijhoff, 1999).

⁶⁹⁸ *Ibid.*

⁶⁹⁹ *Ibid.* at 395 and 396.

⁷⁰⁰ *Ibid.*

⁷⁰¹ Ferrari, Silvio, ‘The Strasbourg Court and Article 9 of the European Convention of Human Rights: A Quantitative Analysis of the Case Law’ in Jeroen Temperman (ed.) *THE LAUTSI PAPERS: MULTIDISCIPLINARY REFLECTIONS ON RELIGIOUS SYMBOLS IN THE PUBLIC SCHOOL CLASSROOM* (Martinus Nijhoff, 2012) at 33.

⁷⁰² In his view, the apparent bias against Islam therefore ‘has to be seen as a component of a larger trend that opposes a way of envisioning and practising religion that is not exclusive to Islam but is transversal to many historical religions, including Christianity’. Ferrari, Silvio, ‘Law and Religion in a Secular world: A European Perspective’, 14(3) *Ecclesiastical Law Journal* (2012) at 368.

I. Belief as the Core of ‘Legal’ Religion in Strasbourg

The ‘*internal* sphere of *personal* thought, conscience, or belief’⁷⁰³ – as the *forum internum* has been usually defined – emerges as the primary locus of ‘legal’ religion in Strasbourg. This primacy is not just presupposed; it is represented overtly in a language that orders the belief/practice dualism hierarchically. Indeed, the Court has long established that ‘Article 9 of the Convention *primarily* protects the sphere of personal beliefs and religious creeds, i.e. the area which is sometimes called “*forum internum*.”’⁷⁰⁴ Religious freedom, the Court has also held, ‘is *primarily* a matter of individual conscience.’⁷⁰⁵ Yet more clearly, the Court has affirmed: ‘[T]he main sphere protected by Article 9 is that of personal convictions and religious beliefs, in other words what are sometimes referred to as matters of individual conscience’.⁷⁰⁶

Moreover, the privileged status of belief or conscience is re-affirmed in the Court’s well-known principle that the protection of the *forum internum* ‘is absolute and unqualified.’⁷⁰⁷ That is, contrary to the *forum externum* or right to manifest a religion or belief, the *forum internum* or right ‘to hold any religious belief and to change religion or belief’ is not subject to any limitation.⁷⁰⁸ Theoretically, at least, the Court thus excludes any considerations of proportionality when it comes to protecting the *forum internum*.⁷⁰⁹

In this first part, I examine cases concerning what several scholars would qualify as *forum internum*: compulsion to reveal (non-)religious beliefs and coercion to recant or to adhere to (non-)religious beliefs.⁷¹⁰ Even though the rationale for the primacy of the *forum internum* has

⁷⁰³ Danchin, Peter G., ‘Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law’ 49 *Harvard International Law Journal* (2008) at 261 (arguing that the *forum internum* is conceptually narrower than what is usually meant by private sphere; the equivalence is rather with internal conscience and belief).

⁷⁰⁴ The principle can be traced all the way back to the Commission era (*see, e.g.*, ECmmHR, *V. v. the Netherlands* 5 July 1984 § 2) and has been re-affirmed by the Court (*see, e.g.*, ECtHR, *Saniewski v. Poland* 26 June 2001 § 1). Emphasis added.

⁷⁰⁵ ECtHR, *Kokkinakis v. Greece*, 25 May 1993) § 31 and ECtHR, *Eweida and Others v. the United Kingdom* (15 January 2013) § 80. Emphasis added.

⁷⁰⁶ ECtHR, *Pichon and Sajous v. France*, 2 October 2001 at p. 4.

⁷⁰⁷ ECtHR, *Eweida and Others v. the United Kingdom*, 15 January 2013, § 80. The justification for the inviolability of conscience, however, remains ‘obscure and unsettled’. Danchin, Peter G., ‘Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law’, 49 *Harvard International Law Journal* (2008) at 263.

⁷⁰⁸ ECtHR, *Eweida and Others v. the United Kingdom*, 15 January 2013 § 80.

⁷⁰⁹ In practice, however, the Court has sometimes avoided the question altogether and simply moved on to examine whether the limitation on freedom of religion was justified as necessary in a democratic society. See ECtHR, *Buscarini and Others v. San Marino*, 18 February 1999; *Dimitras and Others v. Greece*, 3 June 2010; *Dimitras and Others v. Greece* (No 2) 3 November 2011 and *Dimitras and Others v. Greece* (No 3) 8 January 2013.

⁷¹⁰ *See, e.g.*, Evans, Carolyn, *FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (Oxford University Press, 2001) at 74 and Taylor, Paul M., *FREEDOM OF RELIGION: UN AND EUROPEAN HUMAN RIGHTS LAW AND PRACTICE* (Cambridge University Press, 2005) at 116. However, except for *Sinan Işık v. Turkey*, the Court does not appear to have explicitly framed the cases I examine as *forum internum* cases. See ECtHR, *Sinan Işık v. Turkey*, 2 February 2010 § 42.

remained largely opaque in Strasbourg,⁷¹¹ two main reasons can be implicitly discerned in the Court's reasoning in these cases: privacy and autonomy. I take each in turn.

A. Belief as Private

Belief is at the heart of cases concerning compulsion to reveal one's (non-)religious beliefs. At stake in this type of cases – the Court has said – ‘is the right not to disclose one's religion or beliefs, which falls within the *forum internum* of each individual.’⁷¹² The Court goes on to frame this right as ‘the negative aspect’ of the right to manifest one's religion or beliefs.⁷¹³ This aspect comprises the right ‘not to be obliged to disclose his or her religion or beliefs’ and the right ‘not to be obliged to act in such a way that it is possible to conclude that he or she holds – or does not hold – such beliefs.’⁷¹⁴ Underlying the Court's reasoning in this group of cases is a sense of discomfort with the idea of the State meddling in people's inner and personal beliefs.⁷¹⁵ States are not even allowed ‘to seek to discover’ such beliefs.⁷¹⁶

What is remarkable about this group of cases is the Court's clear willingness to protect applicants against the slightest possibility that may coerce them to reveal their (non-)religious beliefs. For example, in a series of cases against Greece, the Court has found a violation of Article 9 ECHR.⁷¹⁷ Most of these applicants were summoned to appear in court as witnesses or complainants and, as such, required by Greek law to take a religious oath. Those who did not have a religion or whose religion did not allow them to take such an oath could make a solemn declaration instead. The applicants were allowed to make a solemn declaration but not without first having to reveal that they were not Orthodox Christians and, sometimes, that they were atheists or Jewish.⁷¹⁸ The Court reasoned that the applicants were not just compelled to deny that they were adherents of the majority religion but also to give more detailed information about their beliefs.

Obliging people to act in a way from which their (non-)religious beliefs may be inferred is similarly unacceptable to the Court. In *Sinan Işık v. Turkey*, concerning a complaint by a member of the Alevi religious community against the mandatory indication of religion on identity cards, the Court concluded that the applicant's right not to manifest his religion was violated.⁷¹⁹ This was the case notwithstanding a legislative amendment entitling the applicant to

⁷¹¹ Evans, Carolyn, ‘Religious Freedom in European Human Rights Law: The Search for a Guiding Conception’, in Mark W. Janis and Carolyn Evans (eds.) *RELIGION AND INTERNATIONAL LAW* (Martinus Nijhoff, 1999) at 394 and 396.

⁷¹² ECtHR, *Sinan Işık v. Turkey*, 2 February 2010 § 42.

⁷¹³ *Ibid* § 41.

⁷¹⁴ *Ibid*.

⁷¹⁵ The Court's reason for this discomfort is best articulated in ECtHR, *Kosteski v. the Former Yugoslav Republic of Macedonia*, 13 April 2006 § 39 (‘the notion of the State sitting in judgment on the state of a citizen's inner and personal beliefs is abhorrent and may smack unhappily of past infamous persecutions’).

⁷¹⁶ See ECtHR, *Alexandridis v. Greece*, 21 February 2008 § 38.

⁷¹⁷ See ECtHR, *Alexandridis v. Greece*, 21 February 2008; *Dimitras and Others v. Greece*, 3 June 2010; *Dimitras and Others v. Greece* (No 2), 3 November 2011 and *Dimitras and Others v. Greece* (No 3), 8 January 2013.

⁷¹⁸ See ECtHR, *Dimitras and Others v. Greece*, 3 June 2010 § 80.

⁷¹⁹ ECtHR, *Sinan Işık v. Turkey*, 2 February 2010.

ask that information about his religion be deleted or that the religion box on his identity card be left blank.⁷²⁰ For the Court, even having to ask that no indication of religion be made raises an issue of disclosure of beliefs.⁷²¹ What is more, and as the *Folgerø* case discussed below shows, the Court has offered protection against the ‘risk’ that applicants ‘might feel compelled to disclose’ their beliefs.⁷²² In short, the Court has been highly protective of the ‘negative aspect’ of the right to manifest one’s religion.

The question now is: on what basis does the Court offer such a strong protection in these cases? The main rationale underpinning the Court’s reasoning in this group of cases is *privacy*. This is reflected, first of all, in the language that the Court uses to characterize applicants’ beliefs. For instance, in *Sinan Işık v. Turkey*, the Court refers to an individual’s ‘most deeply held beliefs’ as one of her ‘most *intimate* aspects.’⁷²³ This formulation resonates with the Article 8 ECHR language underpinning sexual orientation cases, in which the Court has described applicants’ ‘sexual orientation’ as ‘a most intimate aspect of an individual’s private life.’⁷²⁴

The Court’s concern with privacy is spelled out in more detail in a case concerning parents’ right to have their children educated according to their convictions (Article 2 of Protocol 1). In *Folgerø and Others v Norway*, for example, the Court explicitly says that ‘information about personal religious and philosophical conviction concerns some of the most intimate aspects of *private life*.’⁷²⁵ One of the issues that the Court addressed in this case was whether parents’ obligation to give ‘reasonable grounds’ when asking for their children to be exempted from the ‘Christianity, religion and philosophy’ class could raise an issue of disclosure of their convictions. The Court found that ‘inherent in the condition to give reasonable grounds was a risk that the parents might feel compelled to disclose to the school authorities intimate aspects of their own religious and philosophical convictions.’⁷²⁶ It is telling that the Court interprets parents’ right to respect for their convictions not merely in the light of Article 9 ECHR but in the light of Article 8 ECHR as well.⁷²⁷ The conclusion was that the system of exemption was capable of subjecting parents ‘to a heavy burden with a risk of undue exposure of their *private life*.’⁷²⁸

The Court’s reasoning in these cases implicitly tells us that one way in which Strasbourg legally imagines (non-)religious beliefs is as essentially ‘private’ and ‘intimate.’ The Court is certainly keen on protecting (non-)religious beliefs from becoming public (known to others) without applicants’ consent. However, it does not really consider how such public disclosure may inhibit applicants from freely adopting or changing these beliefs. The real issue for the

⁷²⁰ *Ibid.* §§ 47-50.

⁷²¹ *Ibid.* § 51.

⁷²² ECtHR (GC), *Folgerø and Others v. Norway*, 29 June 2007 § 98.

⁷²³ ECtHR, *Sinan Işık v. Turkey*, 2 February 2010 § 51. Emphasis added.

⁷²⁴ See ECtHR, *Lustig-Prean and Beckett v. the United Kingdom*, 27 September 1999 § 83 and *Smith and Grady v. the United Kingdom*, 27 September 1999, §§ 89-90.

⁷²⁵ ECtHR (GC), *Folgerø and Others v Norway*, 29 June 2007 § 98. Emphasis added.

⁷²⁶ *Ibid.*

⁷²⁷ *Ibid.* § 98 and 100.

⁷²⁸ *Ibid.* § 100. Emphasis added. See also, ECmmHR, *C.J., J.J. and E.J. v. Poland*, 16 January 1996. In this case, the Commission examined complaints about the disclosure of beliefs in school reports under Article 8 ECHR.

Court is therefore one of compelled access to and exposure of the individual's internal realm rather than one of coerced religion or belief.

B. Belief as Autonomous

Another group of cases reflecting the Court's protection of religion as belief concerns coercion or pressure to recant or to adhere to (non-)religious beliefs. One example is *Buscarini and Others v. San Marino*, a case concerning two elected members of Parliament complaining that they were required to take a religious oath on pain of losing their Parliamentary seats.⁷²⁹ The applicants claimed that obliging them to swear on the Holy Gospels was an act of 'coercion' directed at their freedom of conscience and religion.⁷³⁰ The Court held that such an obligation was indeed equivalent to requiring allegiance or a declaration of commitment to a particular religion.⁷³¹ Another instance is *Ivanova v. Bulgaria*, a case concerning pressure to recant one's religion.⁷³² The issue was whether the applicant – a school employee – was dismissed on account of her religious beliefs. The Court concluded that she was, given the particular sequence of the events leading to her dismissal. These events included media campaigns against the religious group the applicant was part of and inquiries of the Prosecution Office into the religious activities of the school staff.⁷³³ The Court found most telling that the applicant was pressured by Government officials to recant her religious beliefs in order to keep her job. It strongly condemned this pressure as a 'flagrant violation of her right to freedom of religion.'⁷³⁴

In these two instances, the Court seems to protect the internal realm from external *coercion* (threats and sanctions such as losing Parliamentary seats or losing a job) in essentially two ways: (i) by making sure that external forces do not coerce people to *adopt* (religious) beliefs and (ii) by guaranteeing that external forces do not coerce people to *recant* their (religious) beliefs. As the Court holds in *Ivanova*, States cannot dictate what people believe or take coercive steps to make them change their beliefs.⁷³⁵

So, unlike the first group of cases in which the Court preserves the private character of applicants' (non-)religious beliefs by protecting them against forced access and exposure, in *Buscarini* and *Ivanova* the Court protects the autonomous character of beliefs by preventing them from being coerced. The main basis for the Court's protection of the *forum internum* in cases such as *Buscarini* and *Ivanova* thus seems to be autonomy, which is secured by ensuring absence of coercion in one's adoption or change of a religion or belief. The autonomy rationale – implicit in the Court's rejection of coerced beliefs – tells us that legally imagined (non-)religious beliefs in Strasbourg are those to which people freely assent.

⁷²⁹ ECtHR, *Buscarini and Others v. San Marino*, 18 February 1999.

⁷³⁰ *Ibid.* § 37.

⁷³¹ *Ibid.* § 39.

⁷³² ECtHR, *Ivanova v. Bulgaria*, 12 April 2007.

⁷³³ *Ibid.* § 83.

⁷³⁴ *Ibid.* § 84.

⁷³⁵ *Ibid.* § 79.

The Court has signaled the same autonomy rationale in cases concerning the *forum internum* indirectly.⁷³⁶ Indeed, in cases dealing with proselytism – which may be viewed as an instance of conflict between the proselytizer’s right to manifest her religion (*forum externum*) and the addressee’s right to have a religion (*forum internum*) – the Court has been careful to protect the autonomy of the addressees.⁷³⁷ One of these cases was brought by Greek military officers, members of the Pentecostal Church.⁷³⁸ They complained about their conviction for proselytism of lower-ranked officers and civilians. The Court found a violation of the proselytizers’ right to manifest their religion when the addressees were civilians but not when they were subordinate military officers. This was because the Court drew a distinction between the position of servicemen who found it difficult to withdraw from religious conversations initiated by the applicants, who had been their superiors, and that of civilians who were not subject to pressures and constraints of the same kind as military personnel.⁷³⁹ The Court viewed the former as the application of improper pressure and the latter as an innocuous exchange of ideas. Indeed, the argument for protecting the lower-ranked officers was that they ‘felt constrained and subject to a certain degree of pressure owing to the applicants’ status as officers.’⁷⁴⁰ The Court’s use of the terms ‘constrained’ and ‘pressure’ when assessing the impact of proselytism on the lower-ranked officers, ‘indicates that it considers them to be the victims of coercion on the part of the proselytisers.’⁷⁴¹

To summarize, the Court’s reasons for protecting individuals’ beliefs in the two groups of cases examined in this part echo the liberal values of privacy and autonomy.⁷⁴² Moreover, the privacy and autonomy rationales suggest that the Court imagines ‘legal’ religious beliefs in essentially two ways: as private and as voluntarily or freely adopted. These findings coincide with the way in which the *forum internum* has been understood in international human rights law: as ‘a private autonomous sphere of religion or belief’.⁷⁴³ The findings also confirm what religion scholars such as Talal Asad have argued: ‘although the insistence that beliefs cannot be

⁷³⁶ These cases concern the *forum internum* indirectly because those whose *forum internum* is protected are not the applicants but people affected by the applicants’ proselytizing activities.

⁷³⁷ Smet, Stijn, ‘Freedom of Religion versus Freedom from Religion: Putting Religious Duties Back on the Map’ in Jeroen Temperman (ed.) *THE LAUTSI PAPERS: MULTIDISCIPLINARY REFLECTIONS ON RELIGIOUS SYMBOLS IN THE PUBLIC SCHOOL CLASSROOM* (Martinus Nijhoff, 2012).

⁷³⁸ ECtHR, *Larissis and Others v. Greece*, 24 February 1998.

⁷³⁹ The Court explains the distinction made in *Larissis* in these terms in ECtHR, *Jehovah’s Witnesses of Moscow and Others v Russia*, 10 June 2010 § 139.

⁷⁴⁰ *Ibid.* § 52.

⁷⁴¹ Smet, Stijn, ‘Freedom of Religion versus Freedom from Religion: Putting Religious Duties Back on the Map,’ in Jeroen Temperman (ed.) *THE LAUTSI PAPERS: MULTIDISCIPLINARY REFLECTIONS ON RELIGIOUS SYMBOLS IN THE PUBLIC SCHOOL CLASSROOM* (Martinus Nijhoff, 2012) at 119.

⁷⁴² See also, Evans, Carolyn, ‘Religious Freedom in European Human Rights Law: The Search for a Guiding Conception’ in Mark W. Janis and Carolyn Evans (eds.) *RELIGION AND INTERNATIONAL LAW* (Martinus Nijhoff, 1999) at 395 (arguing that ‘the reason for the primacy given to the internal conscience is arguably more one of the liberal predisposition to divide the private from the public than anything inherent in either the text of Article 9 or the concept of religion or belief’).

⁷⁴³ Petkoff, Peter, ‘*Forum Internum* and *Forum Externum* in Canon Law and Public International Law with a Particular Reference to the Jurisprudence of the European Court of Human Rights,’ 7 *Religion and Human Rights* (2012) at 188.

changed from outside appeared to be saying something empirical about “personal belief” (its singular, autonomous, and inaccessible-to-others location), it was really part of a political discourse about “privacy,” a claim to civil immunity with regard to religious faith that reinforced the idea of a secular state and a particular conception of religion.⁷⁴⁴

II. Practice as the Periphery of ‘Legal’ Religion in Strasbourg

The priority of the belief side of the dichotomy is not only apparent in the Court’s principles and the strong protection it has offered to the negative aspect of the right to manifest one’s religion. The primacy of belief over practice is most fully at work in the Court’s reasoning in cases concerning the ‘manifestation’ of applicants’ religious beliefs, in particular, the manifestation of such beliefs in ‘practice.’⁷⁴⁵

In this part, I locate and bring to the surface the aspects of applicants’ practices that the Court has most commonly relegated to the margin. I argue that the peripheral status of ‘practice’ is mostly reflected in the Court’s reluctance to recognize and protect the types of manifestations that fail to describe themselves in private, cognitive, and disembodied terms. The subordinate term in the duality – practice – thus stands mostly for the habitual, material and embodied dimensions of religion that defy sharp dichotomizations between the sacred and the profane.

The Court has gradually started to count these aspects of religion as ‘manifestations’ for the purposes of Article 9(1) ECHR,⁷⁴⁶ mostly by accepting practices that, though not necessarily required by a religion, are still motivated or inspired by it.⁷⁴⁷ Yet the distinction between religious ‘manifestation’ and religiously motivated conduct remains in place in the Court’s case law. A well-known example of the application of this distinction is *Kosteski v. FYROM*, a case

⁷⁴⁴ Asad, Talal, ‘Thinking about Religion, Beliefs and Politics’ in Robert A. Orsi (ed.), *THE CAMBRIDGE COMPANION TO RELIGIOUS STUDIES* (Cambridge University Press, 2012) at 44.

⁷⁴⁵ Article 9 ECHR guarantees the right to manifest one’s religion or belief ‘in worship, teaching, practice and observance’.

⁷⁴⁶ The Court has long been criticized for minimizing the scope of Article 9(1) ECHR through a narrow approach to determining what counts as manifestation of religion or belief. See Evans, Malcolm D., ‘Freedom of Religion and the European Convention on Human Rights: Approaches, Trends and Tensions’ in Peter Cane, Carolyn Evans and Zoe Robinson (eds.) *LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT* (Cambridge University Press, 2008) at 295; Evans, Carolyn, *FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (Oxford University Press, 2001) at 202 and Vickers, Lucy, *RELIGIOUS FREEDOM, RELIGIOUS DISCRIMINATION AND THE WORKPLACE* (Hart Publishing, 2008) at 96-100.

⁷⁴⁷ Examples of the Court’s recognition of practices motivated or inspired by a religion include burning incense sticks (ECtHR, *Gatis Kovaļkovs v. Latvia*, 31 January 2012 § 60), observing dietary requirements (ECtHR, *Jakóbski v. Poland*, 7 December 2010 § 45) and wearing the Islamic headscarf (ECtHR [GC] *Leyla Şahin v. Turkey* 10 November 2005 § 78). Yet the approach in *Leyla Şahin*, however, is not entirely without objections. Commenting on the Court’s reluctance to decide whether decisions to wear the headscarf are ‘in every case taken to fulfil a religious duty’, Carolyn Evans argues: ‘There is no clear finding (only an assumption) that religious freedom has been interfered with and no clear test set out for later cases. Despite the reluctance of the Court to make such a determination, there is a strong case for arguing that the wearing of religious clothing, at least when the wearing of such clothing is a requirement of the religion, does fall within the protection of art 9 . . . That the Court was unwilling to state this explicitly in its judgment demonstrates its general reluctance to acknowledge the value and religious importance of many key religious practices outside of Christianity’. Evans, Carolyn, ‘The “Islamic Scarf” in the European Court of Human Rights’, 7 *Melbourne Journal of International Law* (2006) at 55-56.

brought by a Muslim applicant complaining that he was fined for taking a day off to celebrate a Muslim holiday.⁷⁴⁸ Here, the Court ‘seems to have declined to accept that taking time off work to attend a religious festival amounted to a manifestation of the applicant’s Islamic faith for the purposes of Article 9, whilst fully accepting that it was motivated by it’.⁷⁴⁹ The distinction between manifestation and motivation is not only difficult to establish. It offers restrictive protection to those who manifest their religion in acts of ordinary life.⁷⁵⁰ This approach, Lucy Vickers for example argues, raises severe problems at work since it is mostly ‘religiously inspired behavior that is requested, not pure religious observance’.⁷⁵¹ Recently, however, the Court has held that ‘there is no requirement on the applicant to establish that he or she acted in fulfillment of a duty mandated by the religion in question’.⁷⁵² Traditionally, though, the Court has tended to look for such a requirement, albeit not consistently.⁷⁵³

In short, while the Court has recently eased some hurdles under Article 9(1) ECHR⁷⁵⁴ – by growingly counting as ‘manifestations’ certain habitual, material and embodied forms of religion that are not necessarily theologically prescribed – it has often attached negligible weight to them in the analysis under Article 9(2) ECHR.

A. Practice as Material

One aspect of applicants’ practices often relegated to the margin is what religion scholars call ‘material,’⁷⁵⁵ in particular, the type of materiality associated with objects. As these scholars

⁷⁴⁸ ECtHR, *Kosteski v. the Former Yugoslav Republic of Macedonia*, 13 April 2006 § 38.

⁷⁴⁹ Evans, Malcolm D., ‘Freedom of Religion and the European Convention on Human Rights: Approaches, Trends and Tensions’ in Peter Cane, Carolyn Evans and Zoe Robinson (eds.) *LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT* (Cambridge University Press, 2008) at 295.

⁷⁵⁰ See, e.g., Martinez-Torron, Javier, ‘Limitations on Religious Freedom in the Case Law of the European Court of Human Rights’, 19 *Emory International Law Review* (2005) at 595-596 (arguing that the distinction between manifestation and motivation has been used sometimes to ‘endorse a rather restrictive understanding of the protection that Article 9 ECHR offers to an individual who endeavors to follow the mandates of his conscience in ordinary life’).

⁷⁵¹ Vickers, Lucy, *RELIGIOUS FREEDOM, RELIGIOUS DISCRIMINATION AND THE WORKPLACE* (Hart Publishing, 2008) at 98.

⁷⁵² ECtHR, *Eweida and Others v. the United Kingdom*, 15 January 2013 § 82. However, the principle still remains that not every act ‘in some way inspired, motivated or influenced by it constitutes a “manifestation” of the belief’.

Ibid.

⁷⁵³ The criteria to recognise manifestations of religion in practice ‘have swung from “normal and recognised manifestations” of the religion or belief to manifestations required by the religion or belief without any strong consistency.’ Rorive, Isabelle ‘Religious Symbols in the Public Space: In Search of a European Answer,’ 30 *Cardozo Law Review* (2009) at 2674 (footnotes omitted).

⁷⁵⁴ Another hurdle that the Court has recently eased is related to the notion of ‘interference’ with religious freedom. At the beginning of 2013, the Court rejected the rationale long upheld in its Article 9 ECHR case law according to which ‘if a person is able to take steps to circumvent a limitation placed on his or her freedom to manifest religion or belief, there is no interference’. ECtHR, *Eweida and Others v the United Kingdom*, 15 January 2013 § 83. This rationale was applied notably in cases concerning conflicts between applicants’ work and religious duties. See, e.g., ECmHR, *Stedman v. the United Kingdom*, 9 April 1997 and ECtHR, *Francesco Sessa v. Italy*, 3 April 2012.

⁷⁵⁵ See, e.g., McDannell, Colleen, *MATERIAL CHRISTIANITY: RELIGION AND POPULAR CULTURE IN AMERICA* (Yale University Press, 1998).

explain, ‘material objects could be central to a person's practice of . . . religion.’⁷⁵⁶ *Gatis Kovaļkovs v. Latvia*⁷⁵⁷ and *Austrianu v. Romania*⁷⁵⁸ are two cases in point. The cases involved prisoners not allowed to keep certain objects in their cells. Gatis Kovaļkovs complained that he could not perform the rituals of Vaishnavism (the Hare Krishna movement) as a result of the confiscation of his incense sticks. Austrianu, a Baptist applicant, claimed that he could not listen to his religious cassettes, following the confiscation of his cassette player. The two applicants’ practices counted as ‘manifestations’ of their religion under Article 9(1) ECHR.⁷⁵⁹

However, in assessing whether the confiscation of the applicants’ objects was justified under Article 9(2) ECHR, the Court downplays the importance of their religious practices. In *Gatis Kovaļkovs*, the Court dismisses the applicant’s complaint, holding that ‘restricting the list of items permitted for storage in prison cells by excluding items (such as incense sticks) which *are not essential for manifesting a prisoner’s religion* is a proportionate response to the necessity to protect the rights and freedoms of others.’⁷⁶⁰ Using a similar reasoning – that the confiscation of the applicant’s cassette player ‘was not such as to completely prevent him from manifesting his religion’ – the Court also rejects the applicant’s claim in *Austrianu*.⁷⁶¹

Interestingly, the *Austrianu* conclusion that the confiscation did not fully prevent the applicant from manifesting his religion was based on two reasons: (i) the applicant could use the cassette player apparently available in the cultural/education facility of the prison and (ii) the applicant could still engage in other practices (e.g., attend religious seminars and read religious books in his cell).⁷⁶² While the first reason is certainly sensible, the second is problematic. By taking into account the religious seminars and religious books as ‘mitigating’ factors in the balancing test, the Court makes implicit assumptions about the ‘non-essential’ nature of the applicant’s access to a cassette player. In other words, it downplays the importance of the cassette player by considering it replaceable by seemingly more ‘essential’ ways of manifesting a religion. If the Court truly considered access to a cassette player important, then it should have not mattered what other kinds of manifestation were allowed to the applicant.

Another case illustrating the Court’s failure to recognize more material aspects of practice is *Jones v. the United Kingdom*.⁷⁶³ The case was brought by a father banned from placing a memorial stone with a photograph on the grave of his daughter. His complaint was that the bar on photographs interfered with his religion, as the Church of Wales accepts photographs on graves. The material form of religiosity is represented in the applicant’s use of objects to

⁷⁵⁶ Sullivan, Winnifred Fallers, ‘Judging Religion’, 81 *Marquette Law Review* (1998) at 448.

⁷⁵⁷ ECtHR, *Gatis Kovaļkovs v. Latvia*, 31 January 2012.

⁷⁵⁸ ECtHR, *Austrianu v Romania*, 12 February 2013.

⁷⁵⁹ See ECtHR, *Gatis Kovaļkovs v. Latvia*, 31 January 2012 § 60.

⁷⁶⁰ *Ibid.* § 68. Emphasis added.

⁷⁶¹ ECtHR, *Austrianu v. Romania*, 12 February 2013 § 104.

⁷⁶² *Ibid.* § 105. In *Gatis Kovaļkovs*, however, the Court’s similar conclusion was based on another reason. Relying on information provided by the Rīga Vaishnavist congregation, the Court concluded that ‘the obligation to observe the religious tradition of burning incense sticks depends on the circumstances of the person in question’. ECtHR, *Gatis Kovaļkovs v. Latvia*, 31 January 2012 § 68.

⁷⁶³ ECtHR, *Jones v. the United Kingdom*, 13 September 2005.

‘sacralize or personalize’⁷⁶⁴ the death of his daughter. The Court however held: ‘it cannot be argued that the applicant’s belief required a photograph on the memorial or that he could not properly pursue his religion and worship without permission for such a photograph being given.’⁷⁶⁵ The complaint was quickly dismissed as incompatible *ratione materiae*, even when most scholars of religion would agree that practices surrounding individuals’ death ‘are close to the heart of religion’.⁷⁶⁶ Winnifred Fallers Sullivan, for example, emphasizes the importance that ‘practices associated with a burial site’ can have for religious people.⁷⁶⁷ These practices may include ‘placing of material objects symbolic of the dead person’s life.’⁷⁶⁸

B. Practice as Quotidian (and Public)

Other aspects of applicants’ practices that the Court has tended to de-emphasize include those that cannot be neatly separated from daily actions or everyday life.⁷⁶⁹ This is the type of religion that manifests in people’s ‘daily task’ and in ‘all the spaces of their experience,’ such as streets and workplaces.⁷⁷⁰ As Julie Ringelheim notes, the Strasbourg case law strongly suggests that manifestations outside the domains of home, family and places of worship are of ‘secondary importance.’⁷⁷¹ The Court’s discomfort with religion manifested outside such discrete spheres is most obvious in cases concerning applicants’ wearing of religious clothing.

The practice of wearing religious dress stands mostly for the habitual and embodied forms of religiosity,⁷⁷² which may generally correspond to what T. Jeremy Gunn has called religion as ‘a way of life.’⁷⁷³ Cases dealing with these dimensions of religion concern Muslim and Sikh applicants seeking to wear the headscarf or the turban in school or in a variety of other ordinary situations (e.g., during security checks, while motorcycle riding). In many of these cases, the Court has readily accepted a range of justifications of restrictions as ‘necessary in a

⁷⁶⁴ Sullivan, Winnifred Fallers, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* (Princeton University Press, 2005) at 142.

⁷⁶⁵ ECtHR, *Jones v. the United Kingdom*, 13 September 2005 § 3.

⁷⁶⁶ Sullivan, Winnifred Fallers, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* (Princeton University Press, 2005) at 215.

⁷⁶⁷ *Ibid.* 217.

⁷⁶⁸ *Ibid.* 216.

⁷⁶⁹ See Martínez-Torrón, Javier, ‘The (Un)Protection of Individual Religious Identity in the Strasbourg Case Law’, *Oxford Journal of Law and Religion* (2012) at 3 (arguing that the Court has not adequately protected individual religious identity expressed in ordinary life).

⁷⁷⁰ See Orsi, Robert A., ‘Everyday Miracles: The Study of Lived Religion,’ David D. Hall (ed.) *LIVED RELIGION IN AMERICA* (Princeton University Press, 1997) at 7.

⁷⁷¹ Ringelheim, Julie ‘Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory’ in Camil Ungureanu and Lorenzo Zucca (eds.) *LAW, STATE AND RELIGION IN THE NEW EUROPE* (Cambridge University Press, 2012) at 293.

⁷⁷² See Laborde, Cécile, ‘The Politics of Religious Freedom: Protecting Freedom of Religion in the Secular Age’, Blog ‘The Immanent Frame’ (2012) <<http://blogs.ssrc.org/tif/2012/04/23/protecting-freedom-of-religion-in-the-secular-age/>> accessed 6 June 2013.

⁷⁷³ Gunn, T. Jeremy, ‘The Complexity of Religion and the Definition of “Religion” in International Law’, 16 *Harvard Human Rights Journal* (2005) at 204 (arguing that ‘[i]n this facet, religion is associated with actions, rituals, customs and traditions that may distinguish the believer from adherents of other religions’).

democratic society’ without carrying any meaningful proportionality analysis.⁷⁷⁴ Reflecting on the headscarf cases, Carolyn Evans for instance argues: ‘there is no proper consideration of the importance of the right, the extent of its violation or the suffering caused to the applicants by its limitation. Rather, the Court’s focus has been on the State and its claims of necessity.’⁷⁷⁵ Indeed, secularism,⁷⁷⁶ health,⁷⁷⁷ security,⁷⁷⁸ public order⁷⁷⁹ and the rights of others⁷⁸⁰ have all trumped applicants’ rights in cases concerning religious dress without much difficulty. The significance that applicants’ religious practices may have in their lives is given no consideration. Nor are the personal/educational/professional costs arising from the restrictions. In fact, a large number of these complaints have been rejected for being ‘manifestly ill-founded.’⁷⁸¹ This reveals the insubstantial character that these applicants’ claims have in the eyes of the Court.

Take the example of *Mann Singh v. France*.⁷⁸² The applicant, a practicing Sikh, complained that he was denied a copy of his driver’s license for refusing to take off his turban for the picture. Mann Singh – and what is at stake for him – is virtually absent in the Court’s analysis of whether the interference with his right was justified. The Court only looks at the State’s alleged justifications of public order and safety and concludes that the measure was necessary to identify the driver and to make sure that s/he had the right to drive the car.⁷⁸³ Contrary to the approach in *Sinan Işık* – where the Court worries that the applicant will be compelled to reveal his religion every time he is asked to show his identity card – in *Mann Singh* the Court ignores that the applicant will be compelled to appear in violation of his religion (bareheaded) every time he is asked to show his driver’s license. In fact, the Court minimizes the restriction on Mann Singh’s freedom of religion by deeming the requirement to remove his turban a ‘one-time’ measure.⁷⁸⁴ This minimizing approach stands in sharp contrast with the approach adopted by the UN Human Rights Committee in a similar case. The Committee, on the contrary, acknowledges the continuing character of the interference: ‘even if the obligation to remove the turban for the identity photograph might be described as a one-time requirement, it would potentially interfere with the author’s freedom of religion on a continuing basis because

⁷⁷⁴ See Belelieu, Christopher D., ‘The Headscarf as a Symbolic Enemy of the European Court of Human Rights’ Democratic Jurisprudence: Viewing Islam through a European Legal Prism in Light of the *Şahin* Judgment’, 12 *Columbia Journal of European Law* (2006) at 608-13 and Gunn, T. Jeremy, ‘Fearful Symbols: The Islamic Headscarf and the European Court of Human Rights’. *Droit et Religion* (2008) at 25-26.

⁷⁷⁵ Evans, Carolyn, ‘Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture’, 26 *Journal of Law and Religion* (2010-2011) at 330.

⁷⁷⁶ See, e.g., ECtHR (GC), *Leyla Şahin v. Turkey*, 10 November 2005; ECtHR, *Aktas v. France*, 30 June 2009 and *Ranjit ECtHR, Singh v. France*, 30 June 2009.

⁷⁷⁷ See, e.g., ECmmHR, *X. v. the United Kingdom*, 12 July 1978.

⁷⁷⁸ See, e.g., ECtHR, *El Morsli v. France*, 4 March 2008 and ECtHR, *Phull v. France*, 11 January 2005.

⁷⁷⁹ See, e.g., ECtHR, *Mann Singh v. France*, 13 November 2008.

⁷⁸⁰ See, e.g., ECtHR, *Dahlab v. Switzerland*, 15 February 2001.

⁷⁸¹ See, e.g., ECtHR, *El Morsli v. France*, 4 March 2008; ECtHR, *Phull v. France*, 11 January 2005, ECtHR, *Mann Singh v. France*, 13 November 2008 and *Dahlab v. Switzerland*, 15 February 2001.

⁷⁸² ECtHR, *Mann Singh v. France*, 13 November 2008.

⁷⁸³ *Ibid.* p 7.

⁷⁸⁴ *Ibid.*

he would always appear without his religious head covering in the identity photograph and could therefore be compelled to remove his turban during identity checks'.⁷⁸⁵

Nowhere is the privileging of the belief/conscience side of the dichotomy – and the simultaneous disadvantaging of the practice side – more evidently at work than in cases concerning secularism. The Court has not only been extremely deferential towards the principle of secularism in its most vigorous forms⁷⁸⁶ in France and Turkey.⁷⁸⁷ It has endorsed it normatively by stating that attitudes that fail to respect these forms ‘will not necessarily be accepted as being covered by the freedom to manifest one’s religion and will not enjoy the protection of Article 9 of the Convention.’⁷⁸⁸ The Court’s readiness to judge these kinds of ‘secular fundamentalism’⁷⁸⁹ as compatible with the European Convention on Human Rights intersects nicely with the assumption of religion as inner belief or conscience pervading its case law more broadly.⁷⁹⁰

Indeed, the imagery lying behind the Court’s support for the strict private/public divide underpinning the endorsed versions of secularism is *invisibility*. As Talal Asad observes, ‘[a]ny view of religious life that requires the separation of what is observable from what is not observable fits comfortably with the modern liberal separation between the public spaces . . . and the private.’⁷⁹¹ The workings of the invisibility imagery are apparent in the Court’s fixation with the dimensions of Muslim applicants’ religious symbols (‘powerful’ and ‘external’)⁷⁹² and in the excessive reliance on the ‘ostentatious’⁷⁹³ character of such symbols rather than on the actual conduct of the applicants wearing them.⁷⁹⁴

Thus, the way in which the Court has imagined the secular in this group of cases is inseparable from the way in which it has imagined the religious: as invisible, given its location in the individual’s inner sphere. Indeed, as Peter Danchin has argued, one of the implicit assumptions shaping the Court’s private/public divide is the idea of religion as ‘primarily a

⁷⁸⁵ UN Human Rights Committee, *Ranjit Singh v. France*, Communication No. 1876/2000, 22 July 2011 § 8.4.

⁷⁸⁶ Matthias Koenig, for example, argues that the Court’s interpretation of neutrality developed in deferential judgments concerning Turkey and France comes close to ‘assertive’ secularism. Koenig, Matthias, ‘Governance of Religious Diversity at the European Court of Human Rights’ in Jane Boulden and Will Kymlicka (eds.), *INTERNATIONAL APPROACHES TO GOVERNING ETHNIC DIVERSITY* (Oxford University Press, forthcoming 2014).

⁷⁸⁷ See, e.g., ECtHR (GC), *Leyla Şahin v. Turkey*, 10 November 2005; ECtHR, *Aktas v. France*, 30 June 2009 and ECtHR, *Ranjit Singh v. France*, 30 June 2009.

⁷⁸⁸ ECtHR, *Dogru v. France*, 4 December 2008 § 72. See also, ECtHR (GC), *Refah Partisi (the Welfare Party) and Others v. Turkey*, 13 February 2003 § 93.

⁷⁸⁹ Evans, Malcolm D., ‘Freedom of Religion and the European Convention on Human Rights: Approaches, Trends and Tensions in Peter Cane, Carolyn Evans and Zoe Robinson (eds.) *LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT* (Cambridge University Press, 2011) at 312.

⁷⁹⁰ The Court has however made clear it is not willing to go as far as supporting Turkish secularism banishing religion from the streets or publicly accessible spaces. See, e.g., ECtHR, *Ahmet Arslan and Others v. Turkey*, 23 February 2010.

⁷⁹¹ Asad, Talal, ‘Reading a Modern Classic: W. C. Smith’s “The Meaning and End of Religion”’ 40(3) *History of Religions* (2001) at 214.

⁷⁹² See, e.g., ECtHR, *Dahlab v. Switzerland*, 15 February 2001.

⁷⁹³ See, e.g., ECtHR, *Dogru v. France*, 4 December 2008 § 71.

⁷⁹⁴ Smet, Stijn, ‘Freedom of Religion versus Freedom from Religion: Putting Religious Duties Back on the Map’ in Jeroen Temperman (ed.) *THE LAUTSI PAPERS: MULTIDISCIPLINARY REFLECTIONS ON RELIGIOUS SYMBOLS IN THE PUBLIC SCHOOL CLASSROOM* (Martinus Nijhoff, 2012).

matter of *belief* or *conscience* whose proper place is in the private sphere.⁷⁹⁵ This is certainly reflected in the Court's endorsement of a secularist relegation of religion to the internal conscience, as evidenced in cases such as *Leyla Şahin v. Turkey*. This form of secularism, as the Turkish Constitutional Court states in this case, locates religion in 'the conscience of each and everyone.'⁷⁹⁶

The Court's notion of the secular and the religious in cases against France and Turkey⁷⁹⁷ in fact seems to reflect broader historical understandings. Scholars of religion have shown that historically secularism has entailed 'the regulation and reformation of religious beliefs, doctrines, and practices to yield a *particular normative conception of religion* (that is largely Protestant Christian in its contours).'⁷⁹⁸ Michael Warner, for instance, argues that modern secularity in the Euro-North American context 'gets much of its meaning from the consolidation of "religion" as a special form of belief and experience.'⁷⁹⁹ This form came to privilege 'what you believe' and 'how strongly you believe it' while sidelining other markers of religiosity such as 'ritual practice, collective worship, or legal observance, where belief in the usual sense may not be at stake at all.'⁸⁰⁰

It is not that the Court has never recognized embodied or habitual – and therefore more visible – forms of religion. It has done so but rather rarely. *Eweida and Others v. the United Kingdom* is one of the few examples.⁸⁰¹ In this case, the Court weighed heavily in the balance what was at stake for two Christian applicants wishing to wear a cross visibly at work.⁸⁰² One of them – Ms. Eweida, a check-in employee at British Airways – won the case. Yet one of the main arguments the Court relied on was that her cross was 'discreet' and could not have detracted from her professional appearance.⁸⁰³ Even though the countervailing interest in *Eweida* was not secularism but a private company's brand or image (an interest that *de facto* no longer existed at the time of the ruling, as a result of the amendment of the dress code by the airline),⁸⁰⁴ the (in)visibility imagery is still at work in the Court's reasoning. Visibility is in fact a notion that

⁷⁹⁵ Danchin, Peter G., 'Islam in the Secular *Nomos* of the European Court of Human Rights,' 32 *Michigan Journal of International Law* (2011) at 672. Also, Julie Ringelheim has noted that the Court's assumption of a neat distinction between the private and public echoes the contested paradigm of secularisation, in particular, the privatisation thesis according to which religion 'retreats in the private sphere, if not the individual conscience.' Ringelheim, Julie 'Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory' in Camil Ungureanu and Lorenzo Zucca (eds.) *LAW, STATE AND RELIGION IN THE NEW EUROPE* (Cambridge University Press, 2012) at 294.

⁷⁹⁶ ECtHR (GC), *Leyla Şahin v. Turkey*, 10 November 2005 § 39.

⁷⁹⁷ Most recently, the Court's Grand Chamber has refused to embrace a secularist notion of neutrality by allowing the crucifix to stay in Italian public schools. See ECtHR (GC), *Lautsi and Others v. Italy*, 18 March 2011.

⁷⁹⁸ Danchin, Peter G., 'Islam in the Secular *Nomos* of the European Court of Human Rights,' 32 *Michigan Journal of International Law* (2011) at 708 (quoting Saba Mahmood). Footnote omitted.

⁷⁹⁹ Warner, Michael, 'Rethinking Secularism: Was Antebellum America Secular? Blog 'The Immanent Frame' (2012) <<http://blogs.ssrc.org/tif/2012/10/02/was-antebellum-america-secular/>> accessed 6 June 2013.

⁸⁰⁰ *Ibid.*

⁸⁰¹ ECtHR, *Eweida and Others v the United Kingdom*, 15 January 2013. See also, ECtHR, *Ahmet Arslan and Others v. Turkey*, 23 February 2010.

⁸⁰² ECtHR, *Eweida and Others v. the United Kingdom*, 15 January 2013 §§ 94 and 99.

⁸⁰³ *Ibid.* § 94.

⁸⁰⁴ *Ibid.*

may take ‘many degrees and modulations.’⁸⁰⁵ Contrary to the ‘ostentatious’ character of the Islamic headscarf, the Court regards the cross as ‘discreet.’ The latter characterization suggests that Ms. Eweida’s cross is not officially ‘visible:’ it is ‘not really hidden but also not flaunted.’⁸⁰⁶

In conclusion, and cases like *Eweida* notwithstanding, the fact remains that practices emphasizing ‘embodiment, habit, and daily activity’⁸⁰⁷ have found it more difficult to get the Court’s solicitude. Several of the aspects the Court has sidelined in the cases examined in this part correspond to what religion scholars have called ‘lived religion’.⁸⁰⁸ Robert Orsi describes it in the following terms:

Lived religion cannot be separated from other practices of everyday life, from the ways that humans do other necessary and important things, or from other cultural structures and discourses . . . Nor can sacred spaces be understood in isolation from the places where these things are done – workplaces, hospitals, law courts, homes, and streets.⁸⁰⁹

Though lived religion pays greater attention to the embodied aspects of religion, it does not involve a rejection of the ‘opposite’ disembodied dimensions. In fact, it refuses to adopt an either/or approach: cognitive/textual/institutional versus embodied/material/individual forms of religion. As Orsi explains, lived religion ‘directs attention to institutions *and* persons, texts *and* rituals, practice *and* theology, things *and* ideas.’⁸¹⁰

The Court’s principles, however, have set an explicit internal hierarchy among the forms of manifestations listed in Article 9 ECHR, giving worship ‘the highest status.’⁸¹¹ This hierarchy is apparent in the Court’s principle that ‘Article 9 primarily protects the sphere of personal beliefs and religious creeds i.e. the area which is sometimes called the *forum internum*. In addition, it protects acts which are *intimately linked to these attitudes, such as acts of worship or devotion* which are aspects of the practice of a religion or belief in a generally recognized form.’⁸¹²

⁸⁰⁵ Weintraub, Jeff, ‘The Theory and Politics of the Public/Private Distinction’ in Jeff Weintraub and Krishan Kumar (eds.) *PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE: PERSPECTIVES ON A GRAND DICHOTOMY* (University of Chicago Press, 1997) at footnote 10.

⁸⁰⁶ This is the way in which Jeff Weintraub describes the notion of acting ‘discreetly.’ *Ibid.* at footnote 8.

⁸⁰⁷ Bender, Courtney, ‘Practicing Religions’ in Robert A. Orsi (ed.) *THE CAMBRIDGE COMPANION TO RELIGIOUS STUDIES* (Cambridge University Press, 2012) at 273.

⁸⁰⁸ Orsi, Robert ‘Everyday Miracles: The Study of Lived Religion’ in David D. Hall (ed.) *LIVED RELIGION IN AMERICA: TOWARD A HISTORY OF PRACTICE* (Princeton University Press, 1997) at 7 and McGuire, Meredith B., *LIVED RELIGION: FAITH AND PRACTICE IN EVERYDAY LIFE* (Oxford University Press, 2008). For an illuminating analysis of courts’ struggle to recognize lived religion ‘flowing into everyday activities and objects’ in the US, see Sullivan, Winnifred Fallers, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* (Princeton University Press, 2005) at 140.

⁸⁰⁹ Orsi, Robert A., ‘Is the Study of Lived Religion Irrelevant to the World We Live in?’ 42 *Journal for the Scientific Study of Religion* (2003) at 172.

⁸¹⁰ *Ibid.*

⁸¹¹ Evans, Carolyn, *FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (Oxford University Press, 2001) at 107.

⁸¹² See ECtHR, *Van Den Dungen v. the Netherlands*, 22 February 1995 § 1 and ECtHR, *Porter v. the United Kingdom*, 8 April 2003 § 3. Emphasis added.

So the Court has not just created an overall hierarchy that privileges belief over practice. It has also made a hierarchical move within the term ‘manifestation’ itself. It is therefore no surprise that the Court has often considered worship as ‘essential to religious life,’ while treating other manifestations such as wearing religious clothing as ‘less important.’⁸¹³ Indeed, out of the twenty violations of freedom of religion in its individual dimension,⁸¹⁴ only five of them concern acts outside of worship (e.g., religious symbols,⁸¹⁵ observance of dietary requirements⁸¹⁶ and proselytism⁸¹⁷). The rest concerns worship⁸¹⁸ or claims that do not deviate from the idea of religion as belief or conscience (e.g., non-manifestation of one’s religion,⁸¹⁹ coercion to adhere to a religion,⁸²⁰ coercion to recant one’s religion⁸²¹ and conscientious objection to military service on religious grounds⁸²²).

III. ‘Legal’ Religion in Strasbourg: Inegalitarian Implications

In the two previous parts, I have sought to demonstrate that the Court’s belief/practice dichotomy has given rise to asymmetric relations among different religious forms. The dichotomy tends to valorize certain forms of religiosity (mostly disembodied, autonomous and private beliefs) while obscuring or neglecting others (mostly embodied, habitual and public practices). Martinez Torron sums up the Court’s ambivalence nicely: ‘[T]he Court . . . has been at times very careful to protect individuals’ *right not to disclose*, even indirectly, their religion or beliefs – an aspect of religious freedom which is implicit in Article 9 ECHR, but has not always shown the same zeal in protecting individuals’ *right to express* their religion or beliefs *in practice*’.⁸²³ In this part, I challenge the hierarchy between these understandings of religion by bringing to light two major inegalitarian implications: (i) ‘deviation’ and exclusion from protection and (ii) implicit legitimation of discrimination.

⁸¹³ Evans, Carolyn, ‘Religious Freedom in European Human Rights Law: The Search for a Guiding Conception’ in Mark W. Janis and Carolyn Evans (eds.), *RELIGION AND INTERNATIONAL LAW* (Martinus Nijhoff, 1999) at 394 (referring to the case law of both the Court and the Commission).

⁸¹⁴ The count covers the period of 1959-31 March 2013 and includes violations of freedom of religion alone. Moreover, cases concerning the collective dimension of freedom of religion have been excluded from the count.

⁸¹⁵ ECtHR, *Ahmet Arslan and Others v. Turkey*, 23 February 2010 and ECtHR, *Eweida and Others v. the United Kingdom*, 15 January 2013.

⁸¹⁶ ECtHR, *Jakóbski v. Poland*, 7 December 2010.

⁸¹⁷ ECtHR, *Kokkinakis v. Greece*, 25 May 1993 and ECtHR, *Larissis and Others v. Greece*, 24 February 1998.

⁸¹⁸ ECtHR, *Kuznetsov v. Ukraine*, 29 April 2003; ECtHR, *Poltoratskiy v. Ukraine*, 29 April 2003 and ECtHR, *Igor's Dmitrijevs v. Latvia*, 30 November 2006.

⁸¹⁹ ECtHR, *Alexandridis v. Greece*, 21 February 2008; ECtHR, *Dimitras and Others v. Greece*, 3 June 2010; ECtHR, *Dimitras and Others v. Greece* (No 2), 3 November 2011; ECtHR, *Dimitras and Others v. Greece* (No 3), 8 January 2013, and ECtHR, *Sinan İşık v. Turkey*, 2 February 2010.

⁸²⁰ ECtHR, *Buscarini and Others v. San Marino*, 18 February 1999.

⁸²¹ ECtHR, *Ivanova v. Bulgaria*, 12 April 2007.

⁸²² ECtHR (GC), *Bayatyan v. Armenia*, 7 July 2011; ECtHR *Erçep v. Turkey*, 22 November 2011; ECtHR *Feti Demirtaş v. Turkey*, 17 January 2012; ECtHR, *Bukharatyan v. Armenia*, 10 January 2012 and ECtHR *Tsaturyan v. Armenia*, 10 January 2012.

⁸²³ Martinez Torron, Javier, ‘The (Un)Protection of Individual Religious Identity in the Strasbourg Case Law’, *Oxford Journal of Law and Religion* (2012) at 21.

Privileging belief over practice, as law and religion scholars have increasingly realized, rests on a conception of religion that has emerged out of a particular historical trajectory and that, as a result, is largely Protestant.⁸²⁴ Religion scholars have been particularly critical of the bias and limitations embedded in such a conception of religion. In a recent ‘historicist turn,’ these scholars have become more alert to the genealogy or ‘the history of the making of its terminology,’ beginning with the term ‘religion’ itself.⁸²⁵ One important conclusion arising out of these historical realizations has been that the modern emphasis on individual conscience or belief is largely the consequence of the Protestant Reformation’s challenge to medieval Catholicism’s focus on the body.⁸²⁶ Meredith McGuire, for example, observes: ‘[T]he Reformation era represented, in essence, a revolution in ritual theory: The old ritual had privileged practice, while the new ritual privileged *cognition* – such as hearing preaching, intellectually assenting to creeds, reading and thinking about passages of the Bible’.⁸²⁷ The overall effect of the Reformation was thus the ‘transfer of our religious life out of bodily forms of ritual, worship, practice, so that it comes more and more to reside “in the head.”’⁸²⁸ So, what some have called the ‘ideology of belief’ is ‘an assumption deriving from the history of Christianity that religion is above all an interior state of assent to certain truths.’⁸²⁹

Thus, if there is anything the Strasbourg Court can learn from scholars of religion, the lesson is that there is nothing ‘natural’ or ‘universal’ in describing religion as fundamentally a matter of belief.⁸³⁰ Rather, it is the particular history of Christianity – the ‘interiorization of religion’⁸³¹ following the Reformation⁸³² – that has made belief the ‘measure of what religion is

⁸²⁴ In the Strasbourg context, *see, e.g.*, Danchin, Peter G., ‘Islam in the Secular *Nomos* of the European Court of Human Rights,’ 32 *Michigan Journal of International Law* (2011) 663-747 and Ferrari, Silvio, ‘The Strasbourg Court and Article 9 of the European Convention of Human Rights: A Quantitative Analysis of the Case Law’ in Jeroen Temperman (ed.) *THE LAUTSI PAPERS: MULTIDISCIPLINARY REFLECTIONS ON RELIGIOUS SYMBOLS IN THE PUBLIC SCHOOL CLASSROOM* (Martinus Nijhoff, 2012) at 19.

⁸²⁵ Orsi, Robert A., ‘Introduction’ in Robert A. Orsi (ed.) *THE CAMBRIDGE COMPANION TO RELIGIOUS STUDIES* (Cambridge University Press, 2012) at 2-3. *See also*, McGuire, Meredith B., *LIVED RELIGION: FAITH AND PRACTICE IN EVERYDAY LIFE* (Oxford University Press, 2008) at 22-24.

⁸²⁶ Vasquez, Manuel A., *MORE THAN BELIEF: A MATERIALIST THEORY OF RELIGION* (Oxford University Press, 2011) at 31. *See also*, Smith, Jonathan Z., ‘Religion, Religions, Religious’ in Mark C. Taylor (ed.) *CRITICAL TERMS FOR RELIGIOUS STUDIES* (University of Chicago Press, 1998) at 271.

⁸²⁷ McGuire, Meredith B., ‘Contested Meanings and Definitional Boundaries: Historicizing the Sociology of Religion’ in Arthur L. Greil and David G. Bromley (eds.), *DEFINING RELIGION: INVESTIGATING THE BOUNDARIES BETWEEN THE SACRED AND SECULAR* (JAI, 2003) at 134.

⁸²⁸ Taylor, Charles, *A SECULAR AGE* (Harvard University Press, 2007) at 613. *See also*, Vasquez, Manuel A., *MORE THAN BELIEF: A MATERIALIST THEORY OF RELIGION* (Oxford University Press, 2011) at 33.

⁸²⁹ Lopez, Donald S. Jr., ‘Belief’ in Mark C. Taylor (ed.), *CRITICAL TERMS FOR RELIGIOUS STUDIES* (University of Chicago Press, 1998) at 31.

⁸³⁰ *See*, Asad, Talal, ‘The Construction of Religion as an Anthropological Category’ in Talal Asad, *GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM* (The Johns Hopkins University Press, 1993) at 47 (arguing that religion as belief ‘is a modern, privatized Christian one because and to the extent that it emphasizes the priority of belief as a state of mind rather than as constituting activity in the world.’)

⁸³¹ Taylor, Mark C., ‘Introduction’ in Mark C. Taylor (ed.) *CRITICAL TERMS FOR RELIGIOUS STUDIES* (University of Chicago Press, 1998) at 2.

⁸³² After the Reformation, beliefs and practices associated with ‘peoples’ bodies and emotions’ were ‘defined out – as no longer pertaining to religion.’ McGuire, Meredith B., *LIVED RELIGION: FAITH AND PRACTICE IN EVERYDAY LIFE* (Oxford University Press, 2008) at 119.

understood to be'.⁸³³ Naturalizing – that is, making ‘natural’ what in fact is historically contingent or socially constructed – involves normalizing or ‘setting up a standard by which to judge deviation.’⁸³⁴ Feminists have convincingly shown how the ‘neutral norm’ against which women have been regarded as ‘different’ or ‘deviant’ has often turned out to be ‘the male norm.’⁸³⁵ The exact same point can be made about (inner and private) belief as the essence of religion: the ‘norm’ against which religious claimants have been judged in Strasbourg has turned out to be mainstream Protestant (or, better still, Protestantized) views of religion.⁸³⁶

No surprise, then, that any form of religious expression departing from the ‘norm’ has often been seen as ‘a problematic boundary crossing.’⁸³⁷ Peter Danchin has neatly illustrated how this has been the case of Muslim applicants.⁸³⁸ The ‘problematic boundary-crossers’ in Strasbourg, as the analysis in this Chapter shows, include a variety of other religious group members from Hare Krishna to Sikhs and some Christians. What is furthermore noteworthy is that the ‘convictions’ of Protestant countries remain scarce in Strasbourg while the ‘acquittals’ of Turkey and France – two Council of Europe countries with a strong variety of secularism – are abundant.⁸³⁹ This finding, as Silvio Ferrari observes, is telling ‘because all five Protestant countries until recently had a Church-State system that could potentially create problems in terms of religious freedom’ even though, of course, the Court acts only on the basis of individual applications.⁸⁴⁰

So this is one of the major inegalitarian implications of using a Protestantized view of religion as the standard against which religious claims are judged: certain forms of religion will obviously be less legally cognizable – or less ‘legal’ religions – than others. As a result, they will tend to be excluded from legal protection. Reducing religion to conscience, as Cecile Laborde

⁸³³ Lopez, Donald S. Jr. ‘Belief’ in Mark C. Taylor (ed.), *CRITICAL TERMS FOR RELIGIOUS STUDIES* (University of Chicago Press, 1998) at 33.

⁸³⁴ Warne, Randi R., ‘Gender’ in Willi Braun and Russell T. McCutcheon (eds.), *GUIDE TO THE STUDY OF RELIGION* (Continuum, 2000) at 141.

⁸³⁵ Minow, Martha, ‘The Supreme Court 1986 Term: Justice Engendered’, 101 *Harvard Law Review* (1987) at 32 and 61.

⁸³⁶ On mainstream Protestantism representing the ‘normal’ against which ‘others’ are excluded from protection in other jurisdictions, *see e.g.*, Beaman, Lori G., ‘The Courts and the Definition of Religion: Preserving the Status Quo through Exclusion’ in Arthur L Greil and David G Bromley (eds), *DEFINING RELIGION: INVESTIGATING THE BOUNDARIES BETWEEN THE SACRED AND SECULAR* (JAI 2003) 203-209.

⁸³⁷ Blomley, Nicholas, ‘Flowers in the Bathtub: Boundary Crossings at the Public–Private Divide’, 36 *Geoforum* (2005) at 284.

⁸³⁸ Danchin, Peter G., ‘Islam in the Secular *Nomos* of the European Court of Human Rights,’ 32 *Michigan Journal of International Law* (2011).

⁸³⁹ Ferrari, Silvio, ‘The Strasbourg Court and Article 9 of the European Convention of Human Rights: A Quantitative Analysis of the Case Law’ in Jeroen Temperman (ed.) *THE LAUTSI PAPERS: MULTIDISCIPLINARY REFLECTIONS ON RELIGIOUS SYMBOLS IN THE PUBLIC SCHOOL CLASSROOM* (Martinus Nijhoff, 2012) at 19 and 32.

⁸⁴⁰ *Ibid.* 32. One of the possible explanations offered by Ferrari for such a low number of cases is precisely the similarity between the notion of religion favoured by the Court and the one prevalent in Protestant countries: ‘in both cases, the emphasis is placed on the “primacy of the internal dimensions of religion.”’ *Ibid.*

argues, ‘seems to deny protection to the cultural, habitual, embodied, and collective dimensions of religion’.⁸⁴¹

Another problematic risk of legally imagining religion as essentially about (inner and private) belief is that it obscures instances in which religion is privatized as a result of religious discrimination and intolerance. Such a conception of religion risks overlooking the difference between deliberately maintaining one’s religion as private and being forced to maintain it as such out of ‘fear of social hostility’.⁸⁴² Thus, by viewing religion primarily as inner belief the Court may fail to notice instances of what Kenji Yoshino terms ‘coerced covering’⁸⁴³ which result from hostile and prejudiced reactions to the visibility of some religious forms. The focus, therefore, should not be on visibility but rather on the hostility to such visibility.⁸⁴⁴

In short, the Court should take great care that, in conceiving of religion as an essentially inner or private matter, it does not end up legitimizing the discrimination and social exclusion of unpopular minority religious groups. *S.A.S. v. France*,⁸⁴⁵ a case currently pending before the Court’s Grand Chamber, may be a good illustration of this kind of invidious effects. The case concerns a Muslim woman challenging the so-called ‘burqa ban’ in France. As recent empirical studies have shown, the situation of women wearing the full-face veil is one of aggression and discrimination by the larger society.⁸⁴⁶ It is precisely this kind of vulnerability to prejudiced aggressions from the public that a taken-for-granted approach of religion as essentially (inner and private) belief is likely to miss.

IV. Deconstructing the ‘Wall of Separation’⁸⁴⁷

Having shown the hierarchical and inegalitarian implications that the Court’s privileging of belief over practice has carried (and risks carrying), I now argue that the dominant side of the binary (belief) suffers from an elementary lack: its dependence on the subordinate term

⁸⁴¹ Laborde, Cécile, ‘The Politics of Religious Freedom: Protecting Freedom of Religion in the Secular Age’, Blog ‘The Immanent Frame’ (2012) <<http://blogs.ssrc.org/tif/2012/04/23/protecting-freedom-of-religion-in-the-secular-age/>> accessed 6 June 2013.

⁸⁴² This point has been made in the context of the Court’s sexual orientation case law. *See, e.g.*, Johnson, Paul, ‘An Essentially Private Manifestation of Human Personality: Constructions of Homosexuality in the European Court of Human Rights’, 10 *Human Rights Law Review* (2010) at 85.

⁸⁴³ Yoshino, Kenji, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (Random House, 2007) at 177 and 179.

⁸⁴⁴ Paul Johnson makes this point in the context of the Court’s sexual orientation case law. Johnson, Paul, ‘An Essentially Private Manifestation of Human Personality: Constructions of Homosexuality in the European Court of Human Rights’, 10 *Human Rights Law Review* (2010) at 83.

⁸⁴⁵ *S.A.S. v. France* (Application No 43835/11) introduced on 11 April 2011.

⁸⁴⁶ Brems, Eva, Janssens, Yaiza, Lecoyer, Kim, Ouald Chaib, Saila, and Vandersteen, Victoria, ‘Wearing the Face Veil in Belgium: Views and Experiences of 27 Women Living in Belgium concerning the Islamic Full Face Veil and the Belgian Ban on Face Covering’ (2012) at 4.5 available at <www.ugent.be/re/publiekrecht/en/research/human-rights/faceveil.pdf> accessed 6 June 2013.

⁸⁴⁷ I take the notion of the ‘wall of separation’ between the *forum internum* and the *forum externum* from Peter Petkoff. Petkoff, Peter, ‘*Forum Internum* and *Forum Externum* in Canon Law and Public International Law with a Particular Reference to the Jurisprudence of the European Court of Human Rights’, 7 *Religion and Human Rights* (2012) at 213.

(practice). In this last part, and by means of deconstructive analysis,⁸⁴⁸ I thus ‘rescue’ the forgotten or marginalized term ‘practice.’ Moreover, taking my cue from feminist legal scholars, I argue that one way to counteract the hierarchies and inequalities between the dimensions of religion associated with one or the other side of the belief/practice distinction is to embrace *both* sides more interrelatedly.

The notion of a sharp and stable separation between belief and action is ‘controversial’⁸⁴⁹ and remains ‘a matter of great contestation’ in several legal contexts, including international human rights law.⁸⁵⁰ The artificial and fixed nature of the belief/practice distinction has been criticized for, *inter alia*, obscuring the extent to which the two terms actually interact and are interdependent.⁸⁵¹ In arguing for a clearer scope of the *forum internum* and a more sophisticated understanding of the belief/action relationship, Carolyn Evans for example observes in the Strasbourg context: ‘At some point, burdening external manifestations of belief must have serious implications for the internal realm.’⁸⁵² Her assumption seems to be that a wider and more clearly defined notion of the *forum internum* would leave less room for States to require people to act in ways that contradict their religion/belief or to ‘pay a price’ for adhering to their religion/belief.⁸⁵³ Peter Petkoff also suggests exploring a ‘more relational understanding of the two forums.’⁸⁵⁴ Understanding belief and manifestation as ‘integrated aspects’ of freedom of religion, the argument goes, will emphasize the ‘flourishing’ rather than the ‘containment’ of

⁸⁴⁸ I apply Derrida’s deconstruction in its simplest form: the identification and manipulation of binary oppositions in order to challenge the privileged status of one of the opposites. See generally Balkin, Jack M. ‘Deconstruction’s Legal Career’, 27 *Cardozo Law Review* (2005) 719-740; Balkin, Jack M., ‘Deconstructive Practice and Legal Theory’, 96 *Yale Law Journal* (1987) 743-786.

⁸⁴⁹ Evans, Carolyn, FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Oxford University Press, 2001) at 74.

⁸⁵⁰ Danchin, Peter G., ‘Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law’ 49 *Harvard International Law Journal* (2008) at 263.

⁸⁵¹ See Moens, Gabriel, ‘The Action-Belief Dichotomy and Freedom of Religion’, 12 *Sydney Law Review* (1989-1990) at 195; Evans, Carolyn, FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Oxford University Press, 2001) at 74-79; Trigg, Roger, EQUALITY, FREEDOM AND RELIGION (Oxford University Press, 2012) at 99-102; Sullivan, Winnifred Fallers, ‘Reforming Culture: Law and Religion Today’ in Robert A. Orsi (ed.), THE CAMBRIDGE COMPANION TO RELIGIOUS STUDIES (Cambridge University Press, 2012) at 331-333 and Petkoff, Peter, ‘Forum Internum and Forum Externum in Canon Law and Public International Law with a Particular Reference to the Jurisprudence of the European Court of Human Rights’ 7 *Religion and Human Rights* (2012) 183-214.

⁸⁵² Evans, Carolyn, FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Oxford University Press, 2001) at 76 and 201. Other authors have more straightforwardly argued for an expanded notion of the *forum internum* advocating its application in cases involving coercion of religious beliefs. Taylor, Paul M., FREEDOM OF RELIGION: UN AND EUROPEAN HUMAN RIGHTS LAW AND PRACTICE (Cambridge University Press, 2005). He critiques the Court’s approach for inadequately treating as manifestation instances that in fact concern coercion against the *forum internum*. In his view, issues such as oath-taking and conscientious objection have been ‘shoe-horned awkwardly into the framework of manifestation’ thereby admitting state arguments based on permissible limitations. *Ibid.* at 20.

⁸⁵³ Evans, Carolyn, FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Oxford University Press, 2001) at 102.

⁸⁵⁴ Petkoff, Peter, ‘Forum Internum and Forum Externum in Canon Law and Public International Law with a Particular Reference to the Jurisprudence of the European Court of Human Rights,’ 7 *Religion and Human Rights* (2012) at 183.

freedom of religion.⁸⁵⁵ While I agree with these authors on the need for a more complex analysis that reflects the interrelationship of belief and practice, I differ however on the motivation. My proposal of a more interrelated approach is motivated by the need to rescue ‘practice’ from its subordinate status and, ultimately, by the need to counteract bias and inequality.

A. To the Rescue of Practice

One example of how blurry the lines between belief and action – or between the *forum internum* and the *forum externum* – can get comes from conscientious objection cases. Forcing people to act in violation of their religious beliefs, as several scholars have shown, may entail an affront to their *forum internum*.⁸⁵⁶ Commenting on the cases of *Valsamis v. Greece* and *Efstratiou v. Greece* – concerning the punishment of Jehovah’s Witnesses students for refusing to participate in what they regarded as a military parade – Carolyn Evans persuasively shows how difficult it is to maintain a ‘neat distinction between the internal and the external realms’.⁸⁵⁷ As she argues, forcing someone to act in violation of her religious commitment is arguably equivalent to forcing her to recant a religion or belief.⁸⁵⁸ This is precisely what the Court appears to protect in recent cases concerning Jehovah’s Witnesses applicants’ conscientious objection to military service: that individuals are not forced – by means of criminal sanctions – to act against their conscience or deeply held beliefs.⁸⁵⁹ This sort of cases shows how it is not so easy to draw the line between ‘external pressure inducing a forcible change in *inner* belief and external pressure obliging *action* that runs counter to inner belief.’⁸⁶⁰

In fact, it is hard to imagine how exactly a State may interfere with people’s religious beliefs if not by forcing some form of action upon them. Even the belief-centered cases discussed in the first part turn on some kind of external behavior. Take the cases concerning the right not to be obliged to manifest one’s religion/belief. They all required an *action* from the applicants: to *communicate* or *disclose* their (non-)religious beliefs. What is more, the flaws in constructing a belief/manifestation dichotomy are actually implicit in the Court’s formulation of this right: it ‘falls within the *forum internum* of each individual’⁸⁶¹ and yet is framed as ‘the right of an individual not to be obliged to *manifest* his or her beliefs.’⁸⁶² Thus, when trying to talk about the *forum internum*, the Court immediately talks about manifestation, albeit in its ‘negative aspect.’ Moreover, think of *Buscarini*, the case brought by San Marino’s Members of Parliament obliged

⁸⁵⁵ *Ibid.* 213.

⁸⁵⁶ See, e.g., Taylor, Paul M., *FREEDOM OF RELIGION: UN AND EUROPEAN HUMAN RIGHTS LAW AND PRACTICE* (Cambridge University Press, 2005) at 115-202 and Ringelheim, Julie, *DIVERSITÉ CULTURELLE ET DROITS DE L’HOMME: LA PROTECTION DES MINORITÉS PAR LA CONVENTION EUROPÉENNE DES DROITS DE L’HOMME* (Bruylant, 2006) at 75-76.

⁸⁵⁷ Evans, Carolyn, *FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (Oxford University Press, 2001) at 77.

⁸⁵⁸ *Ibid.*

⁸⁵⁹ See, e.g., ECtHR (GC), *Bayatyan v. Armenia*, 7 July 2011 § 124.

⁸⁶⁰ Danchin, Peter G., ‘Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law’, 49 *Harvard International Law Journal* (2008) at 261.

⁸⁶¹ ECtHR, *Sinan Işık v. Turkey*, 2 February 2010 § 42.

⁸⁶² *Ibid.* 41.

to take a religious oath in order to keep their Parliamentary seats. This case may be a good example of forcing people to *act* against their beliefs (taking a religious oath),⁸⁶³ even though it may not be appropriate to call such an act ‘manifestation’ in the sense of Article 9 ECHR.⁸⁶⁴

Another illustration of how the Court’s reliance on a bright line distinction between belief and action can be problematic is *Kalaç v. Turkey*.⁸⁶⁵ The case concerned a Muslim judge working for the air force who was obliged to retire because ‘his conduct and attitude revealed that he had adopted unlawful fundamentalist opinions.’⁸⁶⁶ This conduct and attitude included giving legal assistance, taking part in training sessions and intervening in the appointment of servicemen who were members of a religious group with alleged ‘fundamentalist tendencies.’⁸⁶⁷ The applicant’s allegation was that his compulsory retirement was based on his religious beliefs and practices. The Court’s conclusion, however, was that the retirement order was not based on his religious opinions or beliefs but on ‘his conduct and attitude.’⁸⁶⁸

Now, as the State itself admitted, it was through the applicant’s conduct that it learned about the applicant’s beliefs. Only then did his belief become apparent to the State. This thus shows one way in which belief depends on practice. Moreover, it was by striking at the applicant’s action that the State was able to strike at his ‘fundamentalist’ beliefs. As Paul Hayden asks, ‘how does one abridge the freedom to *think* or *believe* except by striking at some action motivated by that belief?’⁸⁶⁹ There is yet another way in which the interaction between the applicant’s belief and conduct is evident in the case. According to the hierarchical belief/action distinction, the applicant would be protected ‘for *being* a member of a group but not [for] *doing* things associated with the group’.⁸⁷⁰ However, the *conduct* for which he was forcibly retired – giving legal assistance, taking part in training sessions and intervening in the appointment of servicemen – was cast in a different light precisely for *being* a member of a ‘fundamentalist’ religious group.⁸⁷¹ The same conduct would have hardly provoked the same sanction had it been motivated by the applicant’s affiliation to, say, an environmentalist organization. All this illustrates the relation of mutual dependence in which *belief* and *action* stands to each other.

One more illustration of the interrelation of belief and practice is *Kosteski v. the Former Yugoslav Republic of Macedonia*.⁸⁷² The case concerned a public company employee fined for

⁸⁶³ See Murdoch, Jim, ‘Freedom of Thought, Conscience and Religion: A Guide to the Implementation of Article 9 of the European Convention on Human Rights’, *Human Rights Handbooks* No. 9 (Council of Europe, 2007) at 14.

⁸⁶⁴ Taylor, Paul M., *FREEDOM OF RELIGION: UN AND EUROPEAN HUMAN RIGHTS LAW AND PRACTICE* (Cambridge University Press, 2005) at 129-30 and 199 (arguing that *Buscarini* – and other forms of compulsion to act contrary to one’s religion or belief – has been inappropriately characterised by the Court as a form of ‘manifestation’). Indeed, in forcibly taking a religious oath, the *Buscarini* applicants were not manifesting their religion or belief but a religion that was not theirs.

⁸⁶⁵ ECtHR, *Kalaç v. Turkey*, 1 July 1997.

⁸⁶⁶ *Ibid.* § 8.

⁸⁶⁷ *Ibid.* § 25.

⁸⁶⁸ *Ibid.* § 30.

⁸⁶⁹ Hayden, Paul T., ‘Religiously Motivated “Outrageous” Conduct: Intentional Infliction of Emotional Distress as a Weapon against “Other People’s Faiths”’, 34 *William and Mary Law Review* (1993) at 611.

⁸⁷⁰ Yoshino, Kenji, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (Random House, 2007) at 173.

⁸⁷¹ Kenji Yoshino makes this point in the context of discrimination on the basis of sexual orientation. *Ibid.* 99.

⁸⁷² ECtHR, *Kosteski v. the Former Yugoslav Republic of Macedonia*, 13 April 2006.

not showing up at work due to a conflict with a Muslim holiday. One of his complaints was that, by asking him to prove his faith, domestic courts interfered with the inner sphere of his belief. The Court rejected his complaint and upheld the domestic courts' decision that the applicant did not substantiate 'the genuineness of his claim to be a Muslim.'⁸⁷³ The Court held that, on the contrary, his *conduct* 'cast doubt on that claim in that there were no *outward signs* of his practicing the Muslim faith or joining collective Muslim worship.'⁸⁷⁴ Leaving aside the fact that requiring this sort of substantiation is debatable, what matters for present purposes is that courts are ultimately looking for behavioral or outer signs to decode the applicant's inner belief.

As all these examples make clear, the belief/action distinction is not as sharp as the Court often suggests. The question is therefore not whether belief and action relate to or depend on each other. Rather, the question is the *extent* to which a restriction on one of them affects the other. For example, the extent of the interference with the *forum internum* will depend, to a large extent, on the degree of the restriction on the *forum externum*, which can range from absolute prohibitions of certain actions to circumstantial and exceptional limitations.⁸⁷⁵ This is obviously no easy task and will most likely depend on the context and circumstances of each case.

The Court, however, has rarely acknowledged this sort of interdependence between belief and practice. In the cases of conscientious objection to military service, for example, it treats applicants' failure to report for military service as a manifestation of their (religious) beliefs, without acknowledging any kind of implications for their *forum internum*.⁸⁷⁶ The same can be said of *Kalaç*; the Court says nothing about the kind of implications that the applicant's forced retirement had for his *forum internum*.⁸⁷⁷ The reluctance to address these links may well be due to the fear that this would automatically mean finding a violation of Article 9 ECHR without assessing whether the interference is actually justified.⁸⁷⁸ Though this fear is not ungrounded, the Court has not always followed the absolute form of protection of the *forum internum* it advocates in theory.⁸⁷⁹ So something else must be afoot than just fear of opening up a space of absolute or unlimited protection of freedom of religion: the assumption that belief and practice actually belong to two different and independent realms.

There are however several problems with failing to acknowledge the connection between belief and practice altogether. One of them is that this failure ends up sustaining the extreme reading that a restriction can never infringe on the *forum internum*. On this reading, people always remain free to believe that a certain practice is a religious duty even though they are not

⁸⁷³ *Ibid.* § 39.

⁸⁷⁴ *Ibid.* Emphasis added.

⁸⁷⁵ Danchin, Peter G., 'Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law' 49 *Harvard International Law Journal* (2008) at 262 (pointing out the varying degrees that restrictions may have on religious activities).

⁸⁷⁶ See, e.g., ECtHR (GC), *Bayatyan v. Armenia*, 7 July 2011 § 112.

⁸⁷⁷ Evans, Carolyn, *FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (Oxford University Press, 2001) at 78. For more examples of cases with implications for the *forum internum* in the Strasbourg case law, see *ibid.* at 80-101.

⁸⁷⁸ See Ringelheim, Julie, *DIVERSITÉ CULTURELLE ET DROITS DE L'HOMME: LA PROTECTION DES MINORITÉS PAR LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME* (Bruylant, 2006) at 76.

⁸⁷⁹ See Part I 'Belief as the Core of "Legal" Religion in Strasbourg.'

allowed to engage in it.⁸⁸⁰ That is, applicants can always *be* adherents of a certain religion even when they cannot *behave* as such. This approach reinforces the illusion that, as separable from behavior, belief always remains intact, untouched. As a result, it may sustain the idea that a State is condemning a person's practice without passing a judgment on her beliefs when, in fact, it is.⁸⁸¹

Moreover, the Court's failure to recognize the interdependence of practice and belief in 'manifestation' cases signals the background assumption that practice depends on belief, not the other way around. In the Strasbourg representational discourse, the relationship between the two terms appears unidirectional: belief is imagined as pre-existing and practice as its subsequent manifestation. This assumption is obvious not only in the status that belief and practice have in the Court's principles (i.e. freedom of religion is first of all about belief and only additionally about manifestation) but also in the term 'manifestation' itself. The term begs the question: manifestation of what? The answer is of course 'belief.' Indeed, the Court often speaks of practice either as a 'direct expression' of belief⁸⁸² or as 'motivated' or 'inspired' by it.⁸⁸³ Either way, this suggests that there is an actual belief lying beneath practice that comes first.

In conceiving the belief/practice relationship this way the Court creates two interrelated sets of hierarchy – spatial and temporal.⁸⁸⁴ By temporal hierarchy, I mean that the Court's representational discourse orders the terms in a sequence according to which belief is prior to practice. By spatial hierarchy, I mean that the Court's representational discourse divides the social world in internal (or private) and external (or public) categories.⁸⁸⁵ These spatial and temporal orderings sustain the foundational character of belief and the derivative nature of practice. Belief originates in the internal/private in a way that some have deemed 'pre- or extra-social'⁸⁸⁶ to only then manifest itself into the external/public space. As a result, belief in the Court's case law appears as the source and origin of practice and the latter as its derivative effect.

The problem of this hierarchical construction is that it impedes investigating the ways in which things may go the other way around. As scholars of religion have noted, practice may sustain belief. For instance, in a critique of WC Smith's 'The Meaning and End of Religion,' Talal Asad points out that Smith fails examining 'how practice helps to construct faith.'⁸⁸⁷ Asad explains that, while Smith's claim that faith 'is an act that *I* make myself, naked before God'

⁸⁸⁰ See Danchin, Peter G., 'Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law' 49 *Harvard International Law Journal* (2008) at 262.

⁸⁸¹ See Hayden, Paul T., 'Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon against "Other People's Faiths"' 34 *William and Mary Law Review* (1993) at 612.

⁸⁸² See, e.g., ECtHR, *Skugar and Others v. Russia*, 3 December 2009, p. 6.

⁸⁸³ See, e.g., ECtHR, *Schilder v. the Netherlands*, 16 October 2012, 18 and ECtHR, *Larissis and Others v. Greece*, 24 February 1998 § 45.

⁸⁸⁴ I borrow the notions of spatial and temporal metaphors or orderings from Peller, Gary, 'The Metaphysics of American Law', 73 *California Law Review* (1985) at 1192.

⁸⁸⁵ Peller argues that spatial metaphors constitute 'the available categories for dividing up the social world.' *Ibid.*

⁸⁸⁶ Danchin, Peter G., 'Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law', 49 *Harvard International Law Journal* (2008) at 262.

⁸⁸⁷ Asad, Talal, 'Reading a Modern Classic: W. C. Smith's "The Meaning and End of Religion"', 40 *History of Religions* (2001) at 215.

makes sense in ‘a particular language game,’ in others ‘faith is not a singular act but a relationship based on continuous practice.’⁸⁸⁸ One of other such ‘language games’ is the Islamic tradition.⁸⁸⁹

In conclusion, neither practice nor belief is foundational, as the two are mutually dependant. The distinction becomes problematic when the terms are posed in sharp contrast or opposition and, most crucially, when they are understood hierarchically, just like they are by the Court. I do not argue that the hierarchy should now be permanently reversed, that is to say, that the denigrated term (practice) should now be privileged. This would mean creating a new hierarchy, equally problematic for the reasons discussed in the previous part (practice would be the ‘norm’ against which to judge ‘deviation’ and deny protection). Simply embracing the favored side (belief) instead of challenging the devaluation of the other (practice) may also be flawed. This strategy would force many applicants to reshape their religiosity in a mould they may view as alien while allowing others to live comfortably in a mould they view as theirs.

B. Breaking Out of the Belief/Practice Dichotomy

Reversing the hierarchy or merely identifying with the privileged side would mean reinforcing the belief/practice dichotomy and, ultimately, associating with just one side of the dualism. Legal feminists have persuasively argued that strategies of this sort are flawed, as the result is a sense of incompleteness for many people. Indeed, in an analysis of binary constructions that associate the favored side with men (e.g., public, reason, objective) and the disadvantaged one with women (e.g., private, passion, subjective), Frances Olsen rejects an either/or approach: ‘[w]e cannot choose between the two sides of the dualism, because we need both.’⁸⁹⁰ Thus, claiming that passion is superior to reason or that subjectivity is superior to objectivity will not do.⁸⁹¹ Nor will it do to secure women only the reason or the objectivity term of the dichotomy.⁸⁹² For Olsen, the ‘possibility of wholeness’ and the expansion of choices available to women lie in the rejection of polarization of these dualistic pairs.⁸⁹³

I suggest following a similar approach when it comes to the belief/practice binary. Just like many women (and men) may need both sides of dualistic pairs, so may many religious adherents. Indeed, many religious people ‘consider themselves to be bound by the tenets of their faith to manifest that faith.’⁸⁹⁴ Dichotomous thinking – and the hierarchy it puts in place – overlooks those for whom religious freedom is not just about freedom to believe but *also* about freedom ‘to act in accordance with those beliefs.’⁸⁹⁵ For many people, as Cecile Laborde

⁸⁸⁸ *Ibid.* 215-216.

⁸⁸⁹ *Ibid.* footnote 29.

⁸⁹⁰ Olsen, Frances E., ‘The Family and the Market: A Study of Ideology and Legal Reform’, 96(7) *Harvard Law Review* (1983) at 1577.

⁸⁹¹ *Ibid.* at 1578.

⁸⁹² *Ibid.*

⁸⁹³ *Ibid.*

⁸⁹⁴ Cumper, Peter and Lewis, Tom, ‘”Taking Religion Seriously”? Human Rights and *Hijab* in Europe: Some Problems of Adjudication,’ 24(2) *Journal of Law and Religion* (2008-2009) at 599.

⁸⁹⁵ Trigg, Roger, *EQUALITY, FREEDOM AND RELIGION* (Oxford University Press, 2012) at 102.

explains, ‘the religious experience is fundamentally about *exhibiting* the virtues of the good believer, living in community with others, and shaping one’s daily life in accordance with the rituals of the faith.’⁸⁹⁶ For these religious practitioners, their practices ‘are part and parcel of their belief system, identity and general way of life’.⁸⁹⁷ Since acknowledging the interrelation between belief and practice eschews any hierarchy between the two terms – and between the religions indentified more with one or the other – the result will be more room for equality and inclusiveness.

Conclusion

In unpacking and challenging the hierarchical and inegalitarian relations that the Court creates along religious lines by framing freedom of religion as fundamentally concerned with freedom of conscience or belief, this Chapter hopes to push for reconsideration of the Court’s implicit characterization of religion as belief or conscience. The assumption that belief is the defining feature of religion contradicts the egalitarian impulse that should underlie the Court’s approach to freedom of religion. It is high time for the Court to move away from the principle that makes a Protestantized understanding of religion the standard against which ‘others’ – including some Christians – are regarded as less ‘legal’ religions in an increasingly pluralized Europe. In the words of Talal Asad, ‘we have to abandon the idea of religion as always and essentially the same, and as dependent on faith that is independent of practical traditions.’⁸⁹⁸

⁸⁹⁶ Laborde, Cécile, ‘The Politics of Religious Freedom: Protecting Freedom of Religion in the Secular Age’, Blog ‘The Immanent Frame’ (2012) <<http://blogs.ssrc.org/tif/2012/04/23/protecting-freedom-of-religion-in-the-secular-age/>> accessed 6 June 2013.

⁸⁹⁷ Alidadi, Katayoun and Foblets, Marie-Claire, ‘Framing Multicultural Challenges in Freedom of Religion Terms: Limitations of Minimal Human Rights for Managing Religious Diversity in Europe’, 30(4) *Netherlands Quarterly of Human Rights* (2012) at 399.

⁸⁹⁸ Asad, Talal, ‘Reading a Modern Classic: W. C. Smith’s “The Meaning and End of Religion,”’ 40 *History of Religions* (2001) at 220.

CHAPTER V

THE EXCLUSIONARY FACE OF ‘FAMILY LIFE’ IN STRASBOURG*

We are not an assimilative, homogeneous society, but a facilitative, pluralistic one in which we must be willing to abide someone else’s unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncrasies. Even if we can agree, therefore, that ‘family’ and ‘parenthood’ are part of the good life it is absurd to assume that we can agree on the content of those terms, and destructive to pretend that we do.

-- William J. Brennan, U.S. Supreme Court in *Michael H. v. Gerald D.*, U.S. 110, 141 (1987) (dissenting opinion)

Introduction

The concept of family life developed by the Strasbourg Court in its Article 8 ECHR (right to respect for family life) case law has a Janus-faced character. On the one hand, the concept has an inclusive face. On this view, family life is a ‘broad’ term, ‘not susceptible to exhaustive definition’.⁸⁹⁹ The existence or non-existence of family life ‘is essentially a question of fact depending upon the real existence in practice of close personal ties’.⁹⁰⁰ The focus is thus on ‘the substance and reality of relationships’.⁹⁰¹ What counts is whether there are ‘further legal or factual elements indicating the existence of a close personal relationship’.⁹⁰² To be sure, this

* My gratitude goes to Eva Brems and Marie-Bénédicte Dembour for their generous and insightful comments on earlier versions of this Chapter. This Chapter is based on Peroni, Lourdes, ‘Challenging Culturally Dominant Conceptions in Human Rights Law: The Cases of Property and Family’, 4 *Human Rights and International Legal Discourse* (2010) 241-264. Since the Article on which this Chapter is based was written at the very beginning of my Ph.D. (2010), I have substantially updated it in order to include an analysis of the relevant family life cases decided by the Court over the past three years. These additions are mostly reflected in Part I. Moreover, this Chapter has dropped the parts of the Article dealing with the Inter-American System, as I consider them to be irrelevant for the general points made in my Ph.D. Last, the introduction and conclusion of this Chapter have been re-written accordingly. The main arguments made in the published Article remain obviously the same.

⁸⁹⁹ ECtHR, *Maskhadova and Others v. Russia*, 6 June 2013 § 208.

⁹⁰⁰ ECtHR (GC), *K. and T. v. Finland*, 12 July 2001 § 150. See also, ECmmHR, *K. v. the United Kingdom*, Decision of 15 October 1986, p. 199; ECtHR (GC) *Şerife Yiğit v. Turkey*, 2 November 2010 § 93 and ECtHR, *Alim v. Russia*, 27 September 2011 § 70. See Kilkelly, Ursula, ‘The Right to Respect for Private and Family Life: A Guide to the Implementation of Article 8 of the European Convention on Human Rights’, *Human Rights Handbooks* No. 1 (Council of Europe, 2001) at 17 (arguing that ‘the general principle to be applied is whether there are close personal ties between the parties’.)

⁹⁰¹ Harris, David, O’Boyle, Michael, Warbrick, Colin and Bates, Edward, *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (Oxford University Press, 1995) at 372.

⁹⁰² ECtHR, *L. v the Netherlands*, 1 June 2004 § 37 (a mere biological kinship is not sufficient to attract the protection of Article 8 ECHR).

‘reality’ approach has the capacity to include ‘less conventional family constellations’.⁹⁰³ In fact, the Court has ‘counted’ as family life a broad variety of bonds, including those between parents and minor children,⁹⁰⁴ adopted children and adoptive parents,⁹⁰⁵ and children and extended relatives (e.g., grandparents,⁹⁰⁶ aunts/uncles⁹⁰⁷). Most recently, the Court has established that ‘a cohabiting same-sex couple living in a stable *de facto* partnership falls within the notion of “family life”’.⁹⁰⁸

Yet, and despite its radical inclusive potential, this face of family life paradoxically co-exists with a more restrictive, exclusionary face: that of the ‘core’ family, namely parents and minor children. The case that best epitomizes the exclusionary face of family life in Strasbourg is *Slivenko v. Latvia*. In this case, the Grand Chamber refused to count as ‘family life’ the relationship that a mother and her daughter claimed with their elderly parents (grandparents) in an attempt to avoid expulsion to Russia. According to this line of case law, usual emotional ties between adult relatives – including adult children and their parents – are not enough to fall within the scope of Article 8 ECHR. Applicants need to substantiate additional elements of dependence. The *Slivenko* Court holds:

In the Convention case-law relating to expulsion and extradition measures, the main emphasis has consistently been placed on the ‘family life’ aspect, which has been interpreted as encompassing the effective “family life” established in the territory of a Contracting State by aliens lawfully resident there, *it being understood that ‘family life’ in this sense is normally limited to the core family*.⁹⁰⁹

This narrow conception appears most prominently in the spheres of entry and expulsion of non-nationals. Though the Court’s family life case law in the areas of entry and expulsion has attracted substantial legal commentary,⁹¹⁰ to date, the restrictive construction of family life in

⁹⁰³ Stalford, Helen, ‘Concepts of Family under EU Law: Lessons from the ECHR’, 16 *International Journal of Law, Policy and the Family* (2002) at 429. See also, Kilkelly, Ursula, ‘The Right to Respect for Private and Family Life: A Guide to the Implementation of Article 8 of the European Convention on Human Rights’, *Human Rights Handbooks* No. 1 (Council of Europe, 2001) at 16 (arguing that the Court maintains ‘a flexible approach to the interpretation of family life, bearing in mind the diversity of modern family arrangements, the implications of divorce and medical advance’).

⁹⁰⁴ See, e.g., ECtHR, *Hokkanen v. Finland*, 23 September 1994 § 54; and *Gül v. Switzerland*, 19 February 1996 §§ 32-33.

⁹⁰⁵ See, e.g., ECmmHR, *X. v. Belgium*, 10 July 1975 p. 75; *X. v. France*, 5 October 1982 p. 241; and ECtHR, *Pini and Others v. Romania*, 22 June 2004 § 140.

⁹⁰⁶ See, e.g., ECtHR (Plenary), *Marckx v. Belgium*, 13 June 1979 § 45; ECmmHR, *Lawlor v. the United Kingdom*, 14 July 1988; and ECmmHR, *Price v. the United Kingdom*, 9 March 1988.

⁹⁰⁷ See, e.g., ECmmHR, *Boyle v. the United Kingdom*, 9 February 1993 §§ 43-45.

⁹⁰⁸ ECtHR *Schalk and Kopf v. Austria*, 24 June 2010 § 94. The Court adds: ‘The notion of family life is ‘not confined to marriage-based relationships and may encompass other *de facto* “family” ties where the parties are living together out of wedlock’. *Ibid.* § 91. See also, ECtHR, *Kroon and Others v. the Netherlands*, 27 October 1994 § 30. The Court has also recognized as family life the *de facto* family ties existing between a transsexual, his partner and child in ECtHR (GC), *X, Y and Z v. the United Kingdom*, 22 April 1997 § 37.

⁹⁰⁹ ECtHR (GC), *Slivenko v Latvia*, 9 October 2003 § 94. Emphasis added.

⁹¹⁰ See, e.g., Liddy, Jane, ‘The Concept of Family Life under the ECHR’, 1 *European Human Rights Law Review* (1998) 15-25; Lambert, Hélène, ‘The European Court of Human Rights and the Right of Refugees and Other

these areas has provoked only limited criticism.⁹¹¹ In critically and thoroughly assessing the Court's limited (and limiting) construction of 'family life' in the Strasbourg case law, this Chapter seeks to fill the existing gap. At first sight, the inclusion of family life case law in this thesis may appear surprising, as claims of family lifestyles on cultural grounds have been raised only obliquely by applicants and hardly addressed by the Court. However, this is precisely the point. The fact that these issues have not given rise to any significant case law is just an illustration of how normalized and deep-seated the nuclear family ideal is in Strasbourg. Moreover, while cultural concerns may not be expressly raised in all cases, the fact that the applicants' claims fall, over and over, outside the 'core' idea of family life suggest that different cultural conceptions of family life may be at work in the background of their applications. In short, the fact that the diverse cultural conceptions of family life has given rise to hardly any meaningful case law and very little scholarly comment makes this area of the Court's case law potentially not only more interesting but also revealing of fundamental underlying processes that are too easily over-passed.

The thrust of my argument is that the limited conception of family life that the Court requires primarily in admission and expulsion case law rests on a set of implicit assumptions that privilege an ideal mainstream cultural form of family while disadvantaging less dominant ones. It is probably no surprise that a large number of explicit or implicit challenges to the Court's restrictive notion of family life come from European minority members and migrants of diverse origins outside Europe.

Though all stages of the Court's legal reasoning – from the interpretation of the autonomous concept of 'family life' to the balance of interests – offer an opportunity to examine the Court's perceptions of family life, my analysis focuses primarily on the initial stage of the Court's inquiry, that is, on the scope analysis. In examining a family life claim, the Court's first task is to determine whether the bonds in question fall within the scope of family life or, in other words, whether the ties invoked by applicants amount to 'family life' within the meaning of Article 8(1) ECHR. The reason for focusing on this phase of the inquiry is because this is usually the stage at which the restriction most commonly takes place. If the concept of 'family life' itself cannot accommodate alternative family lifestyles, there is no way applicants' practices will be

Persons in Need of Protection to Family Reunion', 11 *International Journal of Refugee Law* (1999) 427-450; Thym, Daniel 'Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?', 57 *International and Comparative Law Quarterly* (2008) 87-112; de Hart, Betty, 'Love the Neighbor: Family Reunification and the Rights of Insiders', 11 *European Journal of Migration and Law* (2009) 235-252; and Farahat, Anuscheh, 'The Exclusiveness of Inclusion: On the Boundaries of Human Rights in Protecting Transnational and Second Generation Migrants', 11 *European Journal of Migration and Law* (2009) 253-269.

⁹¹¹ Several authors have flagged the restrictive conception of family life prevailing in human rights law and in the ECHR, more specifically. See, e.g., Alidadi, Katayoun and Foblets, Marie-Claire, 'Framing Multicultural Challenges in Freedom of Religion Terms: Limitations of Minimal Human Rights for Managing Religious Diversity in Europe', 30(4) *Netherlands Quarterly of Human Rights* (2012) 388-416 and Brems, Eva, 'Human Rights as a Framework for Negotiating/Protecting Cultural Differences: An Exploration of the Case-law of the European Court of Human Rights' in Marie-Claire Foblets, Jean-François Gaudreault-Desbiens and Alison Dundes Renteln (eds.) *CULTURAL DIVERSITY AND THE LAW: STATE RESPONSES FROM AROUND THE WORLD* (Bruylant, 2010) 663-715. Yet none of these insightful efforts offers a comprehensive analysis of this particular aspect of the Court's family life case law.

recognized at this level, let alone balanced in the proportionality (at least theoretically). The concept is therefore the fundamental unit and this why I focus on it.

The Chapter is organized as follows. Part I unpacks the content of the Court's restrictive notion of 'family life', determines the extent of its application in the Strasbourg case law, assesses the consequences of the limited notion, and offers (and rejects) possible explanations behind such a restrictive approach. Part II critiques the conception of family life articulated in some areas of the Court's case law for its inegalitarian and exclusionary character. Part III makes the case for reconsidering the restrictive notion of family life and outlines possible bases on which such reconsideration might proceed while sketching an alternative approach.

I. Unveiling and Unpacking the Court's Restrictive Notion of Family Life

In this part, I unpack the meaning and elements of the limited conception of family life adopted by the Court and determine the extent of its application, that is to say, the areas of the case law where the concept has been most commonly applied and the groups of applicants most frequently affected by it. Moreover, I outline the kind of implications that such a restrictive interpretation has had for the applicants and reject the justifications possibly underlying such an interpretation. The main claim of this part is that, despite family life's normative openness to culturally diverse conceptions of family lifestyles in Article 8 ECHR jurisprudence, its receptiveness to such conceptions has in fact remained limited and largely unequal.

A. Meaning and Extent of the Application

The limited notion of family life has been applied predominantly – though not exclusively – in admission and expulsion case law. While the ECHR does not guarantee the right of an alien to enter and reside in the territory of a State, excluding someone from a country where her near relatives live may amount to interference with her right to respect for family life.⁹¹² In examining whether applicants' claimed family links fall within the scope of Article 8 ECHR, the Court has held, time and time again, that links outside the 'core' family – understood as *parents* and *minor children* – are excluded from family life in 'immigration cases'⁹¹³ or in cases 'relating to expulsion and extradition measures'.⁹¹⁴ These cases concern refusals to grant residence permits on family reunification grounds for reasons of economic well-being and immigration control as well as expulsions for reasons of crime and disorder prevention.

⁹¹² See, e.g., ECtHR, *Moustaquim v. Belgium*, 18 February 1991 § 16 and ECtHR, *Hasanbasic v. Switzerland*, 11 June 2013 § 46. So the starting point of the Court's analysis is, as Marie-Bénédicte Dembour has pointed out, the State sovereignty on individuals' entry, stay and residence in their territory and thus 'the implicit assumption that the applicant has restricted rights under the Convention as a foreign national'. Dembour, Marie-Bénédicte, 'Human Rights Law and National Sovereignty in Collusion: The Plight of Quasi-Nationals at Strasbourg', 21 *Netherlands Quarterly of Human Rights* (2003) at 98.

⁹¹³ See, e.g., ECtHR, *Miah v. the United Kingdom*, 27 April 2010, p. 7; ECtHR, *Iyisan v. the United Kingdom*, 9 February 2010, p. 6 and ECtHR, *Yesufa v. the United Kingdom*, 26 January 2010, p. 6.

⁹¹⁴ See, e.g., ECtHR, *Nacic and Others v. Sweeden*, 15 May 2012 § 73.

At times, however, the denial of existence of family life outside the ‘core’ surfaces other areas of the Court’s family life case law. One example is the exclusion of family life between *adult relatives*, including parents and adult children. *Emonet and Others v. Switzerland* is a good case in point.⁹¹⁵ The case concerned the adoption of an adult child by her mother’s partner. The Court applied the principle that ‘relationships between parents and adult children do not fall within the protective scope of Article 8 unless “additional factors of dependence, other than normal emotional ties, are shown to exist”’.⁹¹⁶ It found that, even though the child was an adult, she was in need of care and support following a serious illness that resulted in a disability.⁹¹⁷ The Court then considered that ‘additional factors of dependence, other than normal emotional ties exist here which exceptionally bring into play the guarantees that derive from Article 8 between adults’.⁹¹⁸

There are other examples in the Court’s broader case law signaling that the principle denying recognition to relationships between *adult relatives* is seemingly more widely embedded in the Court’s Article 8 ECHR case law. In a series of cases against the United Kingdom, the European Commission of Human Rights has made implicit reference to this principle in response to demands by *adult* prisoners seeking protection of their ‘family life’ with *parents* and *siblings*.⁹¹⁹ The Commission held that ‘in the context of prisoners or other persons who are detained the concept of “family life” must be given a wider scope than in other situations’.⁹²⁰ The idea that ‘family life’ would otherwise have been given a narrower scope is thus implicit in the Commission’s reasoning.

Extended family ties, in turn, have been accepted as ‘family life’ in the Court’s broader case law, albeit not consistently. As far back as the *Marckx* case, the Court has emphasized that family life, within the meaning of Article 8 § 1, ‘includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life’.⁹²¹ Thus, grandparents claiming family ties with their grandchildren have usually been covered by ‘family life’ under Article 8 § 1 ECHR in a range of cases, including those concerning access to and care of grandchildren.⁹²² Yet when it comes to links between other extended relatives, the Court does not appear equally receptive. An example is *X. and Others v. Austria*, a case that actually concerned second-parent adoption by a same-sex

⁹¹⁵ ECtHR, *Emonet and Others v. Switzerland*, 13 December 2007.

⁹¹⁶ *Ibid.* § 35.

⁹¹⁷ *Ibid.* § 80.

⁹¹⁸ *Ibid.*

⁹¹⁹ See, e.g., ECmmHR, *P.K., M.K. and B.K v. the United Kingdom*, 9 December 1992; *McCotter v. the United Kingdom*, 9 December 1992; *Kinsella and Mulvaney v. the United Kingdom*, 1 September 1993; *McCombe v. the United Kingdom*, 1 September 1993.

⁹²⁰ ECmmHR, *Holmes, McGeough and Holmes v. the United Kingdom*, 1 September 1993; See also, ECmmHR, *P.K., M.K. and B.K v. the United Kingdom*, 9 December 1992; *McCotter v. the United Kingdom*, 9 December 1992. The Commission added that ‘[e]motional dependency between, for example, parents and adult children, or siblings is even enhanced in these circumstances.’ *Ibid.*

⁹²¹ ECtHR (Plenary), *Marckx v. Belgium*, 13 June 1979 § 45.

⁹²² See, e.g., ECmmHR, *Price v. the United Kingdom*, 9 March 1988; ECtHR, *Bronda v. Italy*, 9 June 1998 § 51; and ECtHR (GC), *Scozzari and Giunta v. Italy*, 13 July 2000 § 221.

couple. In rejecting the Government's justification that Austrian law's intention was preventing a woman from adopting a child while the legal ties with the child's mother were maintained – a rule that would also prohibit an aunt from adopting her nephew while his relationship with his mother was intact – the Court's Grand Chamber held:

The Court notes firstly that the relationship between two adult sisters or between an aunt and her nephew does not in principle fall within the notion of 'family life' within the meaning of Article 8 of the Convention.⁹²³

Eva Brems is right to conclude that 'despite early recognition that members of the extended family enjoy some rights under article 8, recent case-law shows a renewed emphasis on the nuclear family, against evidence that this denies the experience of people from the Eastern, more recent state parties'.⁹²⁴

In summary, in determining whether family life exists or not, the Court has most frequently applied a more restrictive approach in entry and expulsion cases. In fact, the Court has explicitly stated that the restrictive principle is limited to these cases. Thus – and even though sometimes the principle denying recognition to family life between *parents and adult children*, *extended family members* and *adult relatives* is applied in other areas of Article 8 ECHR case law – it has been migrants who have mostly been burdened by the Court's limited approach. The *ad hoc* application of the restrictive conception of family life in other spheres of the Court's case law is nonetheless revealing of how entrenched the conception of nuclear family life is in the Court's reasoning.

B. The 'Outsiders': Group Members Affected by the Court's Restrictive Approach

The Court's narrow construction of family life has applied to different groups of non-nationals. Some of them are of European origin (e.g., Roma and Baltic Russians); others of origins outside the Council of Europe area (e.g., Algerian, Bangladeshi, Indian, Moroccan, Nigerian). Members of these groups have sought recognition of basically two sets of relationships under Article 8 ECHR 'family life': (i) bonds between *adult children and parents/siblings*, and (ii) bonds between *extended relatives*.

1. Roma

One group of applicants affected by the Court's limited notion of the 'core' family is the Roma minority. Applicants of Roma origin have sometimes expressly claimed to be culturally bound

⁹²³ ECtHR (GC), *X and Others v. Austria*, 19 February 2013 § 129. See also, the much older case ECmmHR, *X. v. Germany*, 19 July 1968 (the relationship between the uncle and nephew and niece did not amount to family life, in particular, because they had not been living together in the same household).

⁹²⁴ Brems, Eva, 'Human Rights as a Framework for Negotiating/Protecting Cultural Differences: An Exploration of the Case-law of the European Court of Human Rights' in Marie-Claire Foblets, Jean-François Gaudreault-Desbiens and Alison Dundes Renteln (eds.) *CULTURAL DIVERSITY AND THE LAW: STATE RESPONSES FROM AROUND THE WORLD* (Bruylant, 2010) 663-715.

together by a sense of family that goes beyond such a core. In *Konstatinov v. the Netherlands*, for example, a Serbian-born applicant of Roma origin complained that her deportation would keep her away not only from her *husband* and *son* but also from her *husband's relatives* – namely his mother and siblings – and from her *own siblings* living in the Netherlands.⁹²⁵ Most notably, Ms. Konstatinov argued that since ‘family ties are more important for Roma than for many other people, such a separation would be emotionally very burdensome’.⁹²⁶

The Court remains silent on the applicant’s *extended family* complaints. Instead, it focuses on her *nuclear family* claims: the relationship with her son. Yet not even this relationship is regarded as family life as the applicant’s son would soon come of age.⁹²⁷ As a result, and based on the case law according to which ‘relationships between adult relatives do not necessarily attract the protection of Article 8 without further elements of dependency’, the Court holds that the son’s suffering from asthma – as the applicant had claimed – does not constitute such a further element.⁹²⁸

The notion of *extended family* also appears to have been vindicated on cultural grounds in the case of *Lakatoš v. the Czech Republic*.⁹²⁹ The applicant was a Slovak national, born in a city then on the territory of the Czechoslovak Socialist Republic, today the territory of Slovakia. He lived at his uncle’s home, was single and did not have children of his own.⁹³⁰ While it is not clear whether the applicant framed his family life claims in express cultural terms before the Court, it is obvious that cultural concerns were ultimately at issue in the case, as his complaints before the national courts show. In the course of the domestic judicial proceedings, in an attempt to resist expulsion from the Czech Republic, he substantiated his family ties in the following terms:

. . . I belong to the Roma minority. It is generally known that we, Roma people, live by tradition in larger families than non-Roma people and that an integral part of such a large family are more distant relatives than parents and children, or possibly grandparents. We maintain very close emotional, and very often also financial, relations with distant relatives, i.e. with uncles, aunts etc. Until I was 15 years old, I had been brought up by my grandmother. I have a very close relationship with my uncle and aunt with whom I live in Prague. Although my ethnic background cannot be the key aspect to be dealt with by the court when imposing punishment, this fact should not be omitted altogether.⁹³¹

The Court does not embark on its usual first task of considering whether sufficient links exist between the applicant and his relatives as to give rise to the family life protection of Article 8 ECHR. The Court speaks directly of *private life* when referring to these ties without even attempting to examine whether such links amount to *family life*.⁹³² In the end, it does not

⁹²⁵ ECtHR, *Konstatinov v. the Netherlands*, 26 April 2007 § 39.

⁹²⁶ *Ibid.*

⁹²⁷ *Ibid.* § 52.

⁹²⁸ *Ibid.*

⁹²⁹ ECtHR, *Lakatoš v. the Czech Republic*, 23 October 2001.

⁹³⁰ *Ibid.*, p. 2.

⁹³¹ *Ibid.*, p. 5.

⁹³² *Ibid.*, p. 13.

consider it necessary to examine the question whether there is interference with the applicant's *private life* because, even assuming that this is the case, the complaint is, at any rate, manifestly ill-founded.⁹³³ The Court thus concludes that 'there is no appearance of a violation of Article 8 of the Convention'.⁹³⁴

To sum up, the applicant in *Konstatinov* seems to vindicate the importance of emotional ties in determining the existence of family life in line with what she deems 'family' as a member of the Roma minority. In *Lakatoš*, in turn, the applicant defends the special significance of extended family links in what he views as the Roma cultural tradition. Both judgments, however, remain silent on the applicants' cultural perceptions. Instead, they measure the applicants' family claims using the yardstick of nuclear family by which both applicants fail.

Anthropologist Sal Buckler insightfully highlights a different understanding of extended family for members of the Roma minority in some parts of Europe: '[W]hat makes the experience of family different amongst Gypsies I have worked with in the UK is that their extended family network only comprises people who are known on a face-to-face basis. This is unlike the experience in the more mainstream, white, non-Gypsy worlds of the UK where many of us might be dimly aware of distant cousins, uncles and aunts – people to whom we are somehow related but whom we have never met'.⁹³⁵ This anthropological insight suggests that, in fact, the Court and the Roma applicants may have been operating under different assumptions of extended family: for the Roma applicants, extended family probably meant *actual contact* with distant relatives whereas for the Court extended family most likely meant *actual distance* with such relatives. This might explain the Court's general presumption of non-existence of family life with extended family members and the subsequent requirement to substantiate additional elements (of dependence). What this shows is that not all extended family views or experiences are the same⁹³⁶ and that any *a priori* exclusion of such links from the scope of family life is problematic. Sal Buckler concludes: 'Any curtailment of the Gypsies' extensive face-to-face family, whether intended or not, results in a shrinking of their family until 'family' as Gypsies understand it to be is no longer possible'.⁹³⁷

2. *Baltic Russians*

Following the break-up of the Soviet Union and the restoration of the Baltic countries' independence, a number of applicants belonging to the Russian-speaking minority faced the disruption of their family lives arising from expulsion orders against them.⁹³⁸ In compliance with

⁹³³ *Ibid.*

⁹³⁴ *Ibid.* p. 14.

⁹³⁵ Buckler, Sal, 'Same Old Story? Gypsy Understandings of the Injustices of Non-Gypsy Justice' in Marie-Bénédicte Dembour and Tobias Kelly (eds.) *PATHS TO INTERNATIONAL JUSTICE: SOCIAL AND LEGAL PERSPECTIVES* (Cambridge University Press, 2007) at 254.

⁹³⁶ *Ibid.*

⁹³⁷ *Ibid.*

⁹³⁸ See, e.g., ECtHR (GC), *Slivenko v. Latvia*, 9 October 2003 (violation of Article 8 ECHR); ECtHR, *Ivanov v. Latvia*, 25 March 2004 (inadmissible); *Sisojeva and Others v. Latvia*, 16 June 2005 (referred to the Grand Chamber and later struck out of the list); *Nagula v. Estonia*, 25 October 2005 (inadmissible); *Dorochenko v. Estonia*, 5

treaties on the withdrawal of Russian troops, some of these applicants were required to leave the country as members of the families of retired Russian military officers.

Slivenko v. Latvia is arguably the most well-known example. The applicants, a mother and her daughter, argued that forcing them out of Latvia would mean separating them from their elderly parents (grandparents) and breaking up their family life. The Court held that the deportation measure did not tear apart the applicants' family life since the family, that is to say, mother, father and daughter, were deported to Russia all together.⁹³⁹ The elderly parents (grandparents), the Court said, were 'adults who did not belong to the core family' and were not shown to be 'dependent members of the applicants' family'.⁹⁴⁰ According to the Court, family life 'established in the territory of a Contracting State by aliens lawfully resident there [...] is normally limited to the core family'.⁹⁴¹

Judge Kovler's partly dissenting opinion takes issue with the majority's choice of 'the traditional concept of a family [...] that is to say, a conjugal family consisting of a father, a mother and their children below the age of majority, while adult children and grandparents are excluded from the circle'.⁹⁴² The tradition of the extended family, Judge Kovler observes, is strongly rooted in Eastern and Southern European countries and enshrined in some of these countries' basic laws.⁹⁴³ Family life, he concludes, is 'plainly inconceivable for [the applicants] if they were denied the possibility of looking after those relatives'.⁹⁴⁴

Relationships between *adult siblings* and between *aunts/uncles* and *nephews/nieces* have similarly sought recognition under family life in other cases against Latvia. Nowhere is this more clearly illustrated than in *Sisojeva*.⁹⁴⁵ In this case, the applicants explicitly advanced their claims on a cultural basis. They claimed to belong to the Udmurt ethnic group, 'for whom the relationship between grandchildren and their grandparents was traditionally very close'.⁹⁴⁶ They argued that any attempt to cast doubt upon their family ties would then be 'contrived and unfounded'.⁹⁴⁷

The Chamber judgment, however, simply overlooks this aspect of their claim. It does not address the links between grandparents and grandchildren. Nor does it refer to the ties between the aunt and her sister's children. Instead, it centers on the relationships between parents and children and between siblings, arguing that they are all adults not entitled to claim family life.⁹⁴⁸ Again, the only judge sensitive to the applicants' claim is Judge Kovler for whom the applicants,

January 2006 (inadmissible); *Shevanova v. Latvia*, 15 June 2006 (referred to the Grand Chamber and later struck out of the list) and *Kaftailova v. Latvia*, 22 June 2006 (referred to the Grand Chamber and later struck out of the list).

⁹³⁹ ECtHR (GC), *Slivenko v Latvia*, 9 October 2003 § 97.

⁹⁴⁰ *Ibid.*

⁹⁴¹ *Ibid.* § 94.

⁹⁴² *Ibid.* Partly Concurring and Partly Dissenting Opinion of Judge Kovler.

⁹⁴³ *Ibid.*

⁹⁴⁴ *Ibid.*

⁹⁴⁵ *Sisojeva and Others v. Latvia*, 16 June 2005. Even though *Sisojeva* was finally struck out of the list, the case still offers a valuable example of family life claimed by applicants in cultural terms.

⁹⁴⁶ *Ibid.* § 59.

⁹⁴⁷ *Ibid.*

⁹⁴⁸ *Ibid.* § 103.

of Udmurt ethnic origin, ‘traditionally have much stronger family ties between parents and adult children than is appreciated in Western Europe’.⁹⁴⁹

3. *Migrants from Outside the Council of Europe*

Applicants of a wide variety of national origins outside Europe – including Algerian,⁹⁵⁰ Bangladeshi,⁹⁵¹ Indian,⁹⁵² Nigerian,⁹⁵³ and Pakistani⁹⁵⁴ – comprise yet another group of applicants claiming family life outside the ‘core’ of the family unit. Notably, a significant amount of these cases concerns the expulsion of ‘quasi-nationals’, that is, settled applicants with well-established links in the Member State in question.⁹⁵⁵ These applicants were either born in the ‘host’⁹⁵⁶ country or arrived there during early childhood.⁹⁵⁷ Applying the standard principle that relationships outside the core of the family unit do not count as ‘family life’, the Court has often rejected family ties between *parents* and *adult children*, between *adult siblings* and between *extended relatives* where additional elements of dependence were lacking.

At times, however, the Court has relaxed its general approach by accepting the existence of family life between *parents* and *adult children*. The fact that applicants were still young and have not yet founded ‘a family of their own’ has seemingly played a role in the Court’s decisions in favor of the existence of family life in these cases.⁹⁵⁸ *Maslov v. Austria* is a good example.⁹⁵⁹ Mr. Maslov – who lawfully entered Austria at the age of six, together with his parents and siblings – still lived at his parents’ home after reaching the age of majority and had no children of his own. In this case, the Court’s Grand Chamber recalls that it ‘has accepted in a number of cases concerning young adults who had not yet founded a family of their own that their relationship with their parents and other close family members also constituted “family life”’.⁹⁶⁰

⁹⁴⁹ *Ibid.* Partly Dissenting Opinion of Judge Kovler. Notwithstanding that *Sisojeva* was struck out of the list, the case still serves to illustrate the discrepancy existing within the Court.

⁹⁵⁰ See, e.g., ECtHR, *Nasri v. France*, 13 July 1995.

⁹⁵¹ See, e.g., ECtHR, *Anam v. the United Kingdom*, 7 June 2011.

⁹⁵² See, e.g., ECmmHR, *S. and S. v. the United Kingdom*, 10 December 1984.

⁹⁵³ See, e.g., ECtHR, *A.A. v. the United Kingdom*, 20 September 2011.

⁹⁵⁴ See, e.g., ECtHR, *Javeed v. the Netherlands*, 3 July 2001.

⁹⁵⁵ Dembour, Marie-Bénédicte, ‘Human Rights Law and National Sovereignty in Collusion: The Plight of Quasi-Nationals at Strasbourg’, 21 *Netherlands Quarterly of Human Rights* (2003) 63-98 (using the term ‘quasi-national’ to refer to those who may not have the nationality of the State in question but have lived there for most or all their lives).

⁹⁵⁶ As Marie-Bénédicte Dembour and Tobias Kelly note, ‘host State’ is ‘a problematic phrase, as it takes for granted the notions of insider and outsider’. Dembour, Marie-Bénédicte and Kelly, Tobias ‘Introduction’ in Marie-Bénédicte Dembour and Tobias Kelly (eds.) *ARE HUMAN RIGHTS FOR MIGRANTS? CRITICAL REFLECTIONS ON THE STATUS OF IRREGULAR MIGRANTS IN EUROPE AND THE UNITED STATES* (Routledge, 2011) at 4.

⁹⁵⁷ See, e.g., ECtHR, *Kilic v. Denmark*, 22 January 2007; *Kaya v. Germany*, 28 June 2007; *Onur v. the United Kingdom*, 17 February 2009; *A. W. Khan v. the United Kingdom*, 12 January 2010; and *Miah v. the United Kingdom*, 27 April 2010.

⁹⁵⁸ See, e.g., ECtHR, *Bouchelkia v. France*, 29 January 1997 § 41; *El Boujaïdi v. France*, 26 September 1997 § 33; ECtHR (GC), *Maslov v. Austria*, 23 June 2008 § 62; ECtHR, *Bousarra v. France*, 23 September 2010 § 38-39; and *Osman v. the United Kingdom*, 14 June 2011 § 55.

⁹⁵⁹ ECtHR (GC), *Maslov v. Austria*, 23 June 2008 § 62.

⁹⁶⁰ *Ibid.*

Yet, at other times, relationships between *adult children* and *parents/siblings* have not been afforded recognition. For example, in *Miah v. the United Kingdom* the Court dismissed the family life claim by an applicant trying to resist expulsion.⁹⁶¹ He was also a young adult not yet with ‘a family of his own’⁹⁶² and had lived with his stepmother, his older brother, his brother's wife and daughter in the same house.⁹⁶³ The family, he claimed, was ‘close knit and maintained regular contact’.⁹⁶⁴ The existence of ‘family life’ was nonetheless denied by the Court given the lack of substantiation of additional elements of dependence with his parents and siblings.⁹⁶⁵

The dependency requirement usually alludes to *financial* and *material* dependence.⁹⁶⁶ While the meaning of financial dependence is self-evident, material dependence seemingly includes the kind of dependence associated with giving or receiving (mental and physical) care. In general, the threshold seems high: the health condition in question must be quite severe before the Court accepts the existence of dependence. In *A.W. Khan v. the United Kingdom*, for example, the Court dismissed the fact that family members suffering from different health complaints constituted a ‘sufficient degree of dependence to result in the existence of family life’.⁹⁶⁷ For the Court, there was no evidence to suggest that these conditions were ‘so severe as to entirely incapacitate [the applicant’s relatives]’.⁹⁶⁸ In *Anam v. the United Kingdom*, on the other side, the Court accepted that ‘the applicant has a higher degree of reliance on his mother and adult siblings than other adults as a result of his diagnosed mental health problems and finds, for this reason, that family life exists between them’.⁹⁶⁹ The Court has similarly admitted such a degree of dependency between an adult son with mental disabilities and his parents⁹⁷⁰ as well as between an adult son with impaired hearing and speech abilities and his parents/siblings.⁹⁷¹ Also, in *Imamovic v. Sweden*, the Court found it established that the applicant parents were ‘*somewhat* dependent’ on their adult daughters (even when they had founded their own families) ‘due mainly to the first applicant’s unstable health’ and found that in such circumstances their

⁹⁶¹ ECtHR, *Miah v. the United Kingdom*, 27 April 2010 § 16.

⁹⁶² *Ibid.* § 23.

⁹⁶³ *Ibid.* § 15. See also, ECtHR, *Onur v. the United Kingdom*, 17 February 2009 § 45 (the applicant, aged around 29 years old at the time of his deportation, had not demonstrated the additional elements of dependence required to establish family life between parents and adult children) and *A.W. Khan v. the United Kingdom*, 12 January 2010 § 32 (the 34-year old applicant did not have family life with his mother and siblings, notwithstanding that he was living with them and that they suffered health problems). However, it is noteworthy that that the *Onur* and *A.W. Khan* applicants had children of their own following relationships of some duration.

⁹⁶⁴ ECtHR, *Miah v. the United Kingdom*, 27 April 2010 § 15.

⁹⁶⁵ *Ibid.* § 16.

⁹⁶⁶ See, e.g., ECmmHR, *S. and S. v. the United Kingdom*, 10 December 1984 and ECtHR, *Kwakye-Nti and Dufie v. the Netherlands*, 7 November 2000.

⁹⁶⁷ ECtHR, *A.W. Khan v. the United Kingdom*, 12 January 2010 § 32.

⁹⁶⁸ *Ibid.*

⁹⁶⁹ ECtHR, *Anam v. the United Kingdom*, 7 June 2011, p. 8.

⁹⁷⁰ ECtHR, *Nacic and Others v. Sweden*, 15 May 2012 § 76 (one of the applicants suffered from severe mental illness).

⁹⁷¹ ECtHR, *Nasri v. France*, 13 July 1995 § 43.

situation amounted to family life.⁹⁷² The Court considered that the father suffered ‘from rather severe mental and physical health problems, including threats to commit suicide’.⁹⁷³

The dependency criterion has been criticized within the Court itself. Judge Spielmann is probably one of its most vocal critics. In various separate opinions, he has vindicated the importance of sentimental ties in the determination of the existence of family life.⁹⁷⁴ For example, he has found it ‘inconceivable’ that the majority attached ‘so little importance’ to the affective ties between a mother and her daughter.⁹⁷⁵ ‘Giving precedence to the criterion of dependency to the detriment of that of normal affective ties’ has struck him ‘as a very artificial approach to determining the existence of “family life”’.⁹⁷⁶ Judge Spielmann has not hesitated to question this line of case law for ‘greatly impoverish[ing] the notion of “family life”’.⁹⁷⁷

C. Consequences of the Court’s Restrictive Approach

The Court has been far from consistent when it comes to the consequences attached to the application of its narrow understanding of family life in entry and expulsion cases. One approach has been to reject the existence of family life altogether and to subsequently remove the family links in question from the scope of Article 8(1) ECHR. This approach means the end of the Court’s inquiry – and of the case – as there is obviously no examination of the justification of the interference, in particular, no assessment of the proportionality of the restriction in question. One example of this approach is *S. and S. v. the United Kingdom*.⁹⁷⁸ The Commission held that, in failing to establish any sort of material or financial dependence, the applicants’ relationship – that of a mother and her 33-year old son – could not attract the protection of Article 8 ECHR.⁹⁷⁹ The result, therefore, was that their form of family life did not even engage Article 8 ECHR. The Court concludes: ‘there is no appearance of a breach of the right to respect for family life’.⁹⁸⁰

Another approach consists in skipping any scope considerations of whether the alleged bonds amount to family life and in applying the dependency criterion directly in the proportionality analysis. A case in point is *Kwakye-Nti and Dufie v. the Netherlands*, concerning the refusal of residence permits on family reunification grounds to a couple’s children.⁹⁸¹ The

⁹⁷² ECtHR, *Imamovic v. Sweden*, 13 November 2012 at p. 14. Emphasis added.

⁹⁷³ *Ibid.* at p. 11.

⁹⁷⁴ See, e.g., ECtHR, *Kaftailova v. Latvia*, 22 June 2006, Partly Concurring Opinion of Judge Spielmann, joined by Judge Kovler. *Kaftailova* was referred to the Grand Chamber which delivered its judgment on 7 December 2007 striking the case out of the list given that the applicant’s complaint under Article 8 ECHR had been resolved. Although *Kaftailova* was finally struck out of the list, the case still serves as a valuable example of the criticism existing within the Court.

⁹⁷⁵ *Ibid.* § 8.

⁹⁷⁶ *Ibid.*

⁹⁷⁷ *Ibid.* § 9.

⁹⁷⁸ ECmmHR, *S. and S. v. the United Kingdom*, 10 December 1984.

⁹⁷⁹ *Ibid.* p. 199. See also, ECmmHR, *T.A. and H.N. v. the United Kingdom*, 8 January 1993, p. 5 and *Akhtar, Johangir and Johangir v. the Netherlands*, 29 June 1992 (in respect of the relationship between a father, Mr. Akhtar, and his 18-year old son, A. Johangir).

⁹⁸⁰ ECmmHR, *S. and S. v. the United Kingdom*, 10 December 1984 p. 199.

⁹⁸¹ ECtHR, *Kwakye-Nti and Dufie v. the Netherlands*, 7 November 2000.

Court concluded that the applicants did not establish that their two adult children were in any way financially or materially dependent on them.⁹⁸² The effect of this approach is that applicants' relationships are attached no weight in the proportionality. In fact, what happens is that the restrictive conception of family life requiring substantiation of dependency between adult relatives is simply applied at a different, later stage: the proportionality analysis.⁹⁸³ The application in *Kwakye-Nti and Dufie* was declared 'manifestly ill-founded', since the Respondent State struck a fair balance between the applicants' interests and its own.

A third approach has been to exclude the links in question from the scope of 'family life' and announce that they will count instead as 'private life'. In other words, notwithstanding the denial of *family life*, the Court states that it will still take these ties into account under the *private life* heading of Article 8 § 1 ECHR.⁹⁸⁴ The Court, however, does not always end up including these links – at least not explicitly – in the assessment of whether the interference with applicants' *private life* is proportionate to the legitimate aim pursued. In *Slivenko v. Latvia*, for example, the Court states it will consider the mother's and her daughter's links with their parents (grandparents) under 'private life' but, in the end, says no word on these links in the proportionality.⁹⁸⁵ At other times, the Court simply reiterates in the proportionality that the applicants have failed to meet the dependency criterion. The Court thereby (re)applies the restrictive conception of family requiring substantiation of dependency between adult relatives at a different stage.⁹⁸⁶ Either way, the ultimate consequence in both cases is that the applicants' alleged family relationships are given no weight in the proportionality.

Yet another (somewhat similar) approach applied in cases concerning non-nationals who have spent most of – if not all – their lives in the 'host' country is that '[r]egardless of the existence or otherwise of a "family life", the expulsion of a settled migrant . . . constitutes an interference with his or her right to respect for private life'.⁹⁸⁷ This is because 'the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8'.⁹⁸⁸ This approach may carry several consequences. Sometimes – and notwithstanding the refusal to count applicants' links as 'family life' – the Court assesses these links in the proportionality when determining the strength of applicants' ties to the 'host' country. For example, in *Onur v. the United Kingdom*, the Court

⁹⁸² *Ibid.* See also, ECtHR, *Benhebbba v. France*, 10 July 2003 § 36 (lack of dependency between adult son and his parents/siblings); *Konstatinov v. the Netherlands*, 26 April 2007 § 52 (lack of dependency between mother and her adult son) and *Samsonnikov v. Estonia*, 3 July 2012 § 87 (the Court was not convinced that the relationship between the applicant and his ill father of advanced age 'extended beyond usual ties between grown-ups family members'. The father lived separately with his partner).

⁹⁸³ For an example of the Court's acceptance of family life between an adult child and his mother/siblings in the scope but rejection in the proportionality for absence of dependency, see ECtHR, *Ezzoudhi v. France*, 13 February 2001 §§ 26 and 34.

⁹⁸⁴ See, e.g., ECtHR (GC), *Slivenko v. Latvia*, 9 October 2003 § 97; ECtHR, *Kolosovskiy v. Latvia*, 29 January 2004, p. 17 and *Ivanov v. Latvia*, 25 March 2004, p. 13.

⁹⁸⁵ ECtHR (GC), *Slivenko v. Latvia*, 9 October 2003 § 97.

⁹⁸⁶ See, e.g., ECtHR, *Ivanov v. Latvia*, 25 March 2004, p. 16 and *Kolosovskiy v. Latvia*, 29 January 2004, p. 21.

⁹⁸⁷ See, e.g., ECtHR (GC), *Maslov v. Austria*, 23 June 2008 § 63 and ECtHR, *Onur v. the United Kingdom*, 17 February 2009 § 46.

⁹⁸⁸ *Ibid.*

found that the applicant did not enjoy family life with his mother and siblings ‘as he has not demonstrated the additional element of dependence normally required to establish family life between adult parents and adult children.’⁹⁸⁹ Yet in the proportionality the Court did mention his mother, brother and three of his sisters and the fact that they were all in the United Kingdom, since they held either British citizenship or permanent residence.⁹⁹⁰ Other times, however, the Court simply omits assessing applicants’ family links when examining their private life in the proportionality.⁹⁹¹ So, in other words, there is no guarantee that the applicants’ family situation will ultimately be evaluated later on in the analysis. What is more, even if they were to count at the proportionality stage, this does not necessarily mean that the Court will attach strong weight to these relationships. In *A.H. Kahn v. the United Kingdom*, for example, the Court found in the proportionality that the applicant’s family life with his parents and siblings was ‘limited in its extent’, albeit without specifying why.⁹⁹²

In other cases, the Court has found that there was actually no need to establish the existence of family life between adult children and their parents in the scope analysis.⁹⁹³ The argument here is that ‘in practice the factors to be examined in order to assess the proportionality of the deportation measure are essentially the same regardless of whether family or private life is engaged’.⁹⁹⁴ Most recently, in *Berisha v. Switzerland* – a case concerning the refusal of residence permits on family reunification grounds to the applicants’ three children born in Kosovo – the Court left the question of whether the parents had family life with their oldest young adult son ‘open’.⁹⁹⁵ These sorts of approach, though questionable for their lack of clarity and certainty – the Court avoids saying whether these links come or not within the family life scope of Article 8 ECHR – at least leave room for weighing up the elements arising from family relationships outside the core in the proportionality.⁹⁹⁶

⁹⁸⁹ ECtHR, *Onur v. the United Kingdom*, 17 February 2009 § 45.

⁹⁹⁰ *Ibid.* § 57. See also, ECtHR, *A.W. Khan v. the United Kingdom*, 12 January 2010 § 43 (‘In the United Kingdom the applicant has established close ties with his mother and two brothers, with whom he has lived for most of his life’); ECtHR, *M.S. v. the United Kingdom*, 16 October 2012 §§ 33-34 (‘. . . the applicant has stronger ties to his host country than to his country of origin, given the time he has spent living in the United Kingdom and the fact that his parents and siblings are all settled there’); and ECtHR, *Akbulut v. the United Kingdom*, 10 April 2012 § 24 (the Court says nothing in the scope about the applicants’ claim of family life with his extended family but weighs them in the proportionality when determining the solidity of his social, cultural and family ties to the United Kingdom: ‘the Court does not doubt that the applicant has stronger family ties to the United Kingdom’).

⁹⁹¹ See, e.g., ECtHR, *Miah v. the United Kingdom*, 27 April 2010.

⁹⁹² See, e.g., ECtHR, *A.H. v. the United Kingdom*, 20 December 2011 § 41.

⁹⁹³ See, e.g., ECtHR, *Samsonnikov v. Estonia*, 3 July 2012 § 82 and *A.A. v. the United Kingdom*, 20 September 2011 § 49.

⁹⁹⁴ *Ibid.*

⁹⁹⁵ ECtHR, *Berisha v. Switzerland*, 30 July 2013 § 46. For a somewhat similar open approach, see ECtHR, *N.M. and M.M. v. the United Kingdom*, 25 January 2011 § 74.

⁹⁹⁶ In *Berisha*, however, the Court seems to say in the proportionality analysis that, even when (financial) dependency is established, this does not require family members to remain together: ‘with regard to the alleged financial dependence of R. on the applicants, the Court cannot see why he, as well as his sister, could not be supported at a distance, especially when it is considered that they are now 19 and 17 years old respectively’. ECtHR, *Berisha v. Switzerland*, 30 July 2013 § 60.

In conclusion, the Court appears more and more willing to recognize family relationships falling short of the ‘core’ family within the scope of Article 8 ECHR, usually under the heading of ‘private life’ – especially in cases concerning the expulsion of established non-nationals. This development has led some to argue that ‘the restrictive new understanding of family life does not translate into a restriction of rights protection’.⁹⁹⁷ This is because, while family life may be restrictive, private life is simultaneously expanded to ‘catch’ those links falling short of family life. These links, therefore, in theory count as part of migrant applicants’ wider social relations, regardless of their family life situation. It is indeed true that the extent of the guarantee ultimately remains the same – because family and private life are equally protected under Article 8 ECHR⁹⁹⁸ and because, in any event, migrants’ family links beyond the core count as private life. The fact remains, however, that the restrictive principle – and its underlying assumptions – stays in place. At the end of the day, there is no official recognition of the value of extended family links and of family links between grown-ups *qua* family life for migrants in Article 8 ECHR jurisprudence.

Moreover, under the ‘private life’ formula (i.e., the Court examines the family links in question under ‘private life’) and the ‘open’ formula (i.e., the Court leaves the question open, as the elements to be weighed are ultimately the same), these links are supposed to be assessed in the proportionality analysis. The problem, however, is that in practice these family relationships are not always considered at this stage of the analysis. Sometimes, the Court either omits assessing these relationships or explicitly rejects them following the (re-)application of the restrictive rationale. The Court thus seems to want to have it both ways: retain the freedom to count these links whenever it regards them as substantial enough to be worthy of protection while officially keeping the restrictive principle intact in family migration case law. Either in the scope or in the proportionality – and regardless of the outcome in the particular cases – the Court keeps in place the problematic assumption that equal treatment is measured by a biased norm, that is to say, by a norm whose criteria for inclusiveness correspond to the cultural religious particularities of only some. I return to these inegalitarian implications in Part II.

D. Possible Explanations to the Court’s Restrictive Approach

Why is the notion of family life overall so ‘impoverished’ – as Judge Spielmann would say – in immigration cases? Why does the Court accept for example that relationships between grandparents and grandchildren are part of family life in access cases in mainstream society while denying them in the context of family migration? One would have expected the Court to offer some kind of justification for its prescriptively narrow model in light of the increasing plurality of family forms in Europe and the large recognition of this reality in the rest of its

⁹⁹⁷ Thym, Daniel ‘Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?’, 57 *International and Comparative Law Quarterly* (2008) at 92.

⁹⁹⁸ Daniel Thym, for example, argues that a clear distinction between private and family life is actually not mandatory ‘since family and private life are both equally protected by Article 8 ECHR and together constitute a single human right with one set of legal criteria for state interferences and their justification’. *Ibid.*

Article 8 ECHR case law. The fact, however, is that the justification for the restrictive approach remains largely opaque in the Strasbourg jurisprudence.

Two sets of explanations for the Court's differential, restrictive approach come to mind. In the first place, the Court's restrictive stance in admission and expulsion case law may be motivated by the need to put a limit to the number of family members entitled to Article 8 ECHR protection in order to enable Contracting States to keep immigration under control and protect their economic well-being.⁹⁹⁹ There is, however, a partial limitation to this explanation: whereas this may account for the Court's restrictive approach in entry cases – where immigration control and economic well-being are at stake – it does not necessarily explain why the Court would keep a similarly restrictive stance in expulsion cases. Indeed, in the latter cases, different sorts of considerations are normally at issue (e.g., protection of national security, prevention of disorder and crime). Most importantly, in expulsion cases – unlike family reunification cases where applicants seek to introduce their relatives in the 'host' country – applicants' family members have usually long been established in the territory of the Member State. In other words, the acceptance of someone's family life would generally not mean an increase of the migrant population in its territory, at least not directly.

The idea that the Court may be using the notion of 'core' family as a way of restricting the applicability of family life to as few individuals as possible when immigration is at issue may partly account for the restrictive approach but does not necessarily justify it. While immigration control and economic well-being concerns should certainly partake of the proportionality analysis, they cannot serve to justify the (unequal) removal of applicants' family bonds from the scope of Article 8 ECHR. The Court would otherwise be sneaking into the scope considerations that belong in the proportionality.¹⁰⁰⁰ What is more, the fact that those bonds fall within the scope of Article 8 ECHR does not necessarily mean that the applicants' interests will ultimately prevail. First, the Court may always attach less weight to those family ties deemed weak when balancing applicants' rights against State interests in the proportionality (instead of discarding them *a priori* at the definitional stage based on covert balancing). And then, even when the family ties in question are deemed strong, they may still be overridden by stronger State countervailing interests, such as immigration control. In sum, accepting wider family life bonds does not automatically entail that these bonds will trump State interests. The Court can still eschew placing a disproportionate burden on the State in the proportionality analysis.

⁹⁹⁹ Helena Wray, for example, argues that a similar restrictive approach in the United Kingdom 'reflects fear of strains on public services as well as anxiety about chain migration'. Wray, Helena, 'Moulding the Migrant Family', 29(4) *Legal Studies* (2009) at 611.

¹⁰⁰⁰ It has been argued that that the Court should make 'an effort to distinguish carefully between the definition of the scope of rights and the examination of the justification for an interference with those rights'. Gerards, Janneke and Senden, Hanneke, 'The Structure of Fundamental Rights and the European Court of Human Rights', 7(4) *International Journal of Constitutional Law* (2009) at 629. Moreover, Gerards and Senden argue that '[a] narrow definition of the scope of fundamental rights might too easily invite a balancing of interests and of the elements of application, all of which could be introduced in the first, definitional stage of review'. *Ibid.* at 627. On this risk, *see generally*, Van Der Schyff, Gerard, *LIMITATION OF RIGHTS: A STUDY OF THE EUROPEAN CONVENTION AND THE SOUTH AFRICAN BILL OF RIGHTS* (Wolf Legal Publishers, 2005) at 33.

In the second place, it is equally possible that the Court intended its narrow construction of family life to be in line with Member States' definitions of family life in their domestic immigration laws. In EU Member States, for example, only the sponsor's spouse and the couple's minor children are eligible for family reunification, although it remains up to Member States to authorize family reunification of dependant first-degree relatives in the direct ascending line and adult unmarried children.¹⁰⁰¹ A partial limitation of this explanation is however that it is not clear whether the same restrictive approach prevails in immigration laws of non-EU Council of Europe Member States.

The explanation that the Court is probably adopting a conception of family life prevalent in State Parties' immigration laws echoes the role of European consensus in constructing the meaning of the ECHR autonomous concepts. Even assuming – for the sake of the argument – that the consensus in the Council of Europe Member States' domestic immigration laws is wide, the argument is not entirely convincing in view of the Court's broader case law. In the first place, it does not appear from the Strasbourg wider case law that the Court has decisively relied on the majority of domestic laws when constructing the meaning of autonomous ECHR concepts,¹⁰⁰² even when, at times, it has claimed that these concepts 'must be examined in the light of the common denominator of the respective legislation of the various Contracting States'.¹⁰⁰³ Second – and most crucially – the Court has highlighted the importance of adopting an interpretation, 'which avoids inequalities of treatment based on distinctions which, at the present day, appear illogical or unsustainable'.¹⁰⁰⁴ In the next part, I take issue with the unequal treatment arising from the Court's interpretation of family life in Article 8 ECHR migration case law.

¹⁰⁰¹ See Article 4 of the Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification and Article 2(c) of Regulation 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection. See also, Fonseca, Maria Lucinda and Ormond, Meghann, 'Defining "Family" and Bringing it Together: The Ins and Outs of Family Reunification in Portugal' in Ralph Grillo (ed.), *THE FAMILY IN QUESTION: IMMIGRANT AND ETHNIC MINORITIES IN MULTICULTURAL EUROPE* (Amsterdam University Press, 2008) at 93. Fonseca and Ormond note that '[f]amily reunification policies in the EU member states do not tend to recognise the right for family members other than spouses and off-spring to reunite with their families living in a receiving country'. Eleonore Kofman similarly observes: 'in European states . . . a highly restrictive definition of the family, normally limited to spouses and dependent children within the nuclear family, has been used as the basis of entry'. Kofman, Eleonore, 'Family-Related Migration: A Critical Review of European Studies', 30(2) *Journal of Ethnic and Migration Studies* (March 2004) at 244. See also, *ibid.* 243–262

¹⁰⁰² See Letsas, George, 'The Truth in Autonomous Concepts: How to Interpret the ECHR', 15(2) *European Journal of International Law* (2004), 295-302 (arguing that in construing autonomous concepts the Court applies 'a first-order moral reading of the ECHR rights, adding hesitant and redundant remarks about this being somehow commonly accepted'). Letsas goes on to argue: 'The idea is more that of hypothetical consensus: given the principles now accepted in the Council of Europe, how would reasonable people agree to apply these principles to concrete human rights cases?'). *Ibid.* at 302.

¹⁰⁰³ ECtHR (Plenary), *Engel and Others v. the Netherlands*, 8 June 1976 § 82. As Letsas argues referring to this case: 'nowhere did the Court attempt to provide a link between the criteria used and the majority of domestic legislations'. *Ibid.* 297

¹⁰⁰⁴ ECtHR (GC), *Stec and Others v. the United Kingdom* (Admissibility Decision), 6 July 2005 § 49.

II. Challenging the Restrictive Conception of Family Life

The Strasbourg appears oblivious to the fact that the family life notion largely prevailing in certain spheres of its case law is in practice advancing a certain cultural appropriation of the concept. The idea of *core* family endorsed by the Grand Chamber in *Slivenko* clearly alludes to the *nuclear* family model, that is to say, to an essentialist conception of family frequently idealized in some parts of Western Europe.¹⁰⁰⁵ Helena Wray, for example, notes that ‘in European kinship, the critical relationship is between nuclear family members’.¹⁰⁰⁶ Anthropologist Roger Ballard explains how the priority given to conjugality in European kinship, reinforced by a commitment to individualism, has eroded inter- and intra-generational bonds:

Having reached [adulthood], it is further expected that these free and autonomous individuals will select partners, marry, and set up similarly structured autonomous conjugal families of their own. To be sure, member of these autonomous households still expect to keep in contact with their parents and siblings, but such relationships are sustained by far weaker bonds of reciprocity than those associated with conjugality. Hence, for example, they are only expected to be associated with co-residence in contexts of exceptional economic hardship.¹⁰⁰⁷

Ballard contrasts these experiences with those of non-European settlers for whom family life is ‘grounded not so much in the conjugality tie between husband and wife [but in] more demanding links of mutuality’ that bind wider family members.¹⁰⁰⁸

By all accounts, the reality of family life in Europe is more complexly diversified. As Judge Kovler observes in his dissent in *Slivenko*, the tradition of the extended family appears more strongly rooted in Eastern and Southern European countries’.¹⁰⁰⁹ In fact, the form of family life favored in Article 8 ECHR migration jurisprudence – and, at times, in family life

¹⁰⁰⁵ For examples referring to the nuclear family as an ‘ideal (European)’ or ‘Western’ model *see, e.g.*, Grillo, Ralph ‘The Family in Dispute: Insiders and Outsiders’ in Ralph Grillo (ed.) *THE FAMILY IN QUESTION: IMMIGRANT AND ETHNIC MINORITIES IN MULTICULTURAL EUROPE* (Amsterdam University Press, 2008) at 16 and Fonseca, Maria Lucinda and Ormond, Meghann, ‘Defining ‘Family’ and Bringing it Together: The Ins and Outs of Family Reunification in Portugal’, in Ralph Grillo (ed.) *THE FAMILY IN QUESTION: IMMIGRANT AND ETHNIC MINORITIES IN MULTICULTURAL EUROPE* (Amsterdam University Press, 2008) at 105. See also, Franklin, Kris, ‘A Family Like Any Other Family: Alternative Methods of Defining Family Law’ 18 *New York University Review of Law and Social Change* (1990-1991) at 1031 (arguing that ‘a shift in Western ideology has increasingly focused on the ideal living situation as the traditional “nuclear” family: two heterosexual married adult partners cohabiting with their biological or adoptive children’).

¹⁰⁰⁶ Wray, Helena, ‘Moulding the Migrant Family’, 29(4) *Legal Studies* (2009) at 594. See also, Stevens, Dallal, ‘The Asylum-Seeking Family’ in Rebecca Probert (ed.) *FAMILY LIFE AND THE LAW: UNDER ONE ROOF* (Ashgate, 2007) at 224.

¹⁰⁰⁷ Ballard, ‘Inside and Outside: Contrasting Perspectives on the Dynamics of Kinship and Marriage in Contemporary South Asian Transnational Networks’ in Ralph Grillo (ed.) *THE FAMILY IN QUESTION: IMMIGRANT AND ETHNIC MINORITIES IN MULTICULTURAL EUROPE* (Amsterdam University Press, 2008) at 48-49.

¹⁰⁰⁸ *Ibid.* at 50.

¹⁰⁰⁹ Judge Kovler’s partly dissenting opinion in ECtHR, *Sisojeva and Others v. Latvia*, 16 June 2005.

jurisprudence more broadly – is not even the ‘standard’ in Western Europe.¹⁰¹⁰ For example, in Mediterranean Europe, it is not uncommon for adult children to share parental household: ‘the process of leaving the parental household is quite different . . . the definitive departure of young people tends to coincide more or less closely with their marriage and finding a stable job’.¹⁰¹¹ The Roma model of family, as discussed in Part I.B.1 of this Chapter, if not found as such everywhere in the world, acts as another reminder that the model of the nuclear family is the odd one out in the world, and an impoverished one, as Judge Spielmann puts it.¹⁰¹²

There are two problematic consequences flowing from using this particular cultural ideal of family as the standard against which to judge family life. In the first place, in construing family life in such restrictive, biased terms, the Court may be demanding many applicants to meet requirements they might view as entirely alien to their own cultural understandings while allowing others to comfortably live by theirs. The Court’s approach thus raises familiar concerns over ‘forcing people into a homogeneous mold that is untrue to them’ and that, furthermore, is not in fact neutral but a ‘reflection of one hegemonic culture’.¹⁰¹³ Moreover, in restricting *a priori* the personal bonds entitled to claim protection under ‘family life’ to one particular view, the Court may be in practice disadvantaging family lifestyles that do not fit into the strict *nuclear* model. Thus, the result is that the Court may be either encouraging these applicants to fit into an alien mould or denying them recognition (and sometimes protection) for not fitting into it. Either possibility carries negative exclusionary/egalitarian implications. In the end, only ‘deviant’ (non-dominant) family lifestyles are either *excluded* or required to *conform*.¹⁰¹⁴

The ideal of nuclear family required by the Court in family migration case law is furthermore particularly problematic because the model is out of tune with the reality of diverse family structures prevailing in contemporary Europe.¹⁰¹⁵ Family has experienced rapid changes

¹⁰¹⁰ See, e.g., Reher, David Sven, ‘Family Ties in Western Europe: Persistent Contrasts’, 24(2) *Population and Development Review* (1998) 203-224 (analyzing different family patterns in the center and north of Europe, including Scandinavia, the British Isles, the Low Countries, much of Germany and Austria, on the one hand, and the Mediterranean region, on the other). The reality in the region is yet more varied: ‘The specific boundaries of different family systems are often not crystal clear, and subregional differences abound’. *Ibid.* at 203.

¹⁰¹¹ *Ibid.* at 204.

¹⁰¹² I am grateful to Marie-Bénédicte Dembour for this point.

¹⁰¹³ Taylor, Charles ‘The Politics of Recognition’ in Amy Gutmann (ed.) *MULTICULTURALISM AND ‘THE POLITICS OF RECOGNITION’: AN ESSAY BY CHARLES TAYLOR*, (Princeton University Press, 1992) at 43. Taylor refers to these concerns as the reproach ‘the politics of difference’ makes to ‘the politics of equal dignity’. He says: ‘The claim is that the supposedly neutral set of difference-blind principles of the politics of equal dignity is in fact a reflection of one hegemonic culture. As it turns out, then, only the minority or suppressed cultures are being forced to take alien form. Consequently, the supposedly fair and difference-blind society is not only inhuman (because suppressing identities) but also, in a subtle and unconscious way, itself highly discriminatory’ (footnote omitted). *Ibid.*

¹⁰¹⁴ As Andrew Bainham argues, ‘we should not . . . conceive of the nuclear family centred on marriage as the ideal from which every other kind of family is a form of deviance’. Bainham, Andrew, ‘Family Law in a Pluralistic Society’, 22(2) *Journal of Law and Society* (1995) at 244.

¹⁰¹⁵ For a similar critique in the context of EU Law, see, e.g., McGlynn, Clare, ‘Families and European Union Law’ in Rebecca Probert (ed.) *FAMILY LIFE AND THE LAW: UNDER ONE ROOF* (Ashgate, 2007) at 248: ‘This model, though mythic and imaginary as it bears little relation to the realities of family life in the EU . . . is nonetheless a powerful concept in Community law’. More generally, on the point that the nuclear family model ‘does not reflect reality’, see Franklin, Kris, ‘A Family like Any Other Family: Alternative Methods of Defining Family Law’, 18 *New York University Review of Law and Social Change* (1990-1991) at 1047.

in the region over the past decades¹⁰¹⁶ and, as a result, has become ‘less uniform and homogenous’.¹⁰¹⁷ The Court’s approach may thus be viewed as rather paradoxical in a region where the conception of the nuclear family has been increasingly undermined. Indeed, employing the nuclear family model appears out of place in a world of divorce, remarriage and single parenting, to name just a few of today’s diverse family forms.¹⁰¹⁸ Moreover, it appears that multigenerational bonds have become increasingly important in some Western societies.¹⁰¹⁹ Some argue that they ‘will not only enhance but in some cases replace nuclear family functions’.¹⁰²⁰ The Court itself has said that ‘there is not just one way or one choice in the sphere of leading and living one’s family or private life’.¹⁰²¹ In short, ‘the nuclear family as a cultural ideal does not accurately reflect the reality of many families today’.¹⁰²² There is therefore ‘far less in the way of shared conceptions of family life than is sometimes supposed’.¹⁰²³

To summarize, the Court’s restrictive conception of family life in migration case law appears deeply inegalitarian and out of tune with social reality.¹⁰²⁴ It sets a standard that privileges a Western European cultural *ideal* of family life, against which many migrants’ lifestyles are implicitly judged ‘deviant’ – or as having the ‘wrong’ kinship relationships. Moreover, it excludes migrants from protection of a broader variety of family life forms usually available to the larger society without a clear justification. The result is that there is not much choice left to applicants: they either conform to a mainstream cultural standard (nuclear family) or risk different, inferior treatment.

III. Moving Away from the ‘Nuclear Family’ Bias (and the Dependence Criterion)

In this part, I propose that the Court consider moving away from the *nuclear* model as the yardstick. This proposal is twofold. It first requires abandoning the family life narrative reflected

¹⁰¹⁶ Buchler, Andrea, *Islamic Family Law in Europe? From Dichotomies to Discourse – or: Beyond Cultural and Religious Identity in Family Law*, 8(2) *International Journal of Law in Context* (2012) at 200.

¹⁰¹⁷ Bailey, Adrian and Boyle, Paul, ‘Untying and Retying Family Migration in the New Europe’, 30(2) *Journal of Ethnic and Migration Studies* (March 2004) at 232.

¹⁰¹⁸ Fonseca, Maria Lucinda and Ormond, Meghann, ‘Defining “Family” and Bringing it Together: The Ins and Outs of Family Reunification in Portugal’ in Ralph Grillo (ed.) *THE FAMILY IN QUESTION: IMMIGRANT AND ETHNIC MINORITIES IN MULTICULTURAL EUROPE* (Amsterdam University Press, 2008) at 105. See also, Bailey, Adrian and Boyle, Paul, ‘Untying and Retying Family Migration in the New Europe’, 30(2) *Journal of Ethnic and Migration Studies* (March 2004) at 236 (arguing that there is ‘growing recognition that the notion of the nuclear family is becoming increasingly redundant in an era when cohabitation, separation, divorce and “reconstituted families” are becoming increasingly common’).

¹⁰¹⁹ Bengtson, Vern L., ‘Beyond the Nuclear Family: The Increasing Importance of Multigenerational Bonds’, 63 *Journal of Marriage and Family* (2001) 1-16 (referring to the American society).

¹⁰²⁰ *Ibid.* at 2.

¹⁰²¹ ECtHR, *Kozak v. Poland*, 2 March 2010 § 98.

¹⁰²² Franklin, Kris, ‘A Family Like Any Other Family: Alternative Methods of Defining Family Law’, 18 *New York University Review of Law and Social Change* (1990-1991) at 1032.

¹⁰²³ Bainham, Andrew, ‘Family Law in a Pluralistic Society’, 22(2) *Journal of Law and Society* (June 1995) at 238.

¹⁰²⁴ See also, albeit in the context of EU law, McGlynn, Clare, ‘Families and European Union Law’ in Rebecca Probert (ed.) *FAMILY LIFE AND THE LAW: UNDER ONE ROOF* (Ashgate, 2007) at 258: ‘... the concept of family employed in EU law is that of the traditional nuclear family. This arbitrarily limits the scope of EU rights and entitlements, is discriminatory and does not reflect the reality of diversity of family life’.

in the notion of ‘core’ as the standard against which migrant (and other) applicants’ families are measured. In addition, it entails using criteria more attuned with the reality of Europe’s cultural diversity and more *equally* responsive to the varied forms of family life of those subject to the Court’s jurisdiction. Reconsideration of the Court’s current approach may thus be justified on the two bases discussed in the previous part: equality and reality.

My proposal is that the Court simply sticks to the general principle prevailing in its wider case law. According to this principle, family life is ‘essentially a question of fact depending upon the real existence in practice of *close personal ties*’.¹⁰²⁵ This would reduce – if not fully dispel – *inegalitarian* exclusions of family life forms, while still allowing the Court to discard those ties that fail to meet the condition of *closeness* in the scope part of the analysis. What should count, therefore, are ‘legal or factual elements indicating the existence of a close personal relationship’.¹⁰²⁶ This approach would not only be compatible with the Court’s case law itself; it would also keep applicants’ affective ties at the center of the inquiry. There is a host of relevant factors that the Court traditionally takes into account in determining the existence in practice of close personal ties. Cohabitation,¹⁰²⁷ demonstrated interest and commitment,¹⁰²⁸ and frequency of contact¹⁰²⁹ are some of these factors.

Butt v. Norway – concerning the expulsion of adult brother and sister to their country of origin – is one of the few expulsion cases where the Court has explicitly applied a ‘close emotional ties’ criterion when establishing whether the applicants’ relationship with their

¹⁰²⁵ ECtHR (GC), *K. and T. v. Finland*, 12 July 2001 § 150. Emphasis added.

¹⁰²⁶ See, e.g., ECtHR, *L. v. the Netherlands*, 1 June 2004 § 37; and ECtHR, *Schneider v. Germany*, 15 September 2011 § 80. Moreover, this is the approach favored by Judges Spielmann and Kovler in their partly concurring opinion in ECtHR, *Kaftailova v. Latvia*, 22 June 2006 § 5.

¹⁰²⁷ ECmmHR, *Boyle v. the United Kingdom*, 9 February 1993 § 43 (reasoning that cohabitation ‘is however not a prerequisite for the maintenance of family ties which are to fall within the scope of the concept of “family life”’). The Commission says: ‘Cohabitation is a factor amongst many others, albeit often an important one, to be taken into account when considering the existence or otherwise of family ties’. *Ibid.* See also, ECmmHR, *Price v. the United Kingdom*, 9 March 1988. However, in ECtHR, *Schneider v. Germany*, 15 September 2011 § 80, the Court says that, as a rule, ‘cohabitation is a requirement for a relationship amounting to family life’.

¹⁰²⁸ See, e.g., ECtHR (GC), *X, Y and Z v. the United Kingdom*, 22 April 1997 § 36; ECtHR, *L. v. the Netherlands*, 1 June 2004 § 36; ECtHR, *Alim v. Russia*, 27 September 2011 § 70 and ECtHR, *Schneider v. Germany*, 15 September 2011 § 89.

¹⁰²⁹ See, e.g., ECmmHR, *Price v. the United Kingdom*, 9 March 1988. The Government argued that the ties between the grandparents and their grandchild were not close enough to fall within the scope of Article 8 ECHR since they were not living together. The Commission holds: ‘The Commission recalls in this case that the applicants visited D. regularly after his birth and that, during his first admittance to hospital, both applicants visited him on a daily basis. Throughout the events that followed, it is evident that the applicants, so far as they were able, *maintained contact with D. through frequent visits*’. Emphasis added. See also, ECmmHR, *Lawlor v. the United Kingdom*, 14 July 1988 (relationship between grandfather and grandchild amounted to family life). The Commission holds: ‘Following her reception into care on 12 April 1985, the applicant *continued to maintain regular contact* with his grandchild and to show concern in matters pertaining to her welfare and future’. Emphasis added. ECmmHR, *Boyle v. the United Kingdom*, 9 February 1993 § 44. The relationship between an uncle and his nephew amounted to family life: ‘The Commission recalls in this case that the applicant had *frequent contact* with C. from the time of C.’s birth and spent considerable time with him. While it appears the two families did not share the same household, they lived in close proximity and C. often made “weekend stays” at the applicant’s home’. Emphasis added. ECtHR, *El Boujaïdi v. France*, 26 September 1997 § 33 and ECtHR, *Boujlifa v. France*, 21 October 1997 § 36.

extended relatives fell within the scope of Article 8 ECHR.¹⁰³⁰ In this case, cohabitation creates a presumption of closeness. The Court reasons:

During most of their stay in Norway, the applicants lived at the home of their maternal uncle and aunt (their mother's brother and sister) with family in Oslo, who took care of them. As observed by the High Court in its judgment of 14 November 2008 . . . the applicants *lived with them* until 2005 and must therefore be *presumed* to have *close emotional links* to this part of the family. The Court further finds it established that the applicants lived with their uncle and aunt for most of the time thereafter.¹⁰³¹

Alternatively, the Court can go further and adopt a broad conception of family life, encompassing all kinds of affective relations – and avoiding internal thresholds in the scope analysis – to then evaluate the closeness of applicants' family links the proportionality.¹⁰³² Since closeness is a matter of degree and depends on a range of factors (e.g., cohabitation, commitment, dependence) its consideration might not so easily proceed in a black-and-white fashion (as required by a threshold-type of analysis).¹⁰³³ The Court itself has sometimes held that 'the comparative strength or weakness of [settled migrants' family or social ties in the Contracting State where they reside] 'is, in the majority of cases, more appropriately considered in assessing the proportionality of the applicant's deportation under Article 8 § 2'.¹⁰³⁴ This approach is illustrated in *Baghli v. France*, a case concerning a ten-year exclusion order against an Algerian national who had lived in France since the age of two, as so have all the members of his family.¹⁰³⁵ After accepting the existence of family between the adult applicant and his parents/siblings in the scope analysis,¹⁰³⁶ the Court goes on to conclude in the proportionality that that the applicant 'has not shown that he has close ties with either his parents or his brothers and sisters living in France'.¹⁰³⁷

In assessing closeness, dependency can be one more factor but not *the* criterion or the *sole* factor. The requirement of dependency, as framed by the Court, appears to be a problematic proxy for the determination of whether applicants' relational ties amount to family life. First, it overestimates financial/material independence while trivializing emotional dependence of adult family members. Indeed, implicit in this requirement is the assumption that the *adult* family member – although less and less young adults – is prototypically financially and materially independent. Only exceptionally (as a result of e.g., mental and physical health problems or financial hardship) do they rely on their family relatives, including parents, for support. Second, the requirement of dependency trivializes the emotional ties involved in family life not only by

¹⁰³⁰ ECtHR, *Butt v. Norway*, 4 December 2012 § 76.

¹⁰³¹ *Ibid.*

¹⁰³² I am thankful to Laurens Lavrysen for this point.

¹⁰³³ *Ibid.*

¹⁰³⁴ See, e.g., ECtHR, *Akbulut v. the United Kingdom*, 10 April 2012 § 16.

¹⁰³⁵ ECtHR, *Baghli v. France*, 30 November 1999.

¹⁰³⁶ *Ibid.* § 37.

¹⁰³⁷ *Ibid.* § 48.

making clear that these ties are not *per se* enough to amount to family life – no matter how close they may be – but also by giving precedence to financial or physical considerations at the expense of emotional dependence.

In examining closeness, the Court can additionally show greater sensitivity to the cultural backgrounds and understandings of family life informing applicants' claims, especially when this aspect is raised by them explicitly. In fact, this approach has been advocated by the UN High Commissioner for Refugees (UNHCR) when it comes to the refugee family: 'pragmatism and flexibility, in addition to *cultural sensitivity*, [should] be brought to bear in the process of identifying members of the refugee family'.¹⁰³⁸

It goes without saying that neither of the proposed approaches – sticking to the closeness criterion in the scope or in the proportionality analyses – means that the applicants' close family links will necessarily override States' interests. The ultimate outcome of the case will always be determined by the balancing of the interests at stake – that is to say, by balancing applicants' interest in developing her family life in the Contracting State against the State interests in its economic well-being, immigration control or crime prevention.

Conclusion

In this Chapter, I have shown that the radical inclusive potential of the notion of 'family life' prevailing in the Court's broader Article 8 ECHR case law is largely muted in the areas of admission and expulsion of non-nationals. By restricting *a priori* the personal bonds entitled to claim protection under family life to one particular cultural view – the predominantly Western essentialist ideal of the nuclear family – the Court is in practice disadvantaging family lifestyles that do not fit into it. As a result, it is either excluding these lifestyles from recognition (and sometimes from protection) or forcing them to fit into an alien mold without even offering a clear justification for this unequal treatment. This Chapter has sought to encourage the Court to move away from the approach currently prevailing in its migration case law towards a more inclusive account that makes room for other forms of family life *qua* family life *on a par with* the nuclear family. A more egalitarian and workable concept of family life, as the *Butt* judgment shows, is possible.

* * *

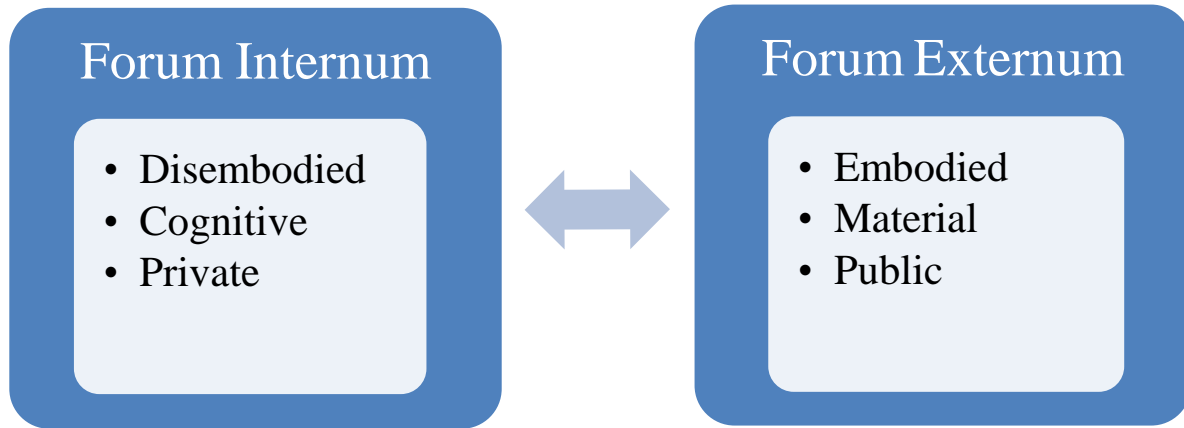
The analysis in Chapters IV and V shows that the Court's assumptions informing its understandings of religion and family life do not reflect universal or all-inclusive conceptions. On the contrary, these assumptions privilege specific historical and cultural constructs that produce and disadvantage an array of 'others'. Viewed in this light, the fundamental issue

¹⁰³⁸ UN High Commissioner for Refugees (UNHCR), *Family Protection Issues*, 4 June 1999, EC/49/SC/CRP.14 at 4, available at: <http://www.refworld.org/docid/4ae9aca00.html> [accessed 6 October 2013]. Emphasis added.

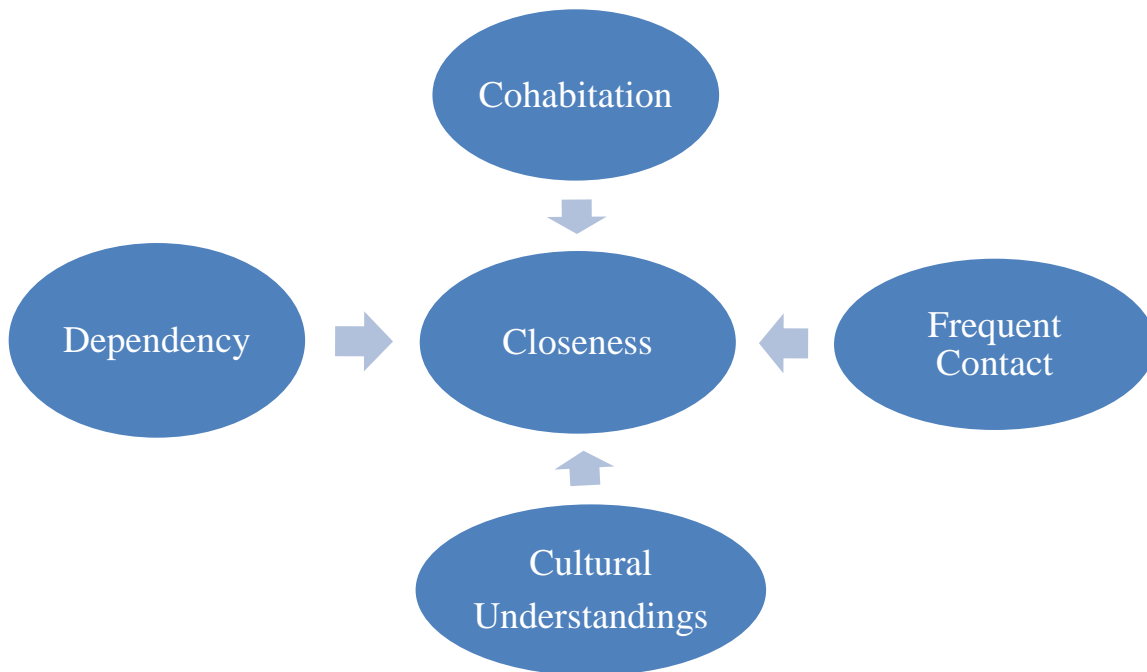
becomes not just one of opening up the prevailing conceptions of religion and family life but one of *equally* opening them up. My proposal goes in the latter direction. It pushes for conceptions of religion or family life that comprehend one form not as *the* form but as *a* form of religion or family life. For example, instead of seeing internal belief as *the* mark of freedom of religion, I propose seeing it as *a* mark, that is, as one more mark among others. The point is therefore not to replace the Protestant or the nuclear family standards with other religious or family lifestyle models. The point is to include them alongside the Protestant and the nuclear family forms.

To conclude Part II, and like in the previous Part, I want to offer a scheme of what the proposed inquiries in freedom of religion and family life jurisprudence may look like. The first scheme illustrates my proposal to interpret the two forums of freedom of religion more interactively in order to avoid a hierarchy between the two of them – and the religious forms and experiences associated with one or the other. The second scheme illustrates my suggestion to adopt the more inclusive approach to family life usually followed by the Court in broader areas of its Article 8 ECHR case law. In particular, this scheme illustrates the proposal to place emphasis on the real or *de facto* indicators of family life, in particular, closeness. The second scheme further shows the different factors (rather than requirements) the Court can rely on to determine closeness (e.g., cohabitation, dependency, frequency of contact, cultural understandings).

I. FREEDOM OF RELIGION INQUIRY



II. FAMILY LIFE INQUIRY



PART III

OPENING UP THE SUB- RELIGIOUS AND CULTURAL ECHR SUBJECT

Feminists, no less than anyone else, and perhaps more than people who have felt at home in the prevailing conceptions of reality, want something to hang on to, some sense of the validity of our own perceptions and experience, some certainty – not more experiences of doubt. Yet, each form of certainty hazards a new arrogance, projecting oneself, one's own experience, or one's own kind as the model for all.

-- Martha Minow¹⁰³⁹

This part brings into view two more exclusionary workings flowing from the Court's assessment of cultural and religious claims. These forms of exclusion recreate the pitfalls discussed in the previous parts but at a different level: the particular is posited as the universal not *across* groups but *within* groups. The first way in which the Court replicates this form of exclusion is by elevating one cultural or religious practice/way of life to the group paradigmatic practice/way of life and by further fixing it as the essence of group identity. For instance, 'the turban' is at the core of the Sikh identity. Likewise, the 'Gypsy way of life' remains essential to the Roma cultural identity even though social reality may show that many Roma no longer travel continuously. Thus, unlike the kinds of exclusions and hierarchies discussed in the two previous parts – the ones within the *abstract human rights subject* and the *abstract religious and cultural human rights subject* – this form of exclusion and hierarchy takes place within the *sub- religious and cultural human rights subject*.

The second way in which the Court recreates exclusion is in fact more complex. It resembles the first form in that it posits one particular feature or experience as representative of the whole group. Yet it differs from the first version in that it additionally equates this feature or experience with negative stereotypes. Thus, in this second form, the exclusions and hierarchies occur (i) *within* groups because one particular feature or experience is elevated as the defining characteristic of the whole group and (ii) most crucially – and the aspect I focus on in this last Chapter – *across* groups because, in further depicting the practice in question in negative terms, it creates an us/them binary. For example, depicting the Islamic headscarf as a symbol of religious oppression not only obscures variation within the group of Muslim women – who may wear (or not) the headscarf for a broad array of reasons – but inherently creates hierarchies

¹⁰³⁹ Minow, Martha, 'Feminist Reason: Getting It and Losing It', 38 *Journal of Legal Education* (1988) 55-56.

across several groups (e.g., Muslims vis-à-vis non-Muslims, Muslim women vis-à-vis non-Muslim women, assigning the former subordinate status).

In short, the two versions of exclusions and hierarchizations studied in this part involve a reductionist process – the group or collective is reduced to one general trait and this is posited as *the* group trait. Yet one fundamental difference is that, whereas under the first form of exclusion or hierarchization the trait is valued or esteemed, under the second form the trait is devalued or delegitimized.

Using language as an entry point of my analysis¹⁰⁴⁰ and incorporating a major post-modern insight – the rejection of fixed, coherent and homogenous conceptions of the self and group identity¹⁰⁴¹ – I critically examine the Court’s representations of applicants’ religious and cultural groups and practices in its legal discourse. One form the post-modern problematization of group representation has taken is known as anti-essentialism.¹⁰⁴² In its most basic sense, anti-essentialism is the objection to the idea that categories of people or collectives (e.g., women, Muslims, heterosexuals) have a constituting, unchanging ‘essence’. There are however several understandings of essentialism. Anne Phillips, for example, identifies four: (i) attributing certain characteristics to everyone within a category; (ii) attributing certain characteristics to the category itself ‘in ways that naturalise or reify what may be socially created or constructed’; (iii) using collectives in ways that assume homogeneity and unification within the group and (iv)

¹⁰⁴⁰ See *infra* Section I.B. ‘Critical Discourse Analysis’.

¹⁰⁴¹ See, e.g., Bartlett, Katharine T., ‘Feminist Legal Methods’, 103 *Harvard Law Review* (1990) at 834 (arguing that the postmodern critique ‘rejects essentialist thinking as it insists that the subject . . . has no core identity but rather is constituted through multiple structures and discourses that in various ways overlap, intersect and contradict each other); Hutchinson, Allan C., ‘Identity Crisis: The Politics of Interpretation’, 26 *New England Law Review* (1992) at 1192 (arguing that postmodernism rejects the notion of an abiding, fixed or essential identity’); Sunder, Madhavi, ‘Cultural Dissent’ 54 *Stanford Law Review* (2001) at 513 (arguing that ‘[w]hile metanarratives of “culture” and “nation” suppressed internal heterogeneity in the hope of imagining a community of shared meaning, the postmodernists’ project was to highlight the suppressed or repressed voices that metanarratives sought to hide – that is, to de-reify “culture”’) and Williams, Joan Chalmers, ‘Dissolving the Sameness/Difference Debate: A Post-Modern Path beyond Essentialism in Feminist and Critical Race Theory’, *Duke Law Journal* (1991) at 307 (arguing that the post-modern approach ‘starts from the notion of fragmented and shifting self’).

¹⁰⁴² See, e.g., Fraser, Nancy and Nicholson, Linda J., ‘Social Criticism without Philosophy: An Encounter between Feminism and Postmodernism’ in Diana Tietjens Meyers (ed.) *FEMINIST SOCIAL THOUGHT: A READER* (Routledge, 1997) at 133 (arguing that postmodernists offer persuasive criticism of essentialism) and Austin, Regina and Schneider, Elizabeth M., ‘Mary Joe Frug’s Postmodern Feminist Legal Manifesto Ten Years Later: Reflections on the State of Feminism Today’ 36(1) *New England Law Review* (2001) at 7 (arguing that ‘[p]ostmodernism opens up the possibility of exploring, acknowledging and recognizing difference, and has the potential to promote anti-essentialism’). The anti-essentialist critique has been applied extensively in a number of areas, including critical race theory and feminist theory. See, e.g., Harris, Angela P., ‘Race and Essentialism in Feminist Legal Theory’, 42 *Stanford Law Review* (1990) 581-616 and Spelman, Elizabeth V., *INESSENTIAL WOMAN: PROBLEMS OF ELUSION IN FEMINIST LEGAL THOUGHT* (Beacon Press, 1988). Intersectionality is arguably the most well-known analytical lens introduced in legal scholarship to account for intra-group diversity. The notion of intersectionality was popularized by Kimberle Crenshaw in several groundbreaking works. See, e.g., Crenshaw, Kimberle, ‘Race, Gender, and Sexual Harassment’, 65 *Southern California Law Review* (1992) 1467-1476 and Crenshaw, Kimberle, ‘Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Color’, 43(6) *Stanford Law Review* (1991) 1241-1299. Essentialism is also one of the most common charges against multiculturalism. See, e.g., Benhabib, Seyla, *THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA* (Princeton University Press, 2002) and Phillips, Anne, *MULTICULTURALISM WITHOUT CULTURE* (Princeton University Press, 2007).

treating certain characteristics as defining the group.¹⁰⁴³ The anti-essentialist objection seeks to address a number of dangers. One of them is the neglect of intra-group difference manifested in the privileging of certain perspectives or experiences at the expense of others.¹⁰⁴⁴ A significant part of Chapter VI focuses on this danger: the exclusionary consequences arising from treating as *universal* the *particular* cultural or religious characteristics or views of some members *within* the group. But Chapter VI also discusses a particular invidious form in which essentialism may manifest itself: negative stereotypes.¹⁰⁴⁵

In brief, incorporating the anti-essentialist insight does not mean giving up on group categories and generalizations. In fact, postmodernism does not reject group or identity categories (e.g., woman, race) but rather ‘problematizes and de-essentializes them’.¹⁰⁴⁶ Since in a postmodern perspective, ‘identity is always constructed,’¹⁰⁴⁷ the challenge is to identify as essential or natural rather than to identities as socio-historical constructs.¹⁰⁴⁸ Moreover, the law, as I will explain in more detail below, works on the basis of generalizations and categorizations. Indeed, the legal analysis of difference with its focus on categorizations ‘bears much similarity to legal analysis in general’: in its judicial form, legal analysis ‘typically addresses whether a given situation “fits” in a category defined by a legal rule or instead belongs outside of it’, asking “Is this a that?”¹⁰⁴⁹ A rigid ban on group categorizations and generalizations may furthermore impede acknowledging and remedying the inequalities and disadvantages along these group categories.¹⁰⁵⁰ That is, such a ban may impede scrutinizing the kinds of group-based vulnerabilities discussed in Part I (the ones arising from societal contexts and arrangements that make the individuals situated in society through certain groups more likely to suffer harm).

¹⁰⁴³ Phillips, Anne, ‘What’s wrong with Essentialism?’ 20 *Distinktion: Scandinavian Journal of Social Theory* (2010) 47-60.

¹⁰⁴⁴ For examples in the literature pointing to the exclusion and marginalization dangers of essentialism, see, e.g., Patterson, ‘Postmodernism/Feminism/Law’, 77 *Cornell Law Review* (1992) at 302; Abrams, Kathryn ‘Title VII and the Complex Female Subject’, *Michigan Law Review* 92 (1994) at 2486; Otto, Dianne, ‘Rethinking the “Universality” of Human Rights Law’, 29 *Columbia Human Rights Law Review* (1997) at 28 and Wong, Jane, ‘The Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond’, 5 *William & Mary Journal of Women and the Law* (1999) at 291.

¹⁰⁴⁵ My study is not the first to point to stereotypical representations of Islam and Muslim women in the Court’s reasoning. See e.g., Evans, Carolyn, ‘The “Islamic Scarf” in the European Court of Human Rights’, 7 *Melbourne Journal of International Law* (2006) at 71-73; Fernandez, Sonya, ‘The Crusade over the Bodies of Women’ in Maleiha Malik (ed.) *ANTI-MUSLIM PREJUDICE: PAST AND PRESENT* (Routledge, 2010) at 64-65; and Malik, Maleiha, ‘Complex Equality: Muslim Women and the “Headscarf”’, 68 *Droit et Société* (2008) at 149-150. However, my examination offers crucial insights into how stereotypes of this sort come about in the Court’s reasoning and unpacks their workings and harmful impact on the particular cases and beyond.

¹⁰⁴⁶ Hutchinson, Alan C., ‘Identity Crisis: The Politics of Interpretation’, 26 *New England Law Review* (1992) at 1211.

¹⁰⁴⁷ *Ibid.* at 1214.

¹⁰⁴⁸ *Ibid.* at 1216.

¹⁰⁴⁹ Minow, Martha, ‘The Supreme Court 1986 Term: Justice Engendered’, 101 *Harvard Law Review* (1987) at 35.

¹⁰⁵⁰ In a similar vein, albeit in the context of gender, see Eichner, Maxine, ‘On Postmodernist Feminist Legal Theory’, 36(1) *Harvard Civil Rights- Civil Liberties Law Review* (2001) at 31 (arguing that ‘refusing all gender-based generalizations could hinder movement toward gender equality by preventing scrutiny of the way in which women’s and men’s lives and subjectivity are shaped by the discourse and practices of gender hierarchy’).

In incorporating anti-essentialist insights, I simply aim to adopt a critical posture to the use of group generalizations and categorizations. This critical stance involves reflecting on ‘how, when and why’ such generalizations and categorizations originate and are employed.¹⁰⁵¹ Moreover, it requires acknowledging their partial, revisable and contingent nature.¹⁰⁵² In the words of Dianne Otto, ‘the issue is not one of dispensing with abstractions or of refining them until they are “correct.” It is, rather, of continually questioning which categories we use in human rights discourse and contesting the power that is attributed to them by modernity's dual constructions of Standard and Other’.¹⁰⁵³ The Chapter that follows is an attempt to embrace this critical posture.

¹⁰⁵¹ Fraser, Nancy and Nicholson, Linda J., ‘Social Criticism without Philosophy: An Encounter between Feminism and Postmodernism’ in Diana Tietjens Meyers (ed.) *FEMINIST SOCIAL THOUGHT: A READER* (Routledge, 1997) at 143.

¹⁰⁵² Higgins, Tracy E., ‘“By Reason of their Sex”: Feminist Theory, Postmodernism and Justice’, 80 *Cornell Law Review* (1995) at 1580-1581 (arguing that all accounts of woman are ‘partial and contingent’). See also, Siegel, Reva B., ‘Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification’, in Robert C. Post, *PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW* (Duke University Press, 2001) at footnote 116 (arguing that the kind of essentialism ‘relevant to the articulation of equality goals’ are inevitable and even necessary ‘so long as generalizations about the socially specific circumstances and traits of the subordinated group are treated as contingent and revisable’) and Harris, Angela P., ‘Race and Essentialism in Feminist Legal Theory’, 42 *Stanford Law Review* (1990) at 586: ‘My suggestion is only that we make our categories explicitly tentative, relational, and unstable, and that to do so is all the more important in a discipline like law, where abstraction and “frozen” categories are the norm’.

¹⁰⁵³ Otto, Dianne, ‘Rethinking the “Universality” of Human Rights Law’, 29 *Columbia Human Rights Law Review* (1997) at 28.

CHAPTER VI

RELIGION AND CULTURE IN THE STRASBOURG DISCOURSE:

THE RISKS OF NATURALIZING AND STEREOTYPING*

Introduction

In examining how the law talks about people, James Boyd White distinguishes between characters and caricatures. While characters, he argues, are ‘believable, full, complex’, caricatures reduce people to ‘single exaggerated aspects, to labels, roles, moments from their lives’.¹⁰⁵⁴ ‘The law’, he pithily pronounces, ‘is a literature of caricature’.¹⁰⁵⁵

Over the past few decades, a number of legal scholars has wrestled with the (in)capacity of the law to do full justice to individuals’ complex, shifting subjectivities on the ground.¹⁰⁵⁶ One of the main questions underlying these scholars’ concerns is how the law, with its ‘discomfort with uncertainty’ and ‘thirst for fixed answers’, can be attentive and responsive to unstable lived experiences.¹⁰⁵⁷ This concern holds not only for the law in its basic form, the rule, but also for one of its flexible versions – adjudication. Indeed, legal cases tend to neglect detail and complexity ‘on the side of the facts and on the side of the law’.¹⁰⁵⁸ In other words, contrary to experience, which is ‘personal, ambivalent, shifting, contextual’, legal cases are supposed to be ‘clear’.¹⁰⁵⁹

The gaps between a real-life person and her ‘legal persona’ become especially visible in the context of legal proceedings,¹⁰⁶⁰ as the law has its own recognizability terms, that is, the rules that facilitate claimants’ recognition in the courtroom. If they want to make sense to courts, claimants have to tell their stories and present themselves in legally recognizable ways. This not

* I am thankful to Eva Brems, Saila Ouald Chaib, Stijn Smet and Alexandra Timmer for their valuable comments on earlier versions of this Chapter. This Chapter reproduces an Article accepted for publication in the *International Journal of Law in Context* (forthcoming 2014).

¹⁰⁵⁴ White, James Boyd, *THE LEGAL IMAGINATION* (The University of Chicago Press, 1973/1985) at 113-114.

¹⁰⁵⁵ *Ibid.* at 114. See also, Douzinas, Costas, *THE END OF HUMAN RIGHTS* (Hart Publishing, 2000) at 237 (arguing that [t]he legal subject is the caricature of the real person, a cartoon-like figure, which, as all caricature, exaggerates certain features and characteristics and totally misses others’).

¹⁰⁵⁶ See, e.g., Abrams, Kathryn, ‘Title VII and the Complex Female Subject’, 92 *Michigan Law Review* (1994) 2479-2540; Abrams, Kathryn, ‘Complex Claimants and Reductive Moral Judgments: New Patterns in the Search for Equality’, 57 *University of Pittsburgh Law Review* (1996) 337-362; Karst, Kenneth L., ‘Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation’, 43 *University of California Law Review* (1995) 263-348; Minow, Martha, *NOT ONLY FOR MYSELF: IDENTITY, POLITICS AND THE LAW* (The New York Press, 1997); Douzinas, Costas, ‘Identity, Recognition, Rights or What Can Hegel Teach Us About Human Rights?’, 29 *Journal of Law and Society* (2002) 379-405 and Tirosh, Yofi, ‘Adjudicating Appearance: From Identity to Personhood’, 19 *Yale Journal of Law and Feminism* (2007) 102-174.

¹⁰⁵⁷ Minow, Martha, *NOT ONLY FOR MYSELF: IDENTITY, POLITICS AND THE LAW* (The New York Press, 1997) at 77.

¹⁰⁵⁸ Baer, Susanne ‘A Closer Look at Law: Human Rights as Multi-level Sites of Struggle Over Multi-dimensional Equality’, 6 *Utrecht Law Review* (2010) at 63-64.

¹⁰⁵⁹ *Ibid.* at 63.

¹⁰⁶⁰ Douzinas, Costas, *THE END OF HUMAN RIGHTS* (Hart Publishing, 2000) at 237.

only means translating everyday language into legal language,¹⁰⁶¹ turning personal traits into legal arguments,¹⁰⁶² transforming stories into rule-oriented narratives¹⁰⁶³ and following ‘rules of evidence and procedure’.¹⁰⁶⁴ Most fundamentally, this may also mean turning particularities into generalities,¹⁰⁶⁵ narratives into meta-narratives,¹⁰⁶⁶ ‘characters’ into ‘caricatures’.¹⁰⁶⁷ Applicants’ real-life and complex stories may thus get lost in the various layers of judicial translation, including legal counseling, which often turns the personal into the collective or ‘represses the litigant as a distinctly contingent subject in order to reconstruct it in rhetorically effective ways’.¹⁰⁶⁸

Law’s need for clarity and certainty may partly explain why litigants often adopt fixed notions of group identity¹⁰⁶⁹ in what is known as ‘strategic essentialism’.¹⁰⁷⁰ The ‘essentialising proclivities of law’¹⁰⁷¹ are particularly at work in assessments of group identity traits – including cultural and religious traits – as individuals inevitably come to courts as part of collectives.¹⁰⁷² In the words of Susanne Baer: ‘Whenever a “culture” or a “religion” claims recognition, we have the problem of reification, in that this suggests that the culture or religion is homogenous’.¹⁰⁷³ Or, as stated by the South African Constitutional Court: ‘There is a danger of falling into an antiquated mode of understanding culture as a single unified entity that can be studied and defined from outside’.¹⁰⁷⁴ In fact, attempts to capture any group commonality often fall prey to

¹⁰⁶¹ Yovel, Jonathan, ‘Language and Power in a Place of Contingencies: Law and the Polyphony of Lay Argumentation’, Yale Law School Faculty Scholarship Series Paper (2010) at 2.

¹⁰⁶² Tirosch, Yofi, ‘Adjudicating Appearance: From Identity to Personhood’, 19 *Yale Journal of Law and Feminism* (2007) at 133.

¹⁰⁶³ Yovel, Jonathan, ‘Language and Power in a Place of Contingencies: Law and the Polyphony of Lay Argumentation’, Yale Law School Faculty Scholarship Series Paper (2010) at 9.

¹⁰⁶⁴ Baer, Susanne ‘A Closer Look at Law: Human Rights as Multi-level Sites of Struggle Over Multi-dimensional Equality’, 6 *Utrecht Law Review* (2010) at 64.

¹⁰⁶⁵ Douzinas, Costas, ‘Identity, Recognition, Rights or What Can Hegel Teach Us About Human Rights?’, 29 *Journal of Law and Society* (2002) at 402.

¹⁰⁶⁶ Tirosch, Yofi, ‘Protecting Transgressive Identities: A Contemporary Challenge for Antidiscrimination Law’, Paper presented at a Seminar at New York University Law School, New York (2007) at 7.

¹⁰⁶⁷ White, James Boyd, *THE LEGAL IMAGINATION* (The University of Chicago Press, 1973/1985).

¹⁰⁶⁸ Yovel, Jonathan, ‘Language and Power in a Place of Contingencies: Law and the Polyphony of Lay Argumentation’, Yale Law School Faculty Scholarship Series Paper (2010) at 2.

¹⁰⁶⁹ Minow, Martha, *NOT ONLY FOR MYSELF: IDENTITY, POLITICS AND THE LAW* (The New York Press, 1997) at 77.

¹⁰⁷⁰ Strategic essentialism has been understood as the utilisation of essential notions of identity while recognising the falsity of an essential reality. See Munro, Vanessa E., ‘Resemblances of Identity: Ludwig Wittgenstein and Contemporary Feminist Legal Theory’, 12(2) *Res Publica* (2006) at 144.

¹⁰⁷¹ Cowan, Jane K. et al. ‘Introduction’ in Jane K. Cowan et al. (eds.) *CULTURE AND RIGHTS: ANTHROPOLOGICAL PERSPECTIVES* (Cambridge University Press, 2001) at 10-11.

¹⁰⁷² Beaman, Lori G., ‘Introduction’ in Lori G. Beaman (ed.) *REASONABLE ACCOMMODATION: MANAGING RELIGIOUS DIVERSITY* (University of British Columbia Press, 2012) at 5 (arguing that ‘although claims may be advanced by individuals, they inevitably invoke an attachment to a group’).

¹⁰⁷³ Baer, Susanne ‘A Closer Look at Law: Human Rights as Multi-level Sites of Struggle Over Multi-dimensional Equality’, 6 *Utrecht Law Review* (2010) at 59.

¹⁰⁷⁴ Constitutional Court of South Africa, *MEC for Education: Kwazulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21 at 54.

charges of ‘essentialism’.¹⁰⁷⁵ Essentialism has been understood as ‘a belief in the real, true essence of things, the invariable and fixed properties which define the “whatness” of a given entity’.¹⁰⁷⁶ These properties may be attributed to ‘everyone identified with a particular category’ or to the ‘category itself’, often in naturalizing and reifying ways.¹⁰⁷⁷ The assumption is that all within the category ‘share the same inherent characteristics’.¹⁰⁷⁸

Scholarly literature – notably feminist legal and political theory – is full of warnings against the essentialist understandings of collective identities traditionally associated with identity politics.¹⁰⁷⁹ Wrongs include reducing people to ‘one trait, one viewpoint and one stereotype’,¹⁰⁸⁰ trapping people in categories that deny self-definition,¹⁰⁸¹ fixing differences among groups and ‘imposing uniformity within them’¹⁰⁸² and policing group boundaries ‘to regulate internal membership’.¹⁰⁸³ Another fundamental objection to positing one group experience as paradigmatic at the expense of others – which is what essentialism is mostly about¹⁰⁸⁴ – is that it reinforces hierarchies within groups or categories.¹⁰⁸⁵ The experiences of some are thus either ignored or treated as ‘different’ from the ‘norm’.¹⁰⁸⁶

Incorporating these insights from the anti-essentialist critique and borrowing tools from critical discourse analysis, this Chapter scrutinizes the ways in which the Strasbourg Court represents individuals’ religious and cultural practices in its legal discourse. My analysis starts from the assumption that, given the nature of legal discourse and of cultural and religious claims, some degree of abstraction or generalization is inevitable. For instance, it is hard to imagine an analysis of Article 9 ECHR (freedom of religion) or Article 14 ECHR (non-discrimination) without the categorizations intrinsic to their operation. It is equally hard to think of cultural and religious claims without individuals’ identifications with groups and, as a result, without some level of collectivization. The challenge is distinguishing inevitable and inoffensive generalizations from more problematic ones. As Anne Phillips puts it: ‘Essentialism is a way of

¹⁰⁷⁵ For example, in feminism, attempts to capture the experience common to all women have often fallen prey to charges of gender essentialism. Munro, Vanessa E., ‘Resemblances of Identity: Ludwig Wittgenstein and Contemporary Feminist Legal Theory’, 12(2) *Res Publica* (2006) 137-162.

¹⁰⁷⁶ Fuss, Diana, *ESSENTIALLY SPEAKING: FEMINISM, NATURE AND DIFFERENCE* (Routledge, 1989) at xi.

¹⁰⁷⁷ Phillips, Anne, ‘What’s Wrong with Essentialism?’ 20 *Distinktion: Scandinavian Journal of Social Theory* (2010) at 50 and 53.

¹⁰⁷⁸ Wong, Jane, ‘The Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond’, 5 *William & Mary Journal of Women and the Law* (1999) at 275.

¹⁰⁷⁹ See, e.g., Minow, Martha, *NOT ONLY FOR MYSELF: IDENTITY, POLITICS AND THE LAW* (The New York Press, 1997); Fraser, Nancy, ‘Rethinking Recognition’, 3 *New Left Review* (2000) 107-120 and Phillips, Anne, *MULTICULTURALISM WITHOUT CULTURE* (Princeton University Press, 2007).

¹⁰⁸⁰ Minow, Martha, *NOT ONLY FOR MYSELF: IDENTITY, POLITICS AND THE LAW* (The New York Press, 1997) at 34.

¹⁰⁸¹ *Ibid.* at 78.

¹⁰⁸² Appiah, Kwame Anthony, *THE ETHICS OF IDENTITY* (Princeton University Press, 2005) at 151.

¹⁰⁸³ Benhabib, Seyla, *THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA* (Princeton University Press, 2002) at 68.

¹⁰⁸⁴ Munro, Vanessa E., ‘Resemblances of Identity: Ludwig Wittgenstein and Contemporary Feminist Legal Theory’, 12(2) *Res Publica* (2006) at 138.

¹⁰⁸⁵ Hekman, Susan J., *PRIVATE SELVES, PUBLIC IDENTITIES: RECONSIDERING IDENTITY POLITICS* (Pennsylvania State University Press, 2004) at 3.

¹⁰⁸⁶ Harris, Angela P., ‘Race and Essentialism in Feminist Legal Theory’, 42 *Stanford Law Review* (1990) at 615.

thinking not always so easily distinguished from more innocent forms of generalisation, and what is wrong with it is often a matter of degree rather than categorical embargo'.¹⁰⁸⁷

The crucial questions therefore are *when* and *why* the Court's generalizations of applicants and their practices become problematic. These questions are far from minor if one considers that the law 'imposes itself coercively on the lives of those who come within its embrace.'¹⁰⁸⁸ The Court's articulation of a certain notion of religious or cultural identity may thus impose the power of the law behind the designated identity.¹⁰⁸⁹ Moreover, over time, the Court's discourse may sustain 'a vocabulary of identities' that may either channel future claimants 'into recognized identity categories with conventional scripts for behaviour',¹⁰⁹⁰ or exclude them from protection. This is because of 'the sedimenting effects' produced by the development of case law, which tends to entrench ideas about what group traits 'are'.¹⁰⁹¹

I argue that the Court's reliance on generalizations becomes problematic when, following the applicant's exclusion (usually by reducing her to and replacing her by one general trait), the Court (i) equates the trait in question with negative stereotypes and (ii) posits the trait in question as the group's 'paradigmatic' practice or as representative of the whole group.¹⁰⁹² I further contend that these two forms of depictions are harmful both for the individuals (actual applicants and those likely to be affected by the Court's rulings in the future) and for the groups concerned because of the inequalities they sustain *across* and *within* groups.

The Chapter proceeds as follows. After offering a brief explanation of the methodology, I present the chief research findings of my study and offer an in-depth analysis of the Court's discourse in the areas where I have found problematic depictions. My findings suggest that the Court uses the two problematic modes of reasoning mentioned above most frequently when assessing the practices of Muslim women, Sikhs and Roma Gypsies. This part is followed by a brief comparison with the Court's broader case law, including gender and sexuality cases, with a view to offering possible explanations for why problematic representations are to be expected in certain groups of cases. Based on the lessons drawn along the Chapter, I conclude by sketching out the basic elements of an approach capable of mitigating the stereotyping and essentializing risks.

¹⁰⁸⁷ Phillips, Anne, 'What's wrong with Essentialism?' 20 *Distinktion: Scandinavian Journal of Social Theory* (2010) at 58.

¹⁰⁸⁸ Hutchinson, Allan C., 'Inessentially Speaking (Is there Politics after Postmodernism?)', 89 *Michigan Law Review* (1991) at 1555.

¹⁰⁸⁹ Minow, Martha, *NOT ONLY FOR MYSELF: IDENTITY, POLITICS AND THE LAW* (The New York Press, 1997) at 61.

¹⁰⁹⁰ Karst, Kenneth L., 'Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation', 43 *University of California Law Review* (1995) at 295.

¹⁰⁹¹ Johnson, Paul, 'An Essentially Private Manifestation of Human Personality: Constructions of Homosexuality in the European Court of Human Rights', 10 *Human Rights Law Review* (2010) at 72.

¹⁰⁹² The problem, therefore, seems to be not just one of over-generalizations as such but one of 'hegemonic generalizations': over-generalizations that posit the experiences of dominant members of the group as 'paradigmatic'. See Narayan, Uma, 'Essence of Culture and a Sense of History: A Feminist Critique of Cultural Essentialism', 13(2) *Hypatia* (1998) at 86.

I. Methodology

A. Selection of Cases and Scope of the Analysis

This Chapter looks at the Court's discourse in primarily three areas of its case law: freedom of religion (Article 9 ECHR),¹⁰⁹³ the right to respect for minority cultural lifestyle (Article 8 ECHR)¹⁰⁹⁴ and non-discrimination (Article 14 ECHR).¹⁰⁹⁵ The reason for focusing on these ECHR provisions is because these are the ones through which applicants have most commonly demanded protection of their religious and cultural practices. The selected cases comprise a mix of 'high-profile cases' – which I define as Grand Chamber and widely-cited cases in the Court's jurisprudence – and less known cases. Moreover, the sample includes a mix of Grand Chamber judgments, Chamber judgments and inadmissibility decisions passed over roughly the last fifteen years.¹⁰⁹⁶ Though the selection of cases is by no means complete, it is substantial enough to allow for meaningful analysis.

The analysis is based on two levels of investigation. The first (and broad) level involves a look into the Court's wider discourse on identity traits – in particular, case law concerning individuals claiming protection of their religious/cultural practices and case law involving women and sexual minorities.¹⁰⁹⁷ I compare the Court's language in these different areas of its identity-based case law in order to identify significant patterns – i.e. which groups of applicants

¹⁰⁹³ Article 9 ECHR does not only guarantee freedom of religion but also freedom of thought and conscience. It is therefore difficult to establish the exact number of 'freedom of religion' rulings on the basis of an Article 9 ECHR search in the Court's database 'HUDOC'. However, my sample makes sure to include all Level of Importance '1' judgments/decisions on 'freedom of religion'. This level is assigned by the Court itself and means that the ruling in question makes a significant contribution to the development, clarification or modification of its case-law. Moreover, the selection includes all relevant judgments/decisions featuring in the 2013 'Freedom of Religion' factsheet prepared by the Court. Additionally, the case selection includes several high-profile rulings from others areas of the Court's case law, including freedom of association, the right to respect for family life and the right to education, as they also involve religious claims. In total, I have examined *sixty seven* rulings involving *religious* claims.

¹⁰⁹⁴ Article 8 ECHR guarantees the right to respect for home, private and family life but the Court has derived from this provision a right to protection of one's minority way of life (*see, e.g., ECmmHR, G. and E. v Norway*, 3 October 1983). For this reason, finding and determining the exact number of cases concerning the protection of applicants' cultural practices/ways of life in the HUDOC database is not a straightforward enterprise. Moreover, there is no available factsheet on the issue. Thus, in order to find the relevant cases, I have used the following search terms in HUDOC: 'way of life', 'cultural practice', 'minority lifestyle' and 'lifestyle'. I have run the same search with Article 1 of Protocol No 1 (protection of property), as this is another ECHR provision through which cultural claims might be channelled. In total, I have examined *twenty one* rulings involving cultural practices.

¹⁰⁹⁵ The study focuses on discrimination cases to the extent that they concern applicants' cultural and religious practices. This means that these cases are already included in the results under other relevant ECHR provisions (Articles 8, 9, 11, Article 1 of Protocol 1 and Article 2 of Protocol 1). This is because Article 14 ECHR is not autonomous but has effect only in relation to ECHR rights.

¹⁰⁹⁶ I take 1998 as a point of departure for the case selection because, since 1998, the Strasbourg Court has sat as a full-time Court, following the entry into force of Protocol 11 to the ECHR. The cases have thus been selected from the period of 1 January 1998-15 July 2013.

¹⁰⁹⁷ Cases on women, gays, lesbians and transsexuals have been selected from factsheets prepared by the Court on the following themes: 'Reproductive Rights', March 2013; 'Violence against Women', May 2013; 'Sexual Orientation', May 2013; and 'Gender Identity', May 2013. These factsheets, though not exhaustive, contain important, high-profile rulings. In total, I have looked at *fifty* gender and sexuality cases.

(and their traits) are represented most problematically in Strasbourg – and to formulate possible explanations for why problematic representations are to be expected in certain groups of cases. The second (and specific) level of inquiry involves in-depth discourse analysis of the sub-sets of cases where problematic patterns have been found. Since this form of analysis only allows space for detailed discussion of a limited number of cases, I focus solely on four problematic judgments: *Leyla Şahin v. Turkey*,¹⁰⁹⁸ *Dahlab v. Switzerland*,¹⁰⁹⁹ *Mann Singh v. France*,¹¹⁰⁰ and *Chapman v. the United Kingdom*.¹¹⁰¹

B. Critical Discourse Analysis

My analysis of the Court's discourse relies on a set of heuristic tools employed in critical discourse analysis, a form of analysis that views representation in discourse as 'a constructive practice' rather than as just neutral communication of events or ideas.¹¹⁰² For critical discourse analysis, the language through which identities are constructed reveals 'a subject's attitudes and ideologies'.¹¹⁰³ This strand of discourse analysis focuses on 'the relation of language to power and privilege'.¹¹⁰⁴ In particular, it looks at the role that 'structures, strategies and other properties of text, talk, verbal interaction or communicative events' play in the (re)production of inequality in society.¹¹⁰⁵

Of particular relevance for my analysis are some notions developed by critical discourse scholar, Theo van Leeuwen, in his work on representation of social actors and social actions.¹¹⁰⁶ Van Leeuwen critically examines the transformations that take place in the re-contextualization of social practices – that is, in discourse.¹¹⁰⁷ These transformations may include substituting, excluding and adding elements of such practices (e.g., social actors, time, location) by way of different representational choices.¹¹⁰⁸ Each of these choices, he claims, takes place through 'specific linguistic or rhetorical realizations'.¹¹⁰⁹ Simply put, Van Leeuwen's idea is that, when we represent a social practice, we add new meanings by transforming the actual elements of the practice through different linguistic and rhetorical means.

Van Leeuwen's work is particularly apt to illuminate my task for various reasons. One of them is that representation – more specifically, the representation of facts and of the individuals

¹⁰⁹⁸ ECtHR (GC), *Leyla Şahin v. Turkey*, 10 November 2005.

¹⁰⁹⁹ ECtHR, *Dahlab v. Switzerland*, 15 February 2001.

¹¹⁰⁰ ECtHR, *Mann Singh v. France*, 13 November 2008.

¹¹⁰¹ ECtHR (GC), *Chapman v. the United Kingdom*, 18 January 2001.

¹¹⁰² Fowler, Roger, *LANGUAGE IN THE NEWS: DISCOURSE AND IDEOLOGY IN THE PRESS* (Routledge, 1991) at 25.

¹¹⁰³ Benwell, Bethan and Stokoe, Elizabeth, *DISCOURSE AND IDENTITY* (Edinburgh University Press, 2006) at 44.

¹¹⁰⁴ Riggins, Stephen Harold, 'The Rhetoric of Othering' in Stephen Harold Riggins (ed.) *THE LANGUAGE AND POLITICS OF EXCLUSION: OTHERS IN DISCOURSE* (SAGE 1997) 2.

¹¹⁰⁵ Van Dijk, Teun, 'Principles of Critical Discourse Analysis' in Margaret Wetherell, Stephanie Taylor and Simeon J. Yeats (eds.) *DISCOURSE THEORY AND PRACTICE: A READER* (SAGE., 2001) at 300.

¹¹⁰⁶ Van Leeuwen, Theo, *DISCOURSE AND PRACTICE: NEW TOOLS FOR CRITICAL DISCOURSE ANALYSIS* (Oxford University Press, 2008).

¹¹⁰⁷ *Ibid.* at 3-6.

¹¹⁰⁸ *Ibid.* at 17-22.

¹¹⁰⁹ *Ibid.* at 25.

involved in the facts – is at the heart of the adjudication enterprise.¹¹¹⁰ Another reason lies in the purpose of Van Leeuwen’s scheme, which coincides with the main purpose of my investigation: scrutinizing the ways in which actors and practices are represented in discourse (in my case, in legal discourse). I do not employ in my analysis all the notions developed in Van Leeuwen’s broad scheme but only those that are – per my hypothesis – potentially highly relevant.

My study of the Court’s discourse has particularly benefited from his notions of *exclusion* of social actors, *objectivation* of social actions and assimilation of social actors by *collectivization*. On the exclusion of social actors, Van Leeuwen observes: ‘When the relevant actions (e.g., the killing of demonstrators) are included but some or all of the actors involved in them (e.g., the police) are excluded, the exclusion *does* leave a trace.’¹¹¹¹ He makes a further distinction between the full exclusion of social actors, which he calls ‘suppression’ (the actors are referred nowhere in the text), and their less radical exclusion, which he dubs ‘backgrounding’ (the actors ‘may not be mentioned in relation to a given action, but they are mentioned elsewhere in the text’).¹¹¹² The objective is to identify patterns of inclusion/exclusion and to combine them with the ways in which social actors are represented.¹¹¹³

As regards the ‘objectivation’ of social actions, Van Leeuwen explains that this is one way in which social actions may be ‘deactivated’, that is, ‘represented statically, as though they were entities . . . rather than dynamic processes’.¹¹¹⁴ In turn, collectivization is a form of assimilation of social actors that occurs when they are referred to as groups by means of pluralities (e.g., Christians) or by means of ‘a mass noun or a noun denoting a group of people’ (e.g., the community).¹¹¹⁵

The exclusion of social actors and the objectivation of their social actions may take place through various linguistic forms, including ‘nominalization’ and ‘passivization’. Nominalization consists in ‘turning verbs into nouns’¹¹¹⁶ and passivization in privileging the passive voice over the active voice.¹¹¹⁷ An example of nominalization would be ‘*the attack* on demonstrators’; an example of passivization, ‘demonstrators were *attacked*’.¹¹¹⁸

The notions borrowed from Van Leeuwen’s scheme serve as a starting point for my analysis, which I further supplement with insights from (legal) scholarship on stereotyping and essentialism.

¹¹¹⁰ Karst, Kenneth L., ‘Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation’, 43 *University of California Law Review* (1995) at 281.

¹¹¹¹ Van Leeuwen, Theo, *DISCOURSE AND PRACTICE: NEW TOOLS FOR CRITICAL DISCOURSE ANALYSIS* (Oxford University Press, 2008) at 29.

¹¹¹² *Ibid.* at 29.

¹¹¹³ *Ibid.* at 32.

¹¹¹⁴ *Ibid.* at 63.

¹¹¹⁵ *Ibid.* at 37.

¹¹¹⁶ Fowler, Roger et al., *LANGUAGE AND CONTROL* (Routledge and Kegan Paul, 1979) at 14.

¹¹¹⁷ Billig, Michael, ‘The Language of Critical Discourse Analysis: The Case of Nominalization’, 19 *Discourse and Society* (2008) at 785.

¹¹¹⁸ *Ibid.*

II. Stereotyping and Naturalizing in the Court's Discourse

In this part, I introduce the areas of the Court's case law where I have most frequently found the two problematic modes of reasoning outlined in the introduction and offer an illustration of their operation by means of in-depth discourse analysis. Moreover, I unpack the harmful consequences of these forms of reasoning both for the individual applicants involved in the particular cases and for their groups more broadly.

A. Key Findings

My first (and broad) level of analysis of the Court's discourse on identity traits reveals a widespread use of collectivizations of the applicants and objectivations of their traits. 'Transsexualism',¹¹¹⁹ 'pregnancy',¹¹²⁰ 'homosexuality',¹¹²¹ and the 'Gypsy way of life',¹¹²² are but a few examples of objectivations of applicants' traits. 'Transsexuals',¹¹²³ 'women' (or 'a woman')¹¹²⁴ 'sexual minorities',¹¹²⁵ and 'Jehovah's Witnesses',¹¹²⁶ are, in turn, just some instances of collectivizations.

On one side, I have found that, oftentimes, the deployment of objectivations and collectivizations seems inevitable, intrinsic to the operation of the law or legal reasoning. This happens, for example, when the Court has to determine whether a difference in treatment exists by way of comparators in discrimination cases (e.g., same-sex couples and different-sex couples,¹¹²⁷ men and women¹¹²⁸). It also occurs when the Court refers to the content of domestic laws and regulations (e.g., 'the ban on *the wearing of religious symbols* in universities',¹¹²⁹ under Polish law 'abortion is lawful where *pregnancy* poses a threat to *the woman's* life or health',¹¹³⁰ French law opens up the possibility of 'adoption by *a single homosexual*',¹¹³¹).

On the other side, my findings also demonstrate that, other times, collectivized representations of applicants and objectivized depictions of their traits result in two types of problematic portrayals. The first kind of problematic depiction involves negative stereotyping: following the applicant's reduction to and disappearance behind an objectivized trait or a

¹¹¹⁹ See, e.g., ECtHR (GC), *Christine Goodwin v. the United Kingdom*, 11 July 2002 §§ 81 and 92.

¹¹²⁰ See, e.g., ECtHR, *R.R. v. Poland*, 26 May 2011 §§§§ 181, 195 197 and 203; and ECtHR, *P. and S. V. Poland*, 30 October 2012 §§§ 109, 111 and 148 .

¹¹²¹ See, e.g., ECtHR, *Lustig-Prean and Beckett v. the United Kingdom*, 27 September 1999 §§ 89 and 95. See also, ECtHR, *Alekseyev v. Russia*, 21 October 2010 § 86.

¹¹²² See, e.g., ECtHR (GC), *Chapman v. the United Kingdom*, 18 January 2001 § 96.

¹¹²³ See, e.g., ECtHR (GC), *I. v. the United Kingdom*, 11 July 2002 §§§ 59, 72 and 83; and ECtHR (GC), *Christine Goodwin v. the United Kingdom*, 11 July 2002 §§79 and 82.

¹¹²⁴ See, e.g., ECtHR (GC), *Konstantin Markin v. Russia*, 22 March 2012 §§§ 132, 139 and 140; and ECtHR (GC), *A. B. and C. v. Ireland*, 16 December 2010 §§§ 253, 254 and 258.

¹¹²⁵ See, e.g., ECtHR, *Alekseyev v. Russia*, 21 October 2010 §§§ 82, 83 and 86.

¹¹²⁶ See, e.g., ECtHR, *Jehovah's Witnesses of Moscow and Others v. Russia*, 10 June 2010 § 133.

¹¹²⁷ See, e.g., ECtHR, *Schalk and Kopf v Austria*, 24 June 2010 § 99.

¹¹²⁸ See, e.g., ECtHR (GC), *Konstantin Markin v Russia*, 22 March 2012, §§ 133.

¹¹²⁹ ECtHR (GC), *Leyla Şahin v. Turkey*, 10 November 2005 §116. Emphasis added.

¹¹³⁰ ECtHR, *Tysiāc v. Poland*, 20 March 2007 §104. Emphasis added.

¹¹³¹ ECtHR, *E.B. v. France*, 22 January 2008 § 94. Emphasis added.

collectivized representation, the Court associates the trait or group in question with a stereotype that ‘assigns difference’.¹¹³² This kind of stereotyping generally reflects ‘prejudice or bias’ about a group, exacerbating its subordination.¹¹³³ Broadly speaking, stereotypes are ‘associations and beliefs about the characteristics and attributes of a group and its members that shape how people think about and respond to the group’.¹¹³⁴ Stereotyping is a form of ‘intergroup bias,’ which in turn is a tendency to ‘evaluate one’s own membership group (the in-group) or its members more favorably than a non-membership group (the out-group) or its members’.¹¹³⁵ Anne Phillips views stereotyping as a form of essentialism whose problem lie in over-generalizations and a failure to see the characteristics that do not fit the preconceptions about a certain group.¹¹³⁶ Individuals are therefore assumed to possess certain characteristics by simple virtue of group membership, regardless of their actual capabilities and circumstances.¹¹³⁷ The second type of problematic representation entails what I will refer to as ‘naturalizing’: following the applicant’s reduction to and disappearance behind an objectivized trait or a collectivized representation, the Court associates the trait in question with an unchanging core of the applicant’s group identity. Two forms of essentialism are at work in this mode of reasoning: the attribution of certain characteristics to some ‘static “essence”’, in a move that ‘naturalises differences that may be historically variant and socially created’ and the treatment of such characteristics ‘as the defining ones for anyone in the category’.¹¹³⁸

My examination suggests that these two problematic forms of legal reasoning feature most frequently in cases concerning members of religious and cultural minorities. In particular, the Court appears to most commonly assign difference through negative stereotyping in cases concerning Muslim women and to engage in naturalizations in cases involving Sikhs and Roma Gypsies.

B. Negative Stereotypes

The cases exhibiting the first form of problematic representation concern Muslim women prohibited from wearing the headscarf.¹¹³⁹ What these cases have in common is that the Court

¹¹³² Cook, Rebecca J. and Cusack, Simone, *GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES* (University of Pennsylvania Press, 2010) at 16.

¹¹³³ *Ibid.*

¹¹³⁴ Dovidio, John F., Hewstone, Miles, Glick, Peter and Esses, Victoria M., ‘Prejudice, Stereotyping and Discrimination: Theoretical and Empirical Overview’ in John F. Dovidio et al. (eds.) *THE SAGE HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION* (SAGE, 2010) at 8.

¹¹³⁵ *Ibid.* at 3 and 5.

¹¹³⁶ Phillips, Anne, ‘What’s wrong with Essentialism?’ 20 *Distinktion: Scandinavian Journal of Social Theory* (2010) at 52 (describing in this way one form of essentialism: stereotyping).

¹¹³⁷ Cook, Rebecca J. and Cusack, Simone, *GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES* (University of Pennsylvania Press, 2010) at 9.

¹¹³⁸ These forms are what Anna Phillips calls Essentialism II and IV. Phillips, Anne, ‘What’s wrong with Essentialism?’ 20 *Distinktion: Scandinavian Journal of Social Theory* (2010) at 53, 54 and 57.

¹¹³⁹ These cases include ECtHR, *Dahlab v. Switzerland*, 15 February 2001; ECtHR (GC), *Leyla Şahin v. Turkey*, 10 November 2005; and ECtHR, *Köse and Others v. Turkey*, 24 January 2006. The problematic, stereotypical representations developed in *Dahlab*, *Şahin* and *Köse* are reproduced in the principles of ECtHR, *Dogru v. France* and *Kervanci v. France* but do not feature expressly in the Court’s analysis of the particular circumstances of the

tends to neglect the applicants and to focus nearly exclusively on their practices or symbols as though they had a separate existence, associating them with negative stereotypes. In other words, the Court talks *to* symbols and *about* symbols in harmful stereotypical ways, without regard to the applicants' views or circumstances and without any basis on the evidence of the cases.

I examine the Court's discourse in this first group of cases through the lens of *Dahlab v Switzerland* and *Leyla Şahin v Turkey*. *Dahlab* concerns a female Muslim teacher prohibited from wearing the headscarf at a State school. *Leyla Şahin* concerns a female Muslim student not allowed to wear the headscarf at a State university. The Court declared *Dahlab* inadmissible and rejected *Leyla Şahin* on the merits. It examined the two cases primarily under Article 9 ECHR (freedom of religion).¹¹⁴⁰

(i) The Entrance of 'the Headscarf'

A critical analysis of the Court's representation of the applicants and their religious practices in *Dahlab* and *Leyla Şahin* shows that the applicants, though not really suppressed – the judgments include references to them elsewhere – are constantly pushed into the background in the Article 9 ECHR reasoning.

In *Dahlab*, in determining whether the restriction on the applicant's freedom of religion was necessary in a democratic society, the Court states:

The Court accepts that it is very difficult to assess the impact that a powerful external symbol such as *the wearing of a headscarf* may have on the freedom of conscience and religion of very young children. The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that *the wearing of a headscarf* might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile *the wearing of an Islamic headscarf* with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.¹¹⁴¹ (Emphasis added)

In this passage, the Court backgrounds the applicant through nominalization. Instead of using an active verb clause with the applicant as the subject, the Court suppresses the applicant and turns the verb 'to wear' into the noun 'the wearing of' the headscarf. By means of nominalization, the Court does not only background the agent (the applicant) but also objectivizes her action (wearing the headscarf). Indeed, the action is thereby represented statically, as though it were an entity. Moreover, while the applicant is nearly excluded from the text, her supposed victims

cases. ECtHR, *Dogru v. France* and *Kervanci v. France*, 4 December 2008 §§§ 64, 66 and 71. See also, ECtHR, *Gamaleddyn v. France*; *Ghazal v. France*; *Aktas v. France*; and *Bayrak v. France*, all from 30 June 2009. In these four cases, the implicit idea of the headscarf as a source of pressure and exclusion informs the Court's reasoning.

¹¹⁴⁰ In addition, the Court examined *Leyla Şahin* under Article 2 of Protocol 1 (no violation) and under Articles 8, 10 and 14 ECHR (no violation), and *Dahlab* under Article 14 ECHR (manifestly ill-founded).

¹¹⁴¹ ECHR, *Dahlab v. Switzerland*, 15 February 2001, p. 13.

remain there, albeit in collectivized forms ('very young children', 'applicant's pupils', 'children'). In fact, the Court names the applicant only once: when it talks about her alleged victims.

In *Leyla Şahin*, in turn, in assessing whether the interference with the applicant's freedom of religion was necessary in a democratic society, the majority holds:

. . . In addition, like the Constitutional Court . . . the Court considers that, when examining *the question of the Islamic headscarf in the Turkish context*, it must be borne in mind the impact which *wearing such a symbol*, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it. As has already been noted (see *Karaduman*, decision cited above, and *Refah Partisi* (the Welfare Party) and Others, cited above, § 95), the issues at stake include the protection of the 'rights and freedoms of others' and the 'maintenance of public order' in a country in which the majority of the population, while professing a strong attachment to the rights of women and a secular way of life, adhere to the Islamic faith. Imposing limitations on freedom in this sphere may, therefore, be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially since, as the Turkish courts stated, . . . *this religious symbol* has taken on political significance in Turkey in recent years.¹¹⁴² (Emphasis added).

Here, the Court also backgrounds the applicant and objectivizes her practice through nominalization ('wearing such a symbol') and other noun phrases that act as either the subject ('this religious symbol') or the object ('the question of the Islamic headscarf in the Turkish context'). As a result, the Court leaves the applicant out and turns 'the headscarf' or 'the symbol' into the centre of its discourse. What is furthermore distinctive about the Court's representation of the headscarf in *Leyla Şahin* is the deletion of agency through 'passivization'. The Court tells us that the symbol is 'presented or perceived as a compulsory religious duty' but omits to say who actually 'perceives' or 'presents' the Islamic headscarf as such. Consciously or not, the fact is that the Court omits agency by leaving unspecified who exactly does the labeling of 'compulsory'.

Whereas the agency of Leyla Şahin is deemphasized by way of nominalizations, the agency of the supposed victims is emphasized by the use of the word 'choose' in 'those who choose not to wear it'.¹¹⁴³ Moreover, while the applicant is fully displaced by an objectivized version of her practice, her alleged victims remain in the text, albeit in a collectivized and somehow indeterminate form.

One of the reasons why critical discourse scholars have long viewed nominalizations with suspicion is because they facilitate reification.¹¹⁴⁴ Critical discourse scholar, Roger Fowler, explains how, by means of nominalization, 'processes and qualities assume the status of things: impersonal, inanimate, capable of being amassed and counted, paraded like possessions'.¹¹⁴⁵

¹¹⁴² ECtHR (GC), *Leyla Şahin v. Turkey*, 10 November 2005 § 115.

¹¹⁴³ I am thankful to an anonymous reviewer for this point.

¹¹⁴⁴ Billig, Michael, 'The Language of Critical Discourse Analysis: The Case of Nominalization', 19 *Discourse and Society* (2008) at 786.

¹¹⁴⁵ Fowler, Roger, *LANGUAGE IN THE NEWS: DISCOURSE AND IDEOLOGY IN THE PRESS* (Routledge, 1991) at 80.

This is precisely what happens in *Dahlab* and *Leyla Şahin*: nominalization leads to the reification of the applicants' religious practices. By turning verbs into nouns, the Court linguistically creates a 'thing'. It suggests that 'the headscarf' has a real or tangible existence, external to that of the applicants. It gives 'the headscarf' a life of its own, while denying the lives of the applicants.

(ii) The Harmful Impact on the Case

The representational moves described above involve several negative effects in the particular cases, the majority of which play out in the analysis under Article 9(2) ECHR. This is the stage at which the Court establishes whether the interference with applicants' rights is necessary in a democratic society, most crucially, whether the interference is proportionate to the aim it pursues. The first negative effect of fading the applicants into the background is the exclusion of their own views and particular circumstances from the proportionality analysis. The applicants are rendered virtually invisible.¹¹⁴⁶ The Court does not just disregard the motivations behind their decisions to wear the headscarf.¹¹⁴⁷ It pays no attention to the effects (suffering and loss) of the bans.¹¹⁴⁸ In short, in excluding the applicants from the analysis the Court obviously eschews all possibility of balancing the importance of the applicants' practices – and the personal/professional/educational costs involved – against the importance of the public interests or rights of others at issue.

Another negative implication implicit in the Court's the reification of the applicants' action of wearing the headscarf and the simultaneous obfuscation of their agency is the transformation of 'the headscarf' into the agent of the process of threatening others. Thus, in *Dahlab*, unable to locate the threat in the applicant – more precisely, in the quality and content of her teaching¹¹⁴⁹ – the Court searches for a location elsewhere, namely in the headscarf itself. As the *Dahlab*'s passage quoted earlier shows, the Court locates the threat in the headscarf by signifying the symbol by reference to: (i) its inherent or essentialist characteristics ('powerful', 'external' and 'imposed') and (ii) the possible reaction of others (young children on whom the symbol may have an impact). Thus, the powerful, visible and imposed symbol, on one side, and the children's tender age, on the other, come together to define the threat that the symbol represents: 'some kind of proselytising effect'. In *Leyla Şahin* the Court similarly turns the reified symbol into a threatening agent. Like in *Dahlab*, the threat does not come from the applicant herself. The threat instead comes from a combination of the essentialist attributes of the symbol (its 'compulsory' character) and the Turkish context (majority adhering to Islam and extremist political movements seeking to impose their symbols on society).

¹¹⁴⁶ See Vojdik, Valorie K., 'Politics of the Headscarf in Turkey: Masculinities, Feminism, and the Construction of Collective Identities', 33 *Harvard Journal of Law and Gender* (2010) at 672.

¹¹⁴⁷ See ECtHR, *Dahlab v. Switzerland*, 15 February 2001, p. 1 and ECtHR, *Leyla Şahin v. Turkey*, 29 June 2004 § 85 (Chamber Judgment).

¹¹⁴⁸ See Evans, Carolyn, 'Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture', 26 *Journal of Law and Religion* (2010-2011) at 330 and Rorive, Isabelle 'Religious Symbols in the Public Space: In Search of a European Answer,' 30 *Cardozo Law Review* (2009) at 2683.

¹¹⁴⁹ ECtHR, *Dahlab v. Switzerland*, 15 February 2001, p. 12.

A third troubling consequence implicit in the Court's objectivation of the applicants' practices is delegitimation. Relying on the authority of national courts, the Court resorts to what Van Leeuwen calls 'authorisation'¹¹⁵⁰ in order to delegitimize 'the wearing of the headscarf'. Indeed, many of the negative attributes that the Court ascribes to the Islamic headscarf come from domestic courts' discourses. In describing the applicants' religious practices, the Court either explicitly refers to these courts' decisions or uses words taken from these sources. For example, 'like the [Turkish] Constitutional Court', the Court keeps in mind the impact that a symbol perceived as compulsory may have on others.¹¹⁵¹ Similarly, 'as the [Swiss] Federal Court noted', the Court states that the wearing of the headscarf is hard to square with gender equality.¹¹⁵²

But this is not the only way in which the Court delegitimizes 'the wearing of the headscarf'. The Court employs another form of delegitimation, which Van Leeuwen dubs 'moral evaluation'.¹¹⁵³ This sort of delegitimation is based on 'specific discourses of moral value'.¹¹⁵⁴ One explicit value on the basis of which the Court delegitimizes the Islamic headscarf is 'gender equality', a Council of Europe value¹¹⁵⁵ and, ultimately, a value of any democratic society.¹¹⁵⁶ Thus, in *Dahlab*, it finds it 'difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination'.¹¹⁵⁷ In *Leyla Şahin*, as Judge Tulkens observes in her dissent, the majority considers that wearing the headscarf is 'synonymous with the alienation of women'.¹¹⁵⁸

By failing to 'see' the specific circumstances and motivations of the applicants and by relying instead on the domestic courts' (negative) preconceptions of 'the headscarf' the Court falls into a kind of essentialism referred to as 'one of over-generalisation [and] stereotyping'.¹¹⁵⁹ As Carolyn Evans notes, the Court implicitly advocates two contradictory stereotypes: Muslim women as victims of oppression in need of protection and Muslim women as aggressors from whom everyone needs protection.¹¹⁶⁰ Evans compellingly argues:

The first stereotype is that of victim – the victim of a gender oppressive religion, needing protection from abusive, violent male relatives, and passive, unable to help herself in the face of a culture of

¹¹⁵⁰ Van Leeuwen defines authorisation as 'legitimation by reference to the authority of tradition, custom, law, and/or persons in whom institutional authority of some kind is vested'. Van Leeuwen, Theo, *DISCOURSE AND PRACTICE: NEW TOOLS FOR CRITICAL DISCOURSE ANALYSIS* (Oxford University Press, 2008) at 105.

¹¹⁵¹ ECtHR (GC), *Leyla Şahin v. Turkey*, 10 November 2005 § 115.

¹¹⁵² ECtHR, *Dahlab v. Switzerland*, 15 February 2001, p. 13.

¹¹⁵³ Van Leeuwen, Theo, *DISCOURSE AND PRACTICE: NEW TOOLS FOR CRITICAL DISCOURSE ANALYSIS* (Oxford University Press, 2008) at 110.

¹¹⁵⁴ *Ibid.*

¹¹⁵⁵ ECtHR (GC), *Leyla Şahin v. Turkey*, 10 November 2005 § 115.

¹¹⁵⁶ ECtHR, *Dahlab v. Switzerland*, 15 February 2001, p. 13.

¹¹⁵⁷ *Ibid.*

¹¹⁵⁸ ECtHR (GC), *Leyla Şahin v. Turkey*, 10 November 2005, Dissenting Opinion of Judge Françoise Tulkens § 11.

¹¹⁵⁹ Phillips, Anne, 'What's wrong with Essentialism?' 20 *Distinktion: Scandinavian Journal of Social Theory* (2010) at 50.

¹¹⁶⁰ Evans, Carolyn, 'The "Islamic Scarf" in the European Court of Human Rights', 7 *Melbourne Journal of International Law* (2006) at 71-73.

male dominance . . . The second stereotype relied on by the Court is that of aggressor – the Muslim woman as fundamentalist who forces values onto the unwilling and undefended.¹¹⁶¹

These generalizations are easily made, without being concretely substantiated with statistics or other evidence in the particular cases.¹¹⁶² The Court's reliance on unfounded generalizations about Muslim women harms the particular applicants, for they are denied equal access to benefits (e.g., education or work) based on preconceptions that do not match their actual characteristics, needs and circumstances.¹¹⁶³ As feminist legal theorists have shown, stereotyping may cause distributional harms to stereotyped group members.¹¹⁶⁴ The harm of 'maldistribution', in the words of Nancy Fraser, involves the denial of resources and benefits based on norms that delegitimize certain groups.¹¹⁶⁵

To summarize, in backgrounding the applicants and objectivizing their practices, the Court impoverishes the content of the proportionality test. Indeed, it (i) fails to assess what is at stake for the applicants and simultaneously (ii) renders their practices vulnerable to abstract, harmful stereotypical assessments by others (e.g., governments, domestic courts, the Strasbourg Court itself). The overall result is thus the reduction of the weight of the applicants' interests in the proportionality.

(iii) The Harmful Impact beyond the Case

The Strasbourg Court is often thought to be 'one of the most important discoursing machines in the world' given the 'pan-European [human rights] legal framework' it produces¹¹⁶⁶ and 'the most juridically mature of human rights regimes'.¹¹⁶⁷ Indeed, it has been argued that the Court 'has established itself as the most effective regional system for the protection of human rights in the world'.¹¹⁶⁸ These perceptions give the Court's representational discourse singular and influential force, far beyond the circumstances of the particular cases. Thus, the Court's legal

¹¹⁶¹ *Ibid.*

¹¹⁶² *Ibid.* at 54. See also, Dembour, Marie-Bénédicte, WHO BELIEVES IN HUMAN RIGHTS? REFLECTIONS ON THE EUROPEAN CONVENTION (Cambridge University Press, 2006) at 212 (arguing that these are 'gratuitous assertions: neither demonstrated nor even argued').

¹¹⁶³ See Cook, Rebecca and Cusack, Simone, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES (University of Pennsylvania Press, 2010) at 61 (arguing that women are harmed when they are denied benefits "because of the application, enforcement or perpetuation of a gender stereotype in a law, policy, or practice that does not correspond to her actual needs, abilities, and circumstances.').

¹¹⁶⁴ See, e.g., *Ibid.* at 59-60 and Timmer, Alexandra, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights', 11 *Human Rights Law Review* (2011) at 715-716.

¹¹⁶⁵ Fraser, Nancy, 'Rethinking Recognition', 3 *New Left Review* (2000) at 116-118.

¹¹⁶⁶ Johnson, Paul, 'An Essentially Private Manifestation of Human Personality: Constructions of Homosexuality in the European Court of Human Rights', 10 *Human Rights Law Review* (2010) at 74.

¹¹⁶⁷ Gear, Anna, 'Challenging Corporate "Humanity": Legal Disembodiment, Embodiment and Human Rights', 7 *Human Rights Law Review* (2007) at 536.

¹¹⁶⁸ Danchin, Peter G. and Forman, Lisa, 'The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities', in Peter Danchin and Elizabeth Cole (eds.), PROTECTING THE HUMAN RIGHTS OF RELIGIOUS MINORITIES IN EASTERN EUROPE (Columbia University Press, 2002) at 192.

discourse does not just have implications for the parties involved in the specific cases but may affect future applicants and their groups as well.

One of the profound, broader implications of the Court's use of negative stereotypes is the 'misrecognition' of the group in question (in the case of *Dahlab* and *Leyla Şahin*, of Muslims in general and of Muslim women in particular). The 'misrecognition' harm caused to stereotyped groups¹¹⁶⁹ operates by constituting them 'as inferior, excluded, wholly other, or simply invisible – in other words, as less than full partners in social interaction'.¹¹⁷⁰ Indeed, the stereotype that Muslim women are oppressed in fact contains a mix of stereotypical assumptions (gender/religious/orientalist/racial) that constitute not just Muslim women but Muslims more generally as 'inferior' and 'wholly other'. Thus, the stereotype implicitly regards Muslim men as oppressors, reflecting a historical, colonialist interpretation of gender relations between Muslim men and women, which constructs 'Muslim men as barbaric oppressors of women, inherently inferior to Western men'.¹¹⁷¹ Moreover, the stereotype implicitly portrays a religion, 'Islam', as 'barbaric' and 'backward' compared with the 'West'.¹¹⁷²

In negatively stereotyping Muslims and Muslim women, the Court thus assigns them a lower status vis-à-vis non-Muslim women and non-Muslims, thereby (re)producing hierarchies *between* groups – or *inter-group* hierarchies. Stereotypes, as Alexandra Timmer argues, 'often serve to maintain existing power relationships', upholding 'a symbolic and real hierarchy between "us" and "them"'.¹¹⁷³ The Court (re)creates these hierarchies by implicitly relying on a series of dichotomies (e.g, agency/victimization and reason/culture)¹¹⁷⁴ and by further associating one group with the 'positive' side (agency/reason) and the other group with the 'negative' side (victimization/culture). This kind of thinking creates hierarchies between the sides of the dichotomy and between the groups associated with one or the other. Thus, whereas Muslim women are assumed to be wholly *determined* and *victimized* by their cultures (their religious practices are 'imposed' on them by the Koran), non-Muslims (including non-Muslim

¹¹⁶⁹ See, e.g., Cook, Rebecca and Cusack, Simone, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES (University of Pennsylvania Press, 2010) at 59-60 and Timmer, Alexandra, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights', 11 *Human Rights Law Review* (2011) at 715-716.

¹¹⁷⁰ Fraser, Nancy, 'Rethinking Recognition', 3 *New Left Review* (2000) at 113.

¹¹⁷¹ Vojdik, Valorie K., 'Politics of the Headscarf in Turkey: Masculinities, Feminism, and the Construction of Collective Identities', 33 *Harvard Journal of Law and Gender* (2010) at 676 (referring to Ahmed, Leila, WOMEN AND GENDER IN ISLAM: HISTORICAL ROOTS OF A MODERN DEBATE [Yale University Press, 1992]).

¹¹⁷² Malik, Maleiha, 'The "Other" Citizens: Religion in a Multicultural Europe' in Camil Ungureanu and Lorenzo Zucca (eds.) LAW, STATE AND RELIGION IN THE NEW EUROPE: DEBATES AND DILEMMAS (Cambridge University Press, 2012) at 112 (arguing that 'the legacy of colonialism, as well as contemporary cultural racism, results in a distorted analysis that deems some non-Western religions to be "barbaric" or "backward" in comparison with Western norms.'). Malik further argues that the 'deeply entrenched stereotypes' informing the analysis in the headscarf cases draw on 'orientalist and colonialist assumptions . . . about "oppressed" Muslim women.'). *Ibid.* See also, Dembour, Marie-Bénédicte, WHO BELIEVES IN HUMAN RIGHTS? REFLECTIONS ON THE EUROPEAN CONVENTION (Cambridge University Press, 2006) at 213 (arguing that the Court 'puts the West on a pedestal and demonizes Islam').

¹¹⁷³ Timmer, Alexandra, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights', 11 *Human Rights Law Review* (2011) at 715.

¹¹⁷⁴ Moreover, this kind of dichotomous categories hardly captures the complexity of the experiences of the women involved.

women) are assumed to be *rationally choosing agents*. The dyad echoes the ‘culture versus citizenship dichotomy’ that Leti Volpp has insightfully identified as underlying the French headscarf debates: ‘[t]he citizen is assumed to be modern and motivated by reason; the cultural other is assumed to be traditional and motivated by culture’.¹¹⁷⁵

Besides the misrecognition implications for applicants’ groups, the Court’s stereotyping reasoning also has potentially damaging implications for future applicants: future Muslim applicants wearing the headscarf will have a hard time showing that they do not match the Court’s negative image of ‘the Islamic headscarf’, let alone challenging the image itself. In fact, the Court’s stereotypical constructions of the applicants’ religious practices in *Leyla Şahin* and *Dahlab* have already turned into principles that, by now, have become well-entrenched in the Court’s ‘headscarf’ case-law.¹¹⁷⁶

C. Naturalizations

The cases examined in this part involve the second kind of flawed depiction: the kind that entails equating the trait in question with the group’s ‘paradigmatic’ practice/way of life. As I mentioned earlier, I refer to this problem as ‘naturalization’ because it privileges and freezes as natural what in fact is historically contingent or socially constructed.¹¹⁷⁷ This sort of portrayal seems to appear most often in cases concerning Sikhs¹¹⁷⁸ and Roma Gypsies.¹¹⁷⁹

I analyze this kind of representation through the lens of *Mann Singh v. France* and *Chapman v. the United Kingdom*. *Mann Singh* concerns a Sikh man denied the renewal of his driver’s license for refusing to take off his turban for the picture. *Chapman* deals with the claim of a Gypsy woman evicted from her own land for stationing her caravan there without planning permission. The Court rejected Chapman’s alleged violation of her right to respect for home, private and family life (Article 8 ECHR) and dismissed her discrimination complaint (Article 14 ECHR). *Mann Singh*’s claims – including his freedom of religion complaint (Article 9 ECHR) – were all declared inadmissible.

¹¹⁷⁵ Volpp, Leti, ‘The Culture of Citizenship’, 8 *Theoretical Inquiries in Law* (2007) at 574.

¹¹⁷⁶ See, e.g., ECtHR, *Dogru v. France* and *Kervanci v. France*, both from 4 December 2008 § 64.

¹¹⁷⁷ Warne, Randi R., ‘Gender’ in Willi Braun and Russell T. McCutcheon (eds.), *GUIDE TO THE STUDY OF RELIGION* (Continuum, 2000) at 141. Some would call such a treatment of historically and circumstantially contingent aspects of group experience ‘reification’. See Siegel, Reva B., ‘Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification’ in Robert C. Post, *PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW* (Duke University Press, 2001) at footnote 116.

¹¹⁷⁸ See, e.g., ECtHR, *Mann Singh v. France*, 13 November 2008 and ECtHR, *Ranjit Singh v. France* and *Jasvir Singh v. France* both from 30 June 2009.

¹¹⁷⁹ See, e.g., ECtHR (GC), *Chapman v. the United Kingdom*, 18 January 2001 and four more cases decided by the Grand Chamber the same day: *Beard v. the United Kingdom*; *Coster v. the United Kingdom*; *Jane Smith v. the United Kingdom*; and *Lee v. the United Kingdom*. In several later inadmissibility decisions, the Court has retained the problematic idea behind *Chapman*’s discourse with some modifications. I discuss them at the end of this subpart. See, e.g., ECtHR, *Eatson v. the United Kingdom*; *Smith v. the United Kingdom*; *Porter v. the United Kingdom*, all from 30 January 2001; ECtHR, *Harrison v. the United Kingdom* and *Smith v. the United Kingdom*, both from 3 May 2001; and ECtHR, *Clark and Others v. the United Kingdom*, 22 May 2001. See also, *Horie v. the United Kingdom*, 1 February 2011.

(i) The Entrance of ‘the Turban’ and ‘the Gypsy Way of Life’

In both *Mann Singh* and *Chapman*, the Court backgrounds the applicants and objectivizes their practices, albeit through different representational means. The linguistic move in *Mann Singh* is passivization – the use of the passive voice instead of the active voice. In assessing whether Mann Singh’s wearing of his turban falls within the scope of Article 9(1) ECHR, the Court says:

According to the applicant, the Sikh faith compels its members to wear the turban in all circumstances. *It is considered* not only at the heart of their religion, but also at the heart of their identity. Therefore, the Court notes that this is an act motivated or inspired by a religion or belief.¹¹⁸⁰ (Emphasis added).

In the second sentence of this passage, the Court states that the turban is ‘considered’ to be at the heart of the Sikh religion and identity without saying who actually considers the turban as such. The context indicates that it is Mann Singh who views the turban this way.¹¹⁸¹ However, with the passive construction in ‘[the turban] is considered’ – that is to say, with the deletion of Mann Singh as the subject – the Court separates the turban from its wearer, objectivizes his religious practice by reducing it to ‘the turban’ and, ultimately, gives the practice a life of its own, ready to travel around its case law in the form of a principle.¹¹⁸²

In *Chapman*, in turn, the Court’s preferred representational form to push the applicant aside is collectivization. In determining whether Article 8(1) ECHR was at issue, the Court says:

The Court considers that the applicant's occupation of her caravan is an integral part of her ethnic identity as a Gypsy, reflecting the *long tradition* of *that minority* of following a travelling lifestyle. This is the case even though, under the pressure of development and diverse policies or by their own choice, *many Gypsies* no longer live a wholly nomadic existence and increasingly settle for long periods in one place in order to facilitate, for example, the education of their children. Measures affecting the applicant's stationing of her caravans therefore have an impact going beyond the right to respect for her home. They also affect her ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with *that tradition*.¹¹⁸³ (Emphasis added).

In this passage, the Court first foregrounds the applicant but then leaves her aside, assimilating her to ‘that minority’ and ‘many Gypsies’. By way of collectivization, therefore, the Court separates the applicant from her group, sending her backstage and bringing her group centre stage.

¹¹⁸⁰ ECtHR, *Mann Singh v. France*, 13 November 2008 at p. 5. Author’s translation.

¹¹⁸¹ In fact, this characterisation comes from the applicant himself. Mann Singh’s Application of 11 June 2007 at p. 10.

¹¹⁸² Several cases concerning Sikh applicants show how one of Mann Singh’s claims has travelled around without him. See, e.g., ECtHR, *Ranjit Singh v. France*, 30 June 2009 and *Jasvir Singh v. France*, 30 June 2009 at p. 6.

¹¹⁸³ ECtHR (GC), *Chapman v. the United Kingdom*, 18 January 2001 § 73.

In another part of its legal reasoning – more precisely, when setting out the principles necessary to determine if the refusal to let the applicant stay on her land was justified – the Court affirms: ‘[T]here is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate *the Gypsy way of life*’.¹¹⁸⁴ Here, the Court, first of all, objectivizes the applicant’s lifestyle by representing it statically rather than dynamically: ‘the Gypsy way of life’.¹¹⁸⁵ The Court thereby abstracts the way of life from those who, like the applicant, give life to a nomadic lifestyle. Moreover, the Court reduces the Gypsy way of life to one single trait: nomadism. It implies that there is no other form of living the Gypsy way of life than sticking to nomadism.¹¹⁸⁶

Collectivizations and objectivizations allow the Court to assess Mann Singh’s and Chapman’s practices or lifestyles in highly essentialist terms: the Court closely ties their practices to the Sikh and Gypsy identities. At work in the two cases is the kind of essentialism that treats ‘certain characteristics as the defining ones for anyone in the category, as characteristics that cannot be questioned or modified without thereby undermining one’s claim to belong to the group’.¹¹⁸⁷ While in *Mann Singh* the defining characteristic is the turban, in *Chapman* the defining trait is travelling.

Now, on what basis does the Court characterize the applicants’ practices in these essentialist ways? In *Chapman*, the Court resorts to history. By recourse to ‘the long tradition’, the Court insists that travelling remains essential to *all* Gypsies. This is so even when, by the Court’s own admission, reality may show that travelling is not practiced homogeneously within the group (many of them no longer live a ‘wholly nomadic existence’ as a result of either pressure or choice). In this way, the Court ends up freezing the group in time ‘to a retrospective and nostalgic understanding of their identity’.¹¹⁸⁸ In *Mann Singh*, in turn, the Court states without any further elaboration that the turban ‘is at the heart of’ the Sikh religion and identity. In turning the nomadic lifestyle or the turban into a fixed and ‘natural’ defining group characteristic, the Court obscures the socially created and contingent character of the traits in question.

(ii) The Impact on the Cases

In contrast to *Dahlab* and *Leyla Şahin*, the Court’s reliance on generalizable and reducible (group) traits in *Chapman* and *Mann Singh* serves, to some extent, to better understand the applicants’ positions.¹¹⁸⁹ Indeed, the essentialist construction of Chapman’s and Mann Singh’s

¹¹⁸⁴ *Ibid.* § 96. Emphasis added.

¹¹⁸⁵ The objectivation of the action is realised by a process noun (‘the Gypsy way of life’) that functions as the object of the clause. Van Leeuwen, Theo, *DISCOURSE AND PRACTICE: NEW TOOLS FOR CRITICAL DISCOURSE ANALYSIS* (Oxford University Press, 2008) at 63.

¹¹⁸⁶ Farget, Doris, ‘Le Droit au Respect des Modes de Vie Minoritaires et Autochtones dans les Contentieux Internationaux des Droits de l’Homme’, Ph.D. Thesis, Université de Montréal, 2010 at 250.

¹¹⁸⁷ Phillips, Anne, ‘What’s wrong with Essentialism?’ 20 *Distinktion: Scandinavian Journal of Social Theory* (2010) at 57.

¹¹⁸⁸ Eisenberg, Avigail, *REASONS OF IDENTITY: A NORMATIVE GUIDE TO THE POLITICAL AND LEGAL ASSESSMENT OF IDENTITY CLAIMS* (Oxford University Press, 2009) at 131.

¹¹⁸⁹ I am thankful to an anonymous reviewer for this point.

practices leads to their recognition in the ‘scope’ analysis. This is the threshold stage at which the Court establishes whether the claim in question attracts the protection of an ECHR provision. In both cases, the Court decides that the applicants’ practices do fall within the scope of Articles 9 and 8 ECHR.

For instance, in *Mann Singh*, the turban counted as ‘a manifestation’ of the applicant’s religion for the purposes of Article 9(1) ECHR,¹¹⁹⁰ largely because the practice was viewed at the core of the Sikh faith and identity. In *Chapman*, in turn, the Court’s reliance on essentialist views of the applicant’s group lifestyle seems to have been instrumental in the expansion of the scope of Article 8 ECHR: the Court recognizes that at stake is not just the applicant’s right to respect for home but also her right to lead her private and family life in accordance with her tradition as a Gypsy.

Moreover, in *Chapman*, the Court’s reliance on other generalizable group-based traits such as ‘vulnerability’ results in yet another significant recognition for the applicant: the establishing of a positive obligation to facilitate ‘the Gypsy way of life’, even though the obligation turns out to be limited in scope.¹¹⁹¹ The Court holds:

[T]he 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 . . . To this extent, there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the Gypsy way of life.¹¹⁹²

In the rest of the reasoning, however, the Court gives lip service to these recognitions. In the proportionality analysis, *Mann Singh*’s and *Chapman*’s essentialized traits are either completely eclipsed by the States’ alleged countervailing interests or expressly used to diminish the weight of the applicants’ interests. Indeed, in *Mann Singh* the applicant’s essentialized practice plays no role in the proportionality. *Mann Singh* and what is at stake for him – including the alleged importance initially recognized to the turban for his Sikh identity – is virtually absent in the Court’s analysis of whether the interference with his right was justified. The Court looks exclusively at the State’s justifications of public order and security and concludes that the obligation to take off the turban for the driver’s license picture was necessary in a democratic society.¹¹⁹³

In *Chapman*, on the other hand, the Court’s essentialist view expressly serves to reduce the seriousness of what is stake for the applicant in the proportionality. The Court says: ‘[T]he present case is not concerned as such with the traditional itinerant Gypsy lifestyle’.¹¹⁹⁴ In the

¹¹⁹⁰ The notion of ‘manifestation’ of religion stems from the text of Article 9 ECHR, according to which freedom of religion includes the right to ‘manifest’ one’s religion ‘in worship, teaching, practice and observance’.

¹¹⁹¹ The positive obligation is merely procedural; it requires that State authorities show they have taken into account the Roma’s cultural situation both in policy-making and decision-making in the particular cases. ECtHR (GC), *Chapman v. the United Kingdom*, 18 January 2001 § 98.

¹¹⁹² *Ibid.* § 96.

¹¹⁹³ ECtHR, *Mann Singh v. France*, 13 November 2008, p. 7.

¹¹⁹⁴ ECtHR (GC), *Chapman v. the United Kingdom*, 18 January 2001 § 105.

eyes of the Court, the applicant's lifestyle does not fit 'the Gypsy way of life' because she no longer lived a nomadic lifestyle. The Court finds that she was actually 'a resident on site' during considerable periods.¹¹⁹⁵ The conclusion is therefore that the applicant did not 'wish to pursue an itinerant lifestyle'.¹¹⁹⁶

The applicant is therefore no longer viewed as a ('proper' or 'authentic') group member but just as an individual who 'chose' to settle.¹¹⁹⁷ As Julie Ringelheim insightfully argues,

This reading of the facts appears narrowly individualistic in two ways: first, notwithstanding its acknowledgment that caravan life holds an important place in Gypsy collective identity, at the end of the day the majority discards the cultural dimension of the issue and reduces the wish of Ms. Chapman to live in a caravan to a question of *mere individual preference*.¹¹⁹⁸

Thus, the essentialist glasses do not allow the Court to see the more complex circumstances in which the applicant found herself. An acknowledgment of such circumstances – more precisely, of the fact that the applicant was pushed into a settled way of life by policies unresponsive to her travelling lifestyle – could have led to a different conclusion. The dissenters, in fact, reached a different conclusion. They rejected the government's argument that the applicant's intention to settle down should detract from the seriousness of the interference.¹¹⁹⁹ They noted instead that pressure from UK law 'has had the effect of inducing many Gypsies to adopt the solution of finding a secure, long-term base for their caravans on their own land'.¹²⁰⁰

There are therefore two troubling consequences flowing from the majority's essentialist approach in the *Chapman* proportionality analysis. In the first place, the Court's essentialist reasoning causes misrecognition harm to the applicant. In positing one form of lifestyle as 'the' group's paradigmatic type, the Court sets a standard against which the applicant's practice is judged 'deviant'. The problem here is thus one of *intra-group* exclusion and inequality: since the applicant's lifestyle is not as 'authentic' as the practices of other group members who have stuck to travelling, her lifestyle is taken less seriously and her group membership called into question. In the second place, and in connection with the first problem, the Court's essentialist reasoning paradoxically serves to strip the applicant's case of the group dimensions (she is no longer considered a 'proper' member of the vulnerable group in question). This group- and context-stripping approach misses key structural elements that would have allowed for a better appreciation of the vulnerable position in which the applicant found herself. Indeed, one of such

¹¹⁹⁵ *Ibid.*

¹¹⁹⁶ *Ibid.*

¹¹⁹⁷ This is reflected, for example, in the switch from collectivised representations of the applicant to individualised ones. Moreover, the applicant's 'choice' is emphasised by the use of the word 'wish' and of the word 'preference'. *Ibid.* §§ 105-116.

¹¹⁹⁸ Ringelheim, Julie 'Chapman *Redux*: The European Court of Human Rights and Roma Traditional Lifestyle' in Eva Brems (ed.), *DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR* (Cambridge University Press, 2013) at 433.

¹¹⁹⁹ ECtHR (GC), *Chapman v. the United Kingdom*, 18 January 2001. Joint Dissenting Opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Strážnická, Lorenzen, Fischbach and Casadevall at p 38.

¹²⁰⁰ *Ibid.*

elements was the disadvantageous impact of the planning regulations on the applicant's lifestyle as a member of a particularly vulnerable group. In failing to address this vulnerability and disadvantage, the Court fails to address *inter-group* exclusion and inequality.

It may be argued that it is legitimate for the Court to underline any inconsistencies between Chapman's account of the Gypsy lifestyle and her own actual way of life, as it was the applicant herself who used such an essentialist account to reinforce her claims.¹²⁰¹ This argument should be however rejected on the following basis. The applicant's and the Court's appeals to essentialism cannot be evaluated in the same way given the different positions of power from which essentialist arguments are deployed:¹²⁰² the applicant relies on essentialist arguments from a non-dominant position (that of a vulnerable minority) while the Court does it from a dominant one (that of a supranational court). As Annie Bunting argues in another context, essentialism employed to critique dominant discourses and essentialism employed from dominant positions should be evaluated asymmetrically, as the latter may serve to reinforce exclusion and inequality.¹²⁰³ The crucial questions are therefore 'by whom' and 'in what context' the essentialist rhetoric is used.¹²⁰⁴ In the case of the Court, given the authoritative force of its essentialist depictions, it might be problematic to rely on naturalizing depictions simply because the applicant does it herself.

To summarize, the deployment of essentialism is double-edged in *Chapman*. At the scope level, the Court's essentialist arguments were seemingly instrumental in the recognition of the applicant's right to lead her private and family life in accordance with her traditional lifestyle as a Gypsy. In the proportionality analysis, however, the Court's essentialist arguments served to minimize the seriousness of what was stake for the applicant and to detach her case 'from its wider context and from the global difficulties faced, in the whole country, by the minority she

¹²⁰¹ Joint Memorial on Behalf of the Applicants to the Grand Chamber in *Chapman v. the United Kingdom, Coster v. the United Kingdom, Beard v. the United Kingdom, Smith v. the United Kingdom and Lee v. the United Kingdom*, paragraphs 95, 118, 123, 151 and 160.

¹²⁰² See Bunting, Annie, 'Theorizing Women's Cultural Diversity in Feminist International Human Rights Strategies', 20 *Journal of Law and Society* (1993) 6-22 (arguing for asymmetrical anti-essentialism, that is, for rejecting essentialism when this is employed from a position of dominance or power within the group) and Siegel, Reva B., 'Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification' in Robert C. Post, *PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW* (Duke University Press, 2001) at footnote 116 (arguing that 'members of subordinated groups who may simultaneously occupy positions of privilege in other status orders must be vigilant in avoiding what [she] call[s] "positional bias" or expressions of dignitary harms or movement goals that reflect the social experience and concerns of the subordinated group's more socially privileged members'). While both Bunting and Siegel take into account positions of dominance *within* groups, I do not see an objection to using the same asymmetrical or positional bias rationale to positions of dominance or subordination more generally.

¹²⁰³ Bunting, Annie, 'Theorizing Women's Cultural Diversity in Feminist International Human Rights Strategies', 20 *Journal of Law and Society* (1993) at 11-13, 17 and 18. Bunting proposes this asymmetrical approach to anti-essentialism in the context of feminism. While she believes that anti-essentialism is imperative to embrace women's cultural diversity, she argues against using anti-essentialism to disempower 'non-Western, non-white women from articulating identity politics'.

¹²⁰⁴ *Ibid.* at 12.

belonged to'.¹²⁰⁵ As with *Leyla Şahin* and *Dahlab*, the Court thus reduces the weight of Chapman's interests in the proportionality and fails to appreciate the misrecognition harm implicit in the impugned decision. The underlying rationale is however different in the two sets of cases. While in the *Leyla Şahin* and *Dahlab* cases the Court undermines what is at stake for the applicants by forcing them into a mould it condemns, in the *Chapman* case, the Court reduces the importance of the applicant's interests by forcing her out of a mold it esteems.

(iii) The Impact beyond the Cases

Contrary to its discourse in *Leyla Şahin* and *Dahlab*, the Court's discourse in *Chapman* and *Mann Singh* does not go as far as delegitimizing the applicants' group practices via negative stereotyping. This is probably one of the most significant differences between the group of cases studied in the previous part and those examined in this part. Indeed, the Court does not deem 'the wearing of the turban' contrary to Convention values such as gender equality. Nor does it describe the 'Gypsy way of life' as, say, a threat to the rights of those who lead a sedentary lifestyle.

Yet the Court's essentialist discourse results in 'naturalizing'. One of the problems arising from naturalizing is that it sets up 'a standard by which to judge deviation'.¹²⁰⁶ The danger of this sort of reasoning therefore lies in the exclusions and inequalities it may sustain by deeming some lifestyles or practices 'natural' or 'normal' and others 'deviant'. In *Chapman* and *Mann Singh*, for instance, the Court's naturalizing language implicitly (re)affirms *intra-group* exclusions and inequalities: those who do not follow the 'core' practices of travelling in a caravan or wearing a turban – or do not follow them strictly – may be regarded as less 'members' than others or, simply, as not 'members' at all. Briefly put, 'those who do not fit are in trouble'.¹²⁰⁷ Chapman herself is a tragic example.

Moreover, the Court's naturalizing reasoning also risks (re)producing *inter-group* exclusions and inequalities. This kind of risk is illustrated in *Horie v. the United Kingdom* – a little-known inadmissibility decision concerning a New Traveler who had pursued a nomadic lifestyle for almost three decades.¹²⁰⁸ The Court says *obiter dicta* that, unlike 'Romani gypsies' and 'Irish Travellers', 'New Travellers live a nomadic lifestyle through personal choice and not on account of being born into any ethnic or cultural group'.¹²⁰⁹ The Court hereby reaffirms the natural or immutable status of 'travelling' in the Gypsy tradition, albeit by a different criterion –

¹²⁰⁵ Ringelheim, Julie 'Chapman *Redux*: The European Court of Human Rights and Roma Traditional Lifestyle' in Eva Brems (ed.), *DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR* (Cambridge University Press, 2013) at 432.

¹²⁰⁶ Warne, Randi R., 'Gender' in Willi Braun and Russell T. McCutcheon (eds.), *GUIDE TO THE STUDY OF RELIGION* (Continuum, 2000) at 141.

¹²⁰⁷ Phillips, Anne, 'What's wrong with Essentialism?' 20 *Distinktion: Scandinavian Journal of Social Theory* (2010) at 57.

¹²⁰⁸ ECtHR, *Horie v. the United Kingdom*, 1 February 2011.

¹²⁰⁹ *Ibid.* § 28.

birth¹²¹⁰ – implying that those who are gypsies by choice are not ‘real’ gypsies. Once the trait is cast in this immutable way, it serves to exclude groups practicing itinerant lifestyles such as Ms Horie’s from recognition.

The reasoning in *Chapman*, *Mann Singh* and *Horie* thus leads to a classic essentialism problem: the policing of group boundaries. Mann Singh may have met the criterion of group membership but Sikh applicants not wearing the turban ‘in all circumstances’ will most likely fail the test, just like Chapman and Horie failed their group membership tests.

In some of its later ‘caravan’ case law, the Court has adopted more inclusive and socially constructed accounts of applicants’ lifestyles.¹²¹¹ For instance, in *Connors v. the United Kingdom*, the Court has refused to deploy the sort of generalizations that ‘would identify the nomadic lifestyle as the essence of gypsy life and culture’.¹²¹² Moreover, in several post-*Chapman* inadmissibility decisions, the Court has toned down its naturalizing discourse by dropping one of the most problematic sentences¹²¹³ and by accepting that the applicants remained Gypsies even though they had switched to a more sedentary way of life.¹²¹⁴

All this, however, does not necessarily mean that the problem posed by naturalizing depictions of ‘the Gypsy way of life’ no longer exists. First of all, in these inadmissibility decisions the Court, at the end of the day, re-affirms the *Chapman* rationale by concluding that the applicants’ cases did not ultimately concern ‘traditional itinerant gypsy life styles’.¹²¹⁵ Most importantly, *Connors* is a Chamber judgment and the others are inadmissibility decisions. *Chapman*, in contrast, is a Grand Chamber judgment and, therefore, remains the authority on the matter. Moreover, *Horie*, a 2011 case, confirms that problematic essentialist assumptions about Gypsies are not yet fully behind.

III. Contrasts with the Court’s Broader Case Law

In other areas of its cultural- and religious-practice jurisprudence, the Strasbourg Court has largely circumvented the problematic depictions discussed in the previous part. The same holds for the case law concerning gender and sexuality.¹²¹⁶ In this part, I point to four major ways in

¹²¹⁰ In *Chapman*, though the Court describes the applicant as a ‘Gypsy by birth’ in the summary of facts, it does not use the ‘birth’ criterion in its legal reasoning. ECtHR (GC), *Chapman v. the United Kingdom*, 18 January 2001 § 10.

¹²¹¹ Farget, Doris, ‘Defining Roma Identity in the European Court of Human Rights’, 19 *International Journal on Minority and Group Rights* (2012) at 303.

¹²¹² Brems, Eva, ‘Human Rights as a Framework for Negotiating/Protecting Cultural Differences: An Exploration of the Case-law of the European Court of Human Rights’ in Marie-Claire Foblets, Jean-François Gaudreault-Desbiens and Alison Dundes Renteln (eds.) *CULTURAL DIVERSITY AND THE LAW: STATE RESPONSES FROM AROUND THE WORLD* (Bruylant, 2010) at 674. ECtHR, *Connors v. the United Kingdom*, 27 May 2004 § 93.

¹²¹³ The Court drops the following sentence: ‘This is the case even though, under the pressure of development and diverse policies or by their own choice, many Gypsies no longer live a wholly nomadic existence and increasingly settle for long periods in one place in order to facilitate, for example, the education of their children’. See, e.g., ECtHR, *Harrison v. the United Kingdom*, 3 May 2001 p. 11.

¹²¹⁴ *Ibid.* at p. 12.

¹²¹⁵ *Ibid.*

¹²¹⁶ I do not want to suggest that the Court’s discourse in these areas is completely devoid of problems. For a critique of the Court’s discourse on ‘homosexuality’, see Johnson 2010 and for a critique of the Court’s depiction of women

which the Court's wider discourse has mostly avoided the stereotyping and naturalising pitfalls that pervade its discourse on Muslim women, Sikhs and Roma Gypsies.

(i) Rejecting Unfounded Generalizations

Aware of the lack of evidence in several cases, the Court has either refrained from making generalizations about the applicants' practices/traits or rejected governments' general assumptions as justifications for restrictions on their rights. Take *Eweida and Others v. the United Kingdom*, brought by four Christian applicants not allowed to manifest their religion at work – two of them by visibly wearing a cross.¹²¹⁷ The case of Ms. Eweida, a British Airways employee and the only of the four applicants to win the case, is especially illustrative. The airline justified the ban alleging the need to protect its corporate image. The Court rejects this argument: 'There was *no evidence* that the wearing of other, previously authorised items, of religious clothing, such as turbans and hijabs, by other employees, had any negative impact on British Airways' brand or image'.¹²¹⁸

Another example is *Lautsi v. Italy*, a case concerning a mother's unsuccessful attempt to have crucifixes removed from her children's State school.¹²¹⁹ The Court's Grand Chamber notes:

There is *no evidence* before the Court that the display of a religious symbol on classroom walls may have an influence on pupils and so it cannot reasonably be asserted that it does or does not have an effect on young persons whose convictions are still in the process of being formed.¹²²⁰

To be sure, the *Lautsi* and *Eweida* judgments also rely on characteristics inherently attributed to the symbols at issue. Thus, 'a crucifix on a wall is an essentially *passive* symbol'.¹²²¹ And 'Ms Eweida's cross was *discreet* and cannot have detracted from her professional appearance'.¹²²² The properties of these symbols ('passive' and 'discreet') are exactly the opposite of the attributes used to characterize 'the headscarf' ('powerful' and 'ostentatious'). Moreover, whereas the headscarf's inherent characteristics in *Dahlab* and *Leyla Şahin* served to construe the symbol as a threat, the innate properties of Ms. Eweida's cross and the crucifix on a wall served to minimize the threat. Either way, the fact is that, unlike in *Dahlab* and *Leyla Şahin*, in *Lautsi* and *Eweida* the Court additionally takes care to refer to (the absence of) evidence in support of its conclusions.

in ECtHR, *S. H. and Others v. Austria*, see Timmer, Alexandra, 'Missed Chance at Condemning Paternalism: *S.H. and Others v. Austria*, Part Two', (2010) Blog 'Strasbourg Observers' available at <http://strasbourgobservers.com/2010/04/26/missed-chance-at-condemning-paternalism-s-h-and-others-v-austria-part-two/>

¹²¹⁷ ECtHR, *Eweida and Others v. the United Kingdom*, 15 January 2013.

¹²¹⁸ *Ibid.* § 94.

¹²¹⁹ ECtHR (GC), *Lautsi and Others v. Italy*, 18 March 2011.

¹²²⁰ *Ibid.* § 66.

¹²²¹ *Ibid.* § 72. Emphasis added.

¹²²² ECtHR, *Eweida and Others v. the United Kingdom*, 15 January 2013 § 94. Emphasis added.

Jehovah's Witnesses of Moscow v. Russia is another good case in point.¹²²³ The applicants complained about the dissolution of their religious community. The Russian government argued, among other things, that the dissolution was necessary to protect the followers' health from damages arising from refusals of blood transfusions. In rejecting the government's argument, the Court points to the lack of evidence:

[T]he domestic judgments did not identify any member of the applicant community whose health had been harmed or cite any forensic study assessing the extent of the harm and establishing a causal link between that harm and the activities of the applicant community.¹²²⁴

In other cases, the Court has examined governments' allegations of improper proselytism in light of the available evidence. Indeed, unlike in *Dahlab* – where the headscarf proselytising effects are assumed rather than proven – in these other cases the Court makes sure to either point to evidence¹²²⁵ or its lack thereof¹²²⁶ in order to accept or dismiss governments' reasons to protect others from proselytizers' pressure. The same approach surfaces in various cases concerning claims of religious discrimination in child custody and access disputes.¹²²⁷ For instance, in *Palau-Martinez v. France*, a case in which a Jehovah's Witness mother's custody of her two children was withdrawn, the Court concludes: 'the Court of Appeal ruled *in abstracto* and on the basis of general considerations'.¹²²⁸

Several examples from the Court's sexual orientation case law illustrate a similar approach. Emphasizing the lack of evidence, the Court has for instance rejected governments' arguments that 'the mere mention of homosexuality [in public]' 'would adversely affect children or "vulnerable adults"'¹²²⁹. The Court has likewise noted 'the lack of concrete evidence to substantiate the alleged damage to morale' as a result of the presence of homosexuals in the armed forces.¹²³⁰ Similarly, it has highlighted 'the lack of evidence adduced by the Government in order to show that it would be detrimental to the child to be brought up by a same-sex couple'.¹²³¹

¹²²³ ECtHR, *Jehovah's Witnesses of Moscow v. Russia*, 10 June 2010.

¹²²⁴ *Ibid.* § 144. The Court rejects several other alleged justifications based on lack of evidence. *Ibid.* §§§§ 110, 112, 132 and 139.

¹²²⁵ See, e.g., ECtHR, *Larissis and Others v. Greece*, 24 February 1998 § 52.

¹²²⁶ See, e.g., ECtHR, *Ahmet Arslan and Others v. Turkey*, 23 February 2010 § 51; and ECtHR, *Ivanova v. Bulgaria*, April 2007 § 82.

¹²²⁷ See, e.g., ECtHR, *Vojnity v. Hungary*, 12 February 2013 §38 (concerning an adherent of the 'Congregation of the Faith') and ECtHR, *Deschomets v. France*, 16 May 2006 at p. 13 (concerning an adherent of the Brethren movement).

¹²²⁸ ECtHR, *Palau-Martinez v. France*, 16 December 2003 § 42.

¹²²⁹ ECtHR, *Alekseyev v. Russia*, 21 October 2010 § 86.

¹²³⁰ ECtHR, *Smith and Grady v. the United Kingdom*, 27 September 1999 § 99.

¹²³¹ ECtHR, *X. and Others v. Austria*, 19 February 2013 § 146.

(ii) ‘Seeing’ the Applicants

Contrary to *Dahlab* and *Leyla Şahin*, the Court has ‘seen’ the applicants in several cases. One example is *Ahmet Arslan and Others v. Turkey*.¹²³² At the heart of the controversy was the prosecution of members of the group ‘Aczimendi tarikati’ for wearing their religious garment in the streets on the occasion of a religious ceremony. The Court observes: ‘[T]here is no indication in the case file that *the way in which the applicants manifested their beliefs through certain clothes* constituted or was likely to constitute a threat to the public order or pressure on others’.¹²³³

Here, the Court does not look at ‘the’ black tunic, ‘the’ black turban and ‘the’ stick – the items of clothing at issue in the case – but at the specific way in which they were worn by the applicants. In *Leyla Şahin*, for example, and as I have shown earlier, the Court fails to see the concrete way in which the applicant manifested her religion. Her claim was precisely that the manner in which she wore her headscarf was ‘neither ostentatious nor intended as a means of protest and did not constitute a form of pressure, provocation or proselytism’.¹²³⁴

In *Eweida*, the Court even acknowledges the importance of what was at stake for the four Christian applicants – winner and losers. For example, in the case of Ms Chaplin, a nurse who unsuccessfully sought to visibly wear a crucifix at a State hospital, the Court holds: ‘the importance for the second applicant of being permitted to manifest her religion by wearing her cross visibly must weigh heavily in the balance’.¹²³⁵ Again, the Court’s approach in these cases contrasts with the one in *Dahlab* and *Leyla Şahin*, where the Court ignores the importance that wearing the headscarf may have had for the applicants.

In its case law concerning transsexual applicants, the Court has actually condemned one State for not ‘seeing’ the applicant, more precisely, for substituting its own general assumptions for the views of the applicant. In *Van Kück v. Germany*, a case concerning a transsexual seeking reimbursement of the expenses of a gender reassignment operation, the Court holds: ‘[T]he Court of Appeal, on the basis of general assumptions as to male and female behaviour, substituted its views on the most intimate feelings and experiences for those of the applicant and this without any medical competence’.¹²³⁶

(iii) Limiting Generalizations

In a number of cases, the Court has confined generalizations of applicants’ traits and experiences to particular contexts and circumstances. In *Eweida*, for instance, the Court does not assess the impact of ‘the cross’ – or of ‘the wearing of other items of religious clothing’ – on corporate image in general. Rather, the Court limits the assessment to those items worn by the applicant,

¹²³² ECtHR, *Ahmet Arslan and Others v. Turkey*, 23 February 2010.

¹²³³ *Ibid.* §50. Author’s translation. Emphasis added.

¹²³⁴ ECtHR, *Leyla Şahin v. Turkey*, 29 June 2004 § 85 (Chamber Judgment).

¹²³⁵ ECtHR, *Eweida and Others v. the United Kingdom*, 15 January 2013 § 99.

¹²³⁶ ECtHR, *Van Kück v. Germany*, 12 June 2003 § 81.

Ms Eweida, and ‘by other employees’ and to their impact on a particular corporate image, that of British Airways.

Even in *Lautsi* where the symbol in question was worn by no one – it was hanging on a wall – and the levels of objectivation and generalization were therefore higher, the Court does not just speak of ‘the crucifix’. It also speaks of ‘crucifixes in the classroom’. There is therefore an important difference of degree in the generalizations used in *Dahlab* and *Leyla Şahin* (the wearing of the headscarf) and those employed in *Eweida* and *Lautsi* (the applicant’s cross and the display of crucifixes in classrooms).

Let me now briefly turn to two examples of the Court’s gender case law: *Opuz v. Turkey* and *Rantsev v. Cyprus*, as they further illustrate how the Court has kept the degree of generalizations confined to specific contexts and circumstances. Relying on extensive background data, the Court has established in *Rantsev* that ‘a substantial number of foreign women, particularly from the ex USSR, were being trafficked in Cyprus on artistes visas.’¹²³⁷ In *Opuz*, based on reports and statistics, the Court concludes that the highest number of reported domestic violence victims was in Diyarbakir, Turkey, and were all women.¹²³⁸ The Court does not affirm that (all) women are trafficked and exploited or that (all) women are subject to domestic violence. The point, rather, is that *some* women in *specific contexts and circumstances* are more vulnerable than others to trafficking, exploitation or domestic violence. Moreover, the affirmations are substantiated with ample material such as statistics and reports. This approach contrasts with the implicit unfounded over-statement that ‘(all) Muslim women are oppressed’ made in *Dahlab* and *Leyla Şahin*.

(iv) ‘Seeing’ Social Constructions

Contrary to the approach adopted in *Mann Singh* and *Chapman* that freezes or naturalizes certain cultural and religious practices, the Court has sometimes acknowledged the socially created character of the generalization in question. The best examples seem to come from the Court’s gender and sexuality jurisprudence. For instance, in several cases concerning the lack of legal recognition of post-operative transsexuals, the Court has emphasized the ‘stress’ and ‘alienation’ that ‘a post-operative transsexual’ suffers as a result of ‘a discordance between the position in society . . . and the status imposed by law’.¹²³⁹ This discordance, the Court acknowledges, places ‘the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety’.¹²⁴⁰

To be sure, there is a collectivized form of representing the applicants – ‘the transsexual’ – and a generalization of their experiences and feelings. However, the emphasis is on the socio-legal circumstances – lack of legal recognition – that make post-operative transsexuals likely to experience such feelings. The Court does not say that transsexuals *are* vulnerable, humiliated or

¹²³⁷ ECtHR, *Rantsev v. Cyprus and Russia*, 7 January 2010 § 294.

¹²³⁸ ECtHR, *Opuz v. Turkey*, 9 June 2009 § 194. See also, ECtHR, *N. v. Sweden*, 20 July 2010 § 57.

¹²³⁹ ECtHR (GC), *Christine Goodwin v. the United Kingdom*, 11 July 2002 § 77.

¹²⁴⁰ *Ibid.*

anxious. Nor does it hold that alienation is ‘at the heart of’ transsexuals’ experience. The socially constructed nature of the attributes ascribed to transsexuals is thus implicitly or explicitly recognized in the legal reasoning. There is undoubtedly an assumption that certain experiences are common to (all) post-operative transsexuals (e.g., stress and alienation). Yet in positing these traits as relational (as arising from deficits in legal arrangements) rather than as inherent in transsexuals, the Court treats these generalized experiences as contingent and revisable. A social constructivist approach may therefore eschew the immutability assumptions at the basis of the Court’s reasoning in some cases of culture and religion: membership would not necessarily be conferred by birth or by the immutability of certain practices but may acquire meaning through a range of other influences.

IV. In Search of Explanations

(i) Negative Stereotypes

One possible explanation for why negative stereotypes are most commonly deployed by the Court in cases concerning Muslim women – in particular, when governments invoke justifications based on gender equality – point to the use stereotypical images of Muslims in public discourses in Europe. There is ample material pointing to the widespread use of negative stereotypes of Muslims and Muslim women in these discourses.¹²⁴¹ These images are so embedded in such discourses that the Court probably does not notice that it is further contributing to their perpetuation. Thomas Hammarberg, former Council of Europe Commissioner for Human Rights, has lamented that ‘in Europe, public discussion of female dress, and the implications of certain attire for the subjugation of women, has almost exclusively focused on what is perceived as Muslim dress.’¹²⁴² What is more, the Court’s discourse meshes strikingly well with post-September-11 discourses more broadly. As Sherene Razack notes, three kinds of stereotypes have come to dominate these discourses: ‘the dangerous Muslim man, the imperilled Muslim woman and the civilized European’.¹²⁴³

¹²⁴¹ See, e.g., Hammarberg, Thomas, HUMAN RIGHTS IN EUROPE: NO GROUNDS FOR COMPLACENCY (Council of Europe, 2011) pp. 36-39 and 47-48; Group of Eminent Persons of the Council of Europe, ‘Living Together: Combining Diversity and Freedom in 21st-century Europe’ (Council of Europe, 2011) pp. 15-16; Parliamentary Assembly of the Council of Europe (PACE), Resolution 1743 ‘Islam, Islamism and Islamophobia in Europe’ (Council of Europe, 2010) p. 1 and European Commission against Racism and Intolerance (ECRI) General Policy Recommendation No. 5 ‘On Combating Intolerance and Discrimination against Muslims’ 16 March 2000.

¹²⁴² Hammarberg, Thomas, HUMAN RIGHTS IN EUROPE: NO GROUNDS FOR COMPLACENCY (Council of Europe, 2011) at 40.

¹²⁴³ Razack, Sherene H., CASTING OUT: THE EVICTION OF MUSLIMS FROM WESTERN LAW AND POLITICS (University of Toronto Press, 2007) at 5 (Razack further argues that the figure of the civilized European is seldom named explicitly but nevertheless serves as the anchor of the two other figures). *Ibid.* See also, Abu-Lughod, Lila, DO MUSLIM WOMEN NEED SAVING? (Harvard University Press, 2013).

In fact, these images have deeper and broader historical roots.¹²⁴⁴ For instance, the idea that ‘immigrant women require liberation’ is deeply entrenched in discourses associated with colonialist feminism.¹²⁴⁵ These discourses have been criticized for describing ‘other’ women ‘as “always/already victim,” passively waiting to be rescued from cultural norms that mysteriously impose no restraints on Western feminists’.¹²⁴⁶ Not even international human rights law seems to escape this stereotype. Indeed, one of the female subjectivities dominating international human rights law is what Dianne Otto calls the ‘victim’: this subject embodies colonial gender narratives ‘created by the masculine bearer of “civilization” who rescues “native” women from “barbarian” men’.¹²⁴⁷

While Islamic rules and practices are certainly not the only victims of the Court’s negative stereotypical constructions,¹²⁴⁸ they appear to be one of the most frequent targets. The Strasbourg Court’s use of negative stereotypes in the so-called ‘headscarf’ cases seems in fact a symptom of a larger disease. The Court has portrayed other Islamic practices or rules as incompatible with gender equality in two major Grand Chamber judgments. For example, employing the exact same forms of delegitimation – authorization and moral evaluation – the Court has stated in *Refah Partisi and Others v. Turkey* that Sharia, with its rules on the legal status of women, ‘clearly diverges from Convention values’.¹²⁴⁹ Similarly, the Court has held in *Şerife Yiğit v. Turkey* – a discrimination case unsuccessfully brought by a Muslim woman denied surviving spouse benefits because she was religiously but not civilly married:

[T]he Court notes that in adopting the Civil Code in 1926, which instituted monogamous civil marriage as a prerequisite for any religious marriage, Turkey aimed to put an end to a marriage

¹²⁴⁴ See Fernandez, Sonya, ‘The Crusade over the Bodies of Women’ in Maleiha Malik (ed.) ANTI-MUSLIM PREJUDICE: PAST AND PRESENT (Routledge, 2010) 61-78; and Malik, Maleiha, ‘Complex Equality: Muslim Women and the “Headscarf”’, 68 *Droit et Société* (2008) at 148-149.

¹²⁴⁵ Volpp, Leti, ‘Blaming Culture for Bad Behaviour’, 12 *Yale Journal of Law & the Humanities* (2000) at 111. According to Volpp, this brand of feminism – reflected in the perspectives of some contemporary feminists – ‘was used to justify colonization as part of a civilizing process, along with the rule of law, education, and Christianity’.

Ibid.

¹²⁴⁶ *Ibid.* (references omitted).

¹²⁴⁷ Otto, Dianne, ‘Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law’ in Anne Orford (ed.) INTERNATIONAL LAW AND ITS OTHERS (Cambridge University Press, 2006) at 320.

¹²⁴⁸ Ironically, *Jehovah’s Witnesses of Moscow v. Russia* – one notable example of the Court’s reliance on evidence instead of on unfounded generalisations – at the same time contains instances of delegitimizing generalisations *à la Dahlab* or *Şahin*: ‘[T]he rites and rituals of many religions may harm believers’ well-being, such as, for example, the practice of fasting, which is particularly long and strict in Orthodox Christianity, or circumcision practised on Jewish or Muslim male babies. It does not appear that the teachings of Jehovah’s Witnesses include any such contentious practices’. ECtHR, *Jehovah’s Witnesses of Moscow v. Russia*, 10 June 2010 §144.

¹²⁴⁹ ECtHR (GC), *Refah Partisi and Others v. Turkey*, 13 February 2003 § 123. For a more thorough analysis of the *Refah Partisi* judgment in similar terms, see, Meerschaut, Karen and Gutwirth, Serge, ‘Legal pluralism and Islam in the scales of the European Court of Human Rights: the limits of categorical balancing’ in Eva Brems (ed.) CONFLICTS BETWEEN FUNDAMENTAL RIGHTS (Intersentia, 2008) particularly at 451 (arguing that ‘the generalizing statements of the Court about Islam law deny the complexity and heterogeneity of Islam and come dangerously close to orientalism and Islamophobia’).

tradition which places women at a clear disadvantage, not to say in a situation of dependence and inferiority, compared to men.¹²⁵⁰

The Court accepts in these terms the legitimacy of the reason invoked by the Turkish government (protection of women) to justify the differential treatment of the applicant's religious marriage. Again, objectivation ('a marriage tradition') results in delegitimation ('places women at a clear disadvantage'). This does not pass unnoticed to Judge Kovler, who regrets that the majority refrains 'from making any assessment of the complexity of the rules of Islamic marriage, rather than portraying it in a reductive and highly subjective manner'.¹²⁵¹

The Court's delegitimation of Islamic marriage becomes yet more striking when compared with the judgment in *Muñoz Díaz v. Spain*, a discrimination case partly won by a Roma woman denied surviving spouse status for social benefits purposes due to the lack of recognition of Roma marriage.¹²⁵² In this case, the Court portrays the Roma community as exhibiting certain positive characteristics – own, well-established and deeply rooted values in the Spanish society – that make the applicant's beliefs worth being taken into consideration in the assessment of her good faith.¹²⁵³ In these terms, and contrary to Islamic marriage, Roma marriage is legitimized.

S.A.S. v. France,¹²⁵⁴ a case currently pending before the Court's Grand Chamber, will be a crucial test on whether the Court falls back on negative stereotypes when portraying Muslim women's practices. The case concerns a Muslim woman challenging the so-called 'burqa ban' in France. The negative stereotype of Muslim women as oppressed in need of protection has been at the heart of the debates surrounding bans on full-face veils in Europe.¹²⁵⁵ Indeed, one of the most influential justifications of these bans – usually couched in terms of gender equality – includes the view of this item of clothing as a 'symbol of patriarchal authority and of female subservience to men'.¹²⁵⁶ In *S.A.S.*, the French government has actually made the gender equality argument in these terms.¹²⁵⁷

S.A.S. thus offers the kind of elements that have typically led the Court to negatively stereotype Muslim women (or Islamic rules and practices concerning women). This time, though, several third-party interveners have submitted empirical studies showing that many of the interviewed women wearing full-face veils in countries such as France and Belgium are not

¹²⁵⁰ ECtHR (GC), *Şerife Yiğit v. Turkey* 2 November 2010 § 81.

¹²⁵¹ *Ibid.* Concurring Opinion of Judge Kovler at p 27.

¹²⁵² ECtHR, *Muñoz Díaz v. Spain*, 8 December 2009. Admittedly, the Court had it easier in *Muñoz Díaz*: there were already instances of recognition of spouse status to other people who believed in good faith that they were married even though their marriages turned out to be invalid. Moreover, the Spanish government itself had implicitly recognised the applicant's married status by issuing family-related documents.

¹²⁵³ *Ibid.* §§§ 56, 59 and 68.

¹²⁵⁴ *S.A.S. v. France* (Application No 43835/11) introduced on 11 April 2011.

¹²⁵⁵ See, e.g., Grillo, Ralph and Shah, Prakah, 'Reasons to Ban? The Anti-Burqa Movement in Western Europe', Max Planck Institute for the Study of Religious and Ethnic Diversity, Working Paper 12-05 (2012).

¹²⁵⁶ *Ibid.* at 27.

¹²⁵⁷ French Government's Observations, 29 May 2012, paragraphs 85-89 and 98.

coerced by their male relatives but rather wear it out free choice.¹²⁵⁸ There are two distinctive arguments made by third parties that may allow the Court to break out of the stereotypical constructions that pervade its ‘headscarf’ discourse: (i) ‘the ban did not materially probe the assumption that women are oppressed by wearing the full-face veil’ and (ii) some studies actually demonstrate the opposite.¹²⁵⁹

(ii) Naturalizations

Offering a hypothesis for why the Court is most likely to naturalize applicants’ traits in certain types of cases is a more challenging venture. A partial and tentative explanation includes a mix of elements, most notably applicants’ arguments, the Court’s own ‘assumptions of orthodoxy’¹²⁶⁰ about groups with which it is not sufficiently familiar, and the assent of those directly or indirectly involved in the case (e.g., governments, religious authorities).

To be sure, this combination partly explains the Court’s use of naturalizing language in *Chapman* and *Mann Singh*: the applicants’ naturalized self-representations,¹²⁶¹ the Court’s own assumptions that all Gypsies travel in caravans since birth or that all Sikhs wear the turban¹²⁶² and the absence of dispute by the governments.¹²⁶³

A look at the Court’s broader freedom of religion and right to respect for (minority) cultural way of life case law suggests that the lack of dispute by other parties is in fact crucial in

¹²⁵⁸ See Written Comments of the Open Society Justice Initiative, 10 July 2012, and Written Comments of the Human Rights Centre of Ghent University, 9 July 2012.

¹²⁵⁹ See, e.g., Brems, Eva, Janssens, Yaiza, Lecoyer, Kim, Ouald Chaib, Saila, and Vandersteen, Victoria, ‘Wearing the Face Veil in Belgium: Views and Experiences of 27 Women Living in Belgium concerning the Islamic Full Face Veil and the Belgian Ban on Face Covering’, 1 June 2012, available at www.ugent.be/re/publiekrecht/en/research/human-rights/faceveil.pdf; Open Society Foundations, ‘Unveiling the Truth: Why 32 Muslim Women Wear the Full-face Veil in France, 2011’, available at www.soros.org/publications/unveilingtruth-why-32-muslim-women-wear-full-face-veil-france and Moors, A., ‘Gezichtssluiers: Draagsters en Debatten [Face Veils: Wearers and Debates]’, Amsterdam School for Social Science Research, 31 January 2009 available at www.e-quality.nl/assets/e-quality/dossiers/Moslimas/Onderzoek%20Gezichtssluiers%20draagsters%20en%20debatten.pdf. See also, Open Society Justice Initiative, Written Comments in *S.A.S v France*, 10 July 2012 at p. 8.

¹²⁶⁰ Beaman, Lori G., ‘The Missing Link: Tolerance, Accommodation ... and Equality’, 9(3) *Canadian Diversity* (2012) at 19.

¹²⁶¹ See *Mann Singh*’s Application of 11 June 2007 at p. 10 and Joint Memorial on Behalf of the Applicants to the Grand Chamber in *Chapman v. the United Kingdom*, *Coster v. the United Kingdom*, *Beard v. the United Kingdom*, *Smith v. the United Kingdom* and *Lee v. the United Kingdom* §§§§§§§ 95, 118, 123, 151 and 160.

¹²⁶² The Court has expressed similar assumptions in cases concerning Jehovah’s Witnesses. See, e.g., ECtHR (GC), *Bayatyan v. Armenia*, 7 July 2011 § 111; ECtHR, *Jehovah’s Witnesses of Moscow v. Russia*, 10 June 2010 §§ 133 and 150; and ECtHR (GC), *Thlimmenos v. Greece*, 6 April 2000 § 42. The Court, however, appears more open and inclusive in its formulations: it does not go as far as affirming that opposition to military service is ‘at the heart’ of Jehovah’s Witnesses’ religious identity. Nor does it identify the rejection of blood ingestion with ‘the essence’ of Jehovah’s Witnesses’ way of life.

¹²⁶³ In *Mann Singh*, the application was not actually communicated to the government. In *Chapman*, not only did the government not dispute this aspect of the applicant’s allegations but reinforced it: ‘when considering the applicants’ reliance on their status as gypsies, it must also be borne in mind that they are not travelling in their caravans but are living a settled existence and seeking to remain indefinitely on their land’. Memorial of the Government of the United Kingdom of 28 April 2000, paragraphs 3.5 and 3.13 (4) c.

making naturalizing assumptions more likely in certain cases than in others. Indeed, in several instances where the centrality of a practice to a specific group or tradition has been contested either from the inside (group authorities)¹²⁶⁴ or from the outside (governments),¹²⁶⁵ the Court has avoided assumptions of orthodoxy. For example, in *Eweida and Others v. the United Kingdom*, the centrality of the practice of visibly wearing a cross was disputed. On one side, the Government argued that the applicants' desire to wear a visible cross, 'was not a recognised religious practice or requirement of Christianity, and did not therefore fall within the scope of Article 9'.¹²⁶⁶ On the other side, the applicants argued that 'the visible wearing of a cross or crucifix was clearly an aspect of the practice of Christianity in a generally recognised form'.¹²⁶⁷ None of the *Eweida* applicants went however as far as freezing or naturalizing the practice in question by situating it at the core or essence of Christianity. Given the way in which the dispute was framed, it would have been unlikely for the Court to characterize 'the cross' as being at the 'core' of the Christian identity.

Conclusion

In unpacking and challenging two major pitfalls arising from the Court's assessment of cultural and religious claims – negative stereotyping and naturalizing – this Chapter hopes to push for a more critical use of group generalizations and categorizations in the Court's freedom of religion and right to respect for cultural lifestyle discourse. In fact, underlying some of these modes of reasoning is a deeper view of culture and religion as static and homogeneous that runs the risk of reinforcing intra-group and inter-group hierarchies and exclusions.

Ironically, the Court's own case law suggests several strategies to keep 'a keen eye on generalizations':¹²⁶⁸ seeing the (lack of) evidence, seeing the individual applicant, seeing social constructions and keeping generalizations limited. In making sure to incorporate these levels of inquiry – which can be roughly referred to as evidentiary, individual and contextual (see scheme below) – the Court is most likely to keep generalizations 'under control'. However, if these strategies are to work effectively, they must be accompanied by a deeper transformation of the way in which the Court looks at applicants' cultures and religions – as changing and heterogeneous rather than fixed and homogenous. A supranational court ruling in an increasingly pluralized Europe cannot delegitimize or privilege some group practices over others based on negative stereotypes or presumptions – rather than on demonstrable facts – without risking its own delegitimation.

¹²⁶⁴ See, e.g., ECtHR, *Gatis Kovaļkovs v. Latvia*, 31 January 2012 § 60. However, the Court relies on the information provided by religious authorities in the proportionality, although this might have been due to the fact that the applicant did not contest it. *Ibid.* § 68.

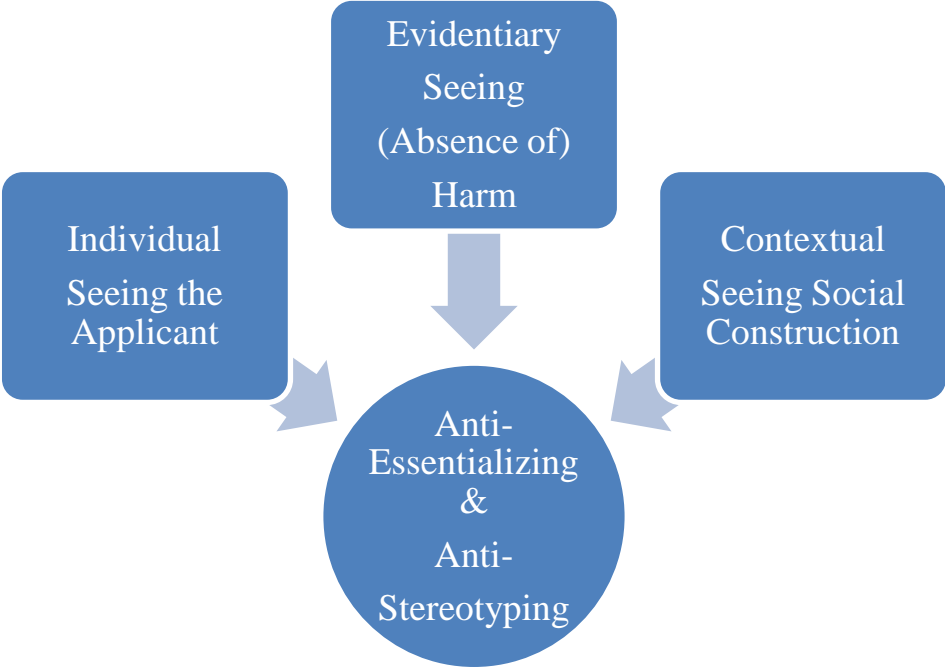
¹²⁶⁵ See, e.g., *Jakóbski v. Poland*, Application No 18429/06, 7 December 2010 §§§ 38, 39 and 45.

¹²⁶⁶ ECtHR, *Eweida and Others v. the United Kingdom*, 15 January 2013 § 58.

¹²⁶⁷ *Ibid.* §§ 64 and 67.

¹²⁶⁸ Carbado, Devon W. and Gulati, Mitu, 'The Law and Economics of Critical Race Theory', 112 *Yale Law Journal* (2003) at 1776.

ANTI-ESSENTIALIZING AND ANTI-STEREOTYPING INQUIRY



GENERAL CONCLUSION

This thesis has sought to expose the distinctiveness of a series of ‘universals’ – i.e., archetypical human rights beneficiaries – inhabiting Articles 8, 9 and 14 ECHR that oftentimes operate to privilege some religious and cultural applicants while disadvantaging or marginalizing others. The study has made an effort to take on board a well-known critique against arguments that advocate the recognition of culture and religion: these arguments tend to obscure the broader patterns that subordinate and disadvantage social actors by constituting some ‘as normative and others as deficient or inferior’.¹²⁶⁹ My examination attempted to incorporate this concern by looking at both sides of the power system: advantage (those benefited by the purported universals) and disadvantage (those excluded or marginalized for not fitting).

In the process, several ‘universals’ have emerged and their exclusionary and inegalitarian consequences have been revealed. Since these ‘universals’ are scattered through this thesis, I would like take the conclusion as an opportunity to put them all together in a final ‘picture’. To this end, I will gather the contours of the ‘universals’ exposed in each of the Chapters and attempt to weave the commonalities among them. Moreover, I will use this opportunity to harness the proposals spread throughout the thesis in what I call ‘an inclusive multilayered framework for adjudicating claims of culture and religion’.

I. The ‘Universals’ Inhabiting the ECHR Religious and Cultural Subject

A. ‘Universal’ I

One of the ‘universals’ unveiled in this study may be called ‘Universal’ I. This ‘universal’ exhibits the characteristics of the quasi-disembodied subject, imported into international human rights law from a naturalistic conception of ‘man,’ which takes rationality and whole autonomy as *the* marks of human nature.¹²⁷⁰ Traces of ‘Universal’ I appear mostly in the Court’s freedom of religion case law, in the form of an ‘invulnerable subject’. This invulnerable subject echoes Gerard Quinn’s notion of ‘masterless man’¹²⁷¹ as well as the liberal subject that Martha Fineman seeks to replace: one based on ‘notions of independence, autonomy, and self-sufficiency that are empirically unrealistic and unrealizable’.¹²⁷²

¹²⁶⁹ This is a classic critique against multiculturalism and against identity politics in general. Nancy Fraser, for example, has famously proposed to re-conceive misrecognition in these terms in order to address social subordination – denial of full partner status in society – rather than free-standing cultural harms. Fraser, Nancy, ‘Rethinking Recognition’, 3 *New Left Review* (2000) 107-120.

¹²⁷⁰ See discussion in Part II of the General Introduction of this Ph.D.

¹²⁷¹ Quinn, Gerard and Arstein-Kerlake, Anna, ‘Restoring the “Human” in “Human Rights”’: Personhood and Doctrinal Innovation in the UN Disability Convention’ in Conor Gearty and Costas Douzinas (eds.) *THE CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW* (Cambridge University Press, 2012) at 37.

¹²⁷² Fineman, Martha Albertson, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’, 20 *Yale Journal of Law and Feminism* (2008) at 11.

According to the logic of this invulnerable subject, the applicants should have not signed an employment contract in the first place if they wanted to remain able to comply with their religious duties.¹²⁷³ Nor should have they chosen to enroll in the military¹²⁷⁴ or in a secular university¹²⁷⁵ to start with. Moreover, the applicants should have found a replacement if they wished to celebrate a religious holiday and still ensure that their clients would be represented in a court hearing.¹²⁷⁶ Likewise, if expelled from a State school for refusing to take off their religious clothing, the applicants could always go to a private school or take classes by correspondence.¹²⁷⁷ Similarly, the applicants should have never settled if they wanted her interests as Gypsies to be taken seriously.¹²⁷⁸ The applicants, even though part of a religious minority, can ultimately advocate and obtain support for their concerns in the democratic process.¹²⁷⁹

What all these cases have in common – despite their different particular circumstances – is that the Court does not interrogate the frameworks, arrangements or contexts that might be at the root of the problem. The Court, instead, directly interrogates and indicts the individuals. These applicants are thus socially, historically and institutionally de-contextualized. They are atomistic agents who fall into disadvantage as a result of their choice or individual preference rather than as a result of societal/institutional arrangements that render them more vulnerable to discrimination and other human rights violations.¹²⁸⁰

B. ‘Universal’ II

Another ‘universal’ ‘installed’ in the ECHR subject is the Protestant one. ‘Universal’ II arises from a sharply dichotomized and hierarchical understanding of belief and practice – reflected in the privileging of the *forum internum* over the *forum externum* of freedom of religion. As a result, this ‘universal’ is paradigmatically disembodied – cerebral and internal – and therefore largely invisible. At best, s/he is private, in the sense that s/he practices her or his religion in discrete spheres such as synagogues, mosques or churches. The embodied and, therefore, public religious subject whose habitual or material religiosity spills over other spheres outside individual conscience, worship places or home appears often ignored, marginalized or trivialized.

¹²⁷³ ECmmHR, *Konttinen v. Finland*, 3 December 1996.

¹²⁷⁴ ECtHR, *Kalaç v Turkey*, 1 July 1997.

¹²⁷⁵ See, e.g., ECmmHR, *Karaduman v. Turkey*, 3 May 1993.

¹²⁷⁶ ECtHR, *Francesco Sessa v. Italy*, 3 April 2012.

¹²⁷⁷ See, e.g., ECtHR, *Ranjit Singh v. France*, 30 June 2009.

¹²⁷⁸ ECtHR (GC), *Chapman v. the United Kingdom*, 18 January 2001.

¹²⁷⁹ See, e.g., ECmmHR, *C. V. the United Kingdom*, 15 December 1983.

¹²⁸⁰ Though Chapman’s group – Roma – was deemed by the Court as a particularly vulnerable group, the applicant ultimately was not in the proportionality analysis.

C. 'Universal' III

'Universal' III, one of the main inhabitants of the Court's family life jurisprudence, echoes aspects of both 'Universal' I and 'Universal' II. Its contours emerge from the Court's privileging of the nuclear form of family life – particularly in the areas of entry and expulsion – and, above all, from the dependency requirement. The dependency requirement is reflected in the Court's principle that there is no family life between adult relatives unless they prove elements of dependence besides the usual emotional bonds. The first assumption implicit in this requirement is that the *adult* family member is prototypically financially and materially independent from her or his family – although this appears to be less and less the case when it comes to young adults. Only exceptionally does the *adult* family member rely for support on parents, siblings and extended family relatives. And only exceptionally does the *adult* family member enjoy family life with them. This particular aspect resembles features of the invulnerable logic present in 'Universal' I (the wholly autonomous, self-sufficient individual).

Another assumption underpinning the dependency requirement is that the adult family member's emotional dependence is not enough in and of itself to merit protection. In making clear that these ties are not *per se* enough to amount to family life, this requirement trivializes the emotional ties involved in family life no matter how close they might be. They artificially give precedence to financial or physical considerations at the expense of emotional dependence. This trivialization and marginalization of the emotional aspect of family life implicit in the assumptions underpinning 'Universal' III sits well with the rationalistic features of both 'Universal' I and 'Universal' II.

D. (Sub-) 'Universal' IV

This 'universal' emerges *within* cultural and religious groups and is the result of positing certain group traits (e.g., wearing a turban, living and travelling in a caravan) as *the* traits for all those within the group. In fixing the traits in question as the essence of the group identity, the Court ends up recreating the same problem present in the other 'universals' but at another level. 'Universal' IV, therefore, is *the* sub- cultural and religious group member by whose standard other members are judged.

E. The Universals' 'Other' (or *the* Non-Universal)

Sustaining and reaffirming 'Universals' I and II are some group members construed as their 'opposite' or 'other'. These group members are oftentimes portrayed as lacking agency (they are victimized) and reason (their practices appear to be 'imposed' on them by their religion). These depictions are in turn based on implicit binaries of agency/victimization and reason/culture. Associated with the devalued sides of these binaries, this 'Other' serves to reaffirm the privileged position of 'Universal' I. Indeed, unlike this 'Other', 'Universal' I is fully autonomous

and rationalistic. The ‘Other’ also sustains ‘Universal’ II, as s/he represents the embodied and public side of a dichotomy that actually values the other side: the disembodied and private. In this way, this ‘Other’ acts as the ‘visible’ outsider of the ‘invisible’ insider of ‘Universal’ II.

F. More Inclusive ECHR (Religious and Cultural) Subjects

The Court has recently made a significant move towards the erasure of one of the fundamental manifestations of ‘Universal’ I by calling into question the long upheld principle that applicants remain free to resign from their jobs if they wish to practice their religion.¹²⁸¹ Yet, significant as this move might be, it is still too soon to tell whether it will represent any definitive shift in the Court’s freedom of religion jurisprudence. Another clear opening towards a more inclusive and egalitarian ECHR subject is the concept of group vulnerability, examined in Chapter I. The vulnerable group member, however, has yet to make her/his appearance in freedom of religion and language cases. Moreover, it has yet to be meaningfully applied in cultural lifestyle cases.

II. An Inclusive, Multilayered Framework for Adjudicating Religious and Cultural Claims

In this Section, I put together the strategies suggested throughout this thesis in what I call ‘an inclusive multilayered framework for adjudicating religious and cultural claims’. The strategies are not meant to exclude one another. On the contrary, they are meant to overlap and be mutually reinforcing. Moreover, they operate in different layers: the first layer offers strategies to render the abstract ECHR subject more inclusive; the second layer to make the religious and cultural ECHR subject more inclusive; and the last layer to turn the sub- religious and cultural ECHR subject more inclusive. Together, they all seek to contribute to a more genuinely universal ECHR subject.

A. Layer I: The Pursuit of Equality within the Abstract ECHR Subject

The first set of proposals draws on the Court’s own opening towards a more inclusive ECHR subject: the concept of ‘vulnerable groups’. These proposals retain two of the main characteristics of the concept developed by the Court: particular and relational. Yet the suggestions go further and expand the potential of the relational aspect of group vulnerability. Moreover, aware of the risks inherent in the concept, these proposals also suggest ways of lessening such risks. The result is a powerful and reflective heuristic device, more capable of fulfilling its potential: the advancement of substantive equality. Applied reflectively and with further refinement, group vulnerability holds out the promise of undermining ‘Universal’ I.

¹²⁸¹ ECtHR, *Eweida and Others v. the United Kingdom*, 15 January 2013 § 83.

(i) Group Vulnerability's Particular Aspect

The term 'particularly' that the Court has tended to use when referring to some vulnerable groups underlines the idea that people belonging to these groups are simply 'more' vulnerable than others as a result of specific historical and social group-based experiences. The particular aspect of group vulnerability points to two characteristics: (i) *group-specific* and (ii) *heightened* vulnerability (vulnerability is experienced to a larger extent by members of these groups). The particular aspect thus contains the 'who' question and the 'extent' question: which *groups* are *particularly* vulnerable? These two characteristics have triggered asymmetrical protection in the Court's case law: the heightened vulnerability experienced by some groups has resulted in heightened protection for them. The asymmetry introduced by group vulnerability has manifested itself in three ways: special positive obligations, increased weight of applicants' harm in the scope and proportionality analyses, and narrowed margin of appreciation.

(ii) Group Vulnerability's Relational Aspect

The Court's notion of vulnerable groups can also be understood as relational because it views the vulnerability of certain groups as shaped by social, historical and institutional forces. Thus, the Court locates vulnerability not in the individual alone but rather in her wider social circumstances. The relational aspect embeds the 'what' (or the 'why') question: what is it that makes the group the applicant is (made) part of particularly vulnerable? Or, put more simply, why is her group particularly vulnerable? The role of this aspect has been crucial in shifting the focus from the individual applicant to the historical, institutional and social arrangements/contexts that render her more vulnerable to various harms, including misrecognition and maldistribution.

(iii) Group Vulnerability Expanded

My first suggestion in Layer I is that the Court considers applying the particular and relational aspects of group-vulnerability reasoning to religious and cultural applicants. Deeming an applicant a member of a particularly vulnerable group is most likely to take the Court out of the 'miniature frame' within which it has tended to examine cultural and religious (discrimination) claims. This miniature frame has largely produced 'Universal' I: the de-contextualized, a-historical applicant, fully responsible for her/his misfortune and, therefore, for remedying it. Introducing group vulnerability analysis in these types of cases will thus most likely enlarge the Court's frame of analysis so as to include an investigation of the contextual circumstances or arrangements at the root of the applicant's disadvantage.

My second suggestion is that the Court applies a refined version of the relational aspect of group vulnerability. By a refined version, I mean that, once out of the miniature frame, the Court expands its inquiry yet further so as to include – along with the interrogation of the applicant's increased vulnerability – an investigation of the lessened vulnerability of others. Put differently, my proposal is that the inquiry also asks how the same environment that is

disadvantaging some is simultaneously advantaging others. The expansion of the concept's relational dimension should come particularly handy in Article 14 ECHR analysis of apparently neutral norms that yet negatively burden religious and cultural applicants. This does not mean that the privilege embedded in the 'neutral' norm will be unjustified. Rather, it means that, at the very least, this privilege will be more closely scrutinized.

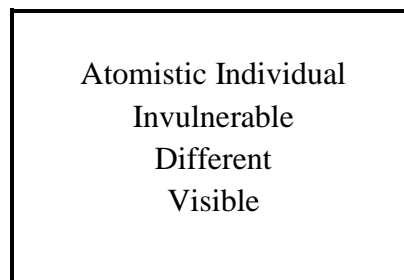
In conclusion, I propose that the Court employs group vulnerability analysis in order to (i) leave the miniature frame within which it tends to examine cultural and religious (discrimination) claims and (ii) look both ways – to the disadvantage side and the advantage side – once out of the miniature frame.

(iv) Group Vulnerability's Risks Reduced

This thesis has argued that, for all its inclusive potential and power to further substantive equality, the concept of group vulnerability also risks sustaining the very exclusion and inequality it aims to redress. An unreflective application of group vulnerability carries several risks. In the first place, an uncritical application of the concept might reinforce the stereotyping and stigmatization of an already stereotyped or stigmatized vulnerable group. In the second place, it might deny individual group members' agency and impose paternalistic protection. In order to mitigate, if not fully dispel, these risks, I suggest that the Court supplement group vulnerability analysis with the following inquiries, one of them collective, the other individual. The Court should ensure that (i) it is specific about *why* it considers that *group* particularly vulnerable and (ii) it demonstrates *why* that makes the *particular applicant* more prone to certain types of harm or why the applicant should be considered and treated as a vulnerable member of that group in the instant case.

Layer I, in conclusion, suggests that the Court moves from a miniature to a larger frame of analysis, and in so doing, 'attacks' 'Universal' I. The larger frame will enable the Court to see the individual within a larger picture, in which s/he is no longer viewed as the sole responsible for her or his disadvantage and in which s/he is no longer regarded as 'different' or 'visible'.

Miniature Frame of 'Universal' I



Large Frame of More Vulnerable ECHR Subject

Individual Embedded in Historical/Social/Institutional Context
Particularly Vulnerable Group Member
'Different' from Hidden Beneficiary
'Visible' vis-à-vis Invisible Beneficiary

B. Layer II: The Pursuit of Equality within the ECHR Cultural and Religious Subject

The second set of proposals seeks to counteract exclusions and hierarchies – and, ultimately, inequalities – within the ECHR cultural and religious subject. It does so, by pushing for understandings of ECHR religious and cultural subjectivity more capable of ‘hosting’ the ‘opposites’ of ‘Universal’ II and ‘Universal’ III. Crucially, these proposals do not aim at ousting any of these ‘universals’. Rather, they recommend that their ‘opposites’ cohabit *on a par* with them. These strategies are therefore about de-universalizing ‘Universal’ II and ‘Universal’ III – that is to say, about them losing their status of ‘universal’.

(i) ‘Universal’ II Shares Room with ‘Universals’ on a More Equal Basis

My suggestion for the Court to achieve a more equal ECHR religious subject requires transforming the distinction between the *forum internum* and the *forum externum* of freedom of religion into a more interactive and textured one. This entails two fundamental moves. First, it requires that the two forums – and the characteristics associated with them – be no longer conceived in sharp and fixed opposite terms: internal v. external; embodied v. disembodied; cerebral v. material; private v. public. Second, it involves rejecting a hierarchy between the ‘opposite’ terms, according to which some of them are favored over others (e.g., the disembodied, cerebral and private is valued over the embodied, material and public). The concrete suggestion is to interpret the relationship between the forums *less* as opposites and *more* as interrelated or interdependent. My argument is that, the more the Court considers the two forums interrelatedly, the less likely it is to produce hierarchical and inequalitarian relations between the religious subjectivities associated with one or the other side of the dichotomy.

(ii) ‘Universal’ III Shares Room with ‘Universals’ on a More Equal Basis

My proposal for the Court to achieve a more equal ECHR family life subject involves abandoning the family life narrative reflected in the notion of ‘core’ as the standard against which migrant (and other) applicants’ family lives are measured. Moreover, it requires adopting as a rule the reality approach frequently employed in its larger family life case law. According to

this approach, family life ‘is essentially a question of fact depending upon the real existence in practice of close personal ties’.¹²⁸² The closeness (including emotional closeness) criterion has the virtue of being more *realistically* and *equally* responsive to the varied forms of family life of those subject to the Court’s jurisdiction in contemporary Europe.

Layer II, in summary, recommends that the Court avoids positing ‘Universal’ II and ‘Universal’ III as *the* mark against which all forms of religious experience and family life are measured and that, instead, recognize them a *a* mark, that is to say, as one more mark among (equal) others.

Freedom of Religion More Genuine Universal

‘Universal’ II Cohabits with ‘Universals’ on Equal Footing
Proposal: Rejection of Dichotomous/Hierarchical Distinction
between the *Forum Internum* and the *Forum Externum*

Family Life More Genuine Universal

‘Universal’ III Cohabits with ‘Universals’ on Equal Footing
Proposal: *De Facto* Close Family Ties Criterion

C. Layer III: The Pursuit of Equality within the Sub- Religious and Cultural ECHR Subject

Just like my proposals in Layer II seek to de-universalize ‘universals’ rather than to oust them, so do my suggestions in Layer III but at different level. My suggestions in this last layer are aimed at making more equal room within the ECHR sub- religious and cultural subject. In particular, they recommend turning Sub- ‘Universal’ IV into a sub- cultural or religious group member in lieu of *the* sub- cultural and religious group member.

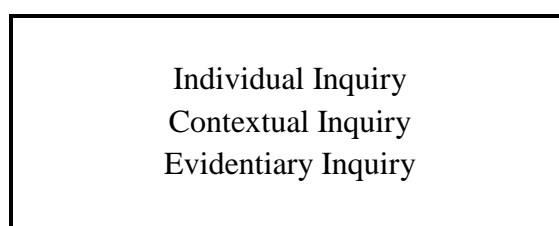
¹²⁸² ECtHR (GC), *K. and T. v. Finland*, 12 July 2001 § 150. See also, ECmmHR, *K. v. the United Kingdom*, Decision of 15 October 1986, p. 199; ECtHR (GC) *Şerife Yiğit v. Turkey*, 2 November 2010 § 93 and ECtHR *Alim v. Russia*, 27 September 2011 § 70.

Three overlapping strategies are therefore suggested to de-universalize Sub- ‘Universal’ IV: individual, evidentiary and contextual. The first strategy seeks to prevent the individual applicant from being engulfed by group experiences that s/he may not share. The second is mostly intended at counteracting the delegitimation of certain group practices on the basis of generalized presumptions rather than of demonstrable facts. The last strategy aims at preventing that the Court sees certain group practices as natural or immutable and encouraging that it views them instead as socially and historically contingent and, therefore, changing and revisable. Together, these strategies can be powerful means of mitigating essentialist and stereotypical generalizations that posit the religious or cultural experience of some group members as *the* experience that operate to exclude those who do not fit or to render them less group members.

Ironically, all these strategies build on approaches that the Court itself has adopted in other areas of its case law (e.g., gender and sexuality case law) and, sometimes, even in some of the areas I have examined in this study (e.g., freedom of religion, respect for cultural lifestyle). They all show that the Court is capable of ‘seeing’ the individual behind the group, ‘seeing’ the evidence – or in fact seeking out evidence of harm and pointing to the lack thereof – and ‘seeing’ the social, historical and institutional contexts within which certain group traits take shape. On one side, this optimistically suggests that Sub- ‘Universal’ IV may not be so pervasive in the Court’s freedom of religion and the right to respect for traditional lifestyle jurisprudence. On the other side, however, this does not erase the fact that some religious and cultural groups are still haunted by exclusionary ‘sub-universals’.

In summary, in offering the three strategies (individual, contextual and evidentiary) my intention is for the Court to construe a more genuinely sub-universal. Together, all of them will likely prevent the Court from confusing certain group practices with the practices of all group members and from either fixing them as *the* defining practice or delegitimizing them with no basis on demonstrable facts.

Cultural and Religious More Genuine Sub- Universal



III. Topics for Future Research

This Ph.D. study has exposed and challenged the exclusions and hierarchies along cultural and religious lines created by several taken-for-granted assumptions operating at different levels of the ECHR ‘universal’. In so doing, it has reached the more structural inequalities embedded therein and encouraged re-thinking of unstated norms that all too often pass for natural and

universal. In this way, the study has addressed the harm of misrecognition. It has identified the multiple forms misrecognition has taken at different levels. Moreover, it has suggested concrete ways in which they might be redressed. In all these ways, this Ph.D. has not just sought to make a contribution to academic studies seeking to go deeper in their inquiries and understandings of the interplay between equality, religion and culture in ECHR law. It has more concretely contributed to a more egalitarian and robust freedom of religion and respect for cultural lifestyle case law in Strasbourg.

The study thus leaves several issues ripe for further analysis. One of them is that of intersectionality. How do these forms of embedded religious and cultural inequalities interact with others, including gender and national (ethnic) origin? Do similar images of exclusionary ‘universals’ emerge along these other lines? For example, does the ‘Other’ (e.g., irrational, victimized, embodied) of ‘Universal’ I and ‘Universal’ II overlap in meaningful ways with ‘others’ of gendered ‘universals’ built on similar dichotomies of reason/emotion and mind/body? Does it overlap with ‘others’ of orientalist ‘universals’ built upon the agency/victimization or the reason/culture dichotomies? What kinds of compounded inequalities and exclusions emerge as a result?

Of equal significance might be the examination of the potential of group vulnerability to address and redress the distributive consequences of the religious and cultural inequalities revealed in this study. Apart from obscuring misrecognition, emphasis on religion and culture has also been accused of displacing maldistribution.¹²⁸³ The charge is that framing the issues in terms of recognition of religion and culture tends to displace economic subordination.¹²⁸⁴ One question here is: Does this hold true for the Court’s freedom of religion and respect for cultural lifestyle case law? If so, can this sort of harm be brought into sharper focus in religious and cultural discrimination cases? Or would they be more adequately addressed under other ECHR provisions? Moreover, what are the connections, if any, between the forms of misrecognition unveiled in this study and maldistribution? Might group vulnerability serve to bridge the gap between these two harms?

Judgments are obviously not the work of the Court alone; they are influenced by a range of elements, most notably the arguments made in the courtroom.¹²⁸⁵ A third theme worthy of further exploration might be the role of other legal actors such as States, applicants, and third-party interveners in the (re-)production of these ‘universals’ and non-universals. An examination of this type might require looking into materials not always considered closely in legal scholarship: applicants’ and States’ written submissions and third-party interventions. The study might be supplemented with empirical work like interviews with applicants, their representatives, third-party interveners and the Court’s judges. These interviews might prove useful in better understanding the reasons behind the processes by which these constructions

¹²⁸³ See, prominently, Fraser, Nancy, ‘Rethinking Recognition’, 3 *New Left Review* (2000) 107-120.

¹²⁸⁴ *Ibid.*

¹²⁸⁵ As suggested in Chapter VI, the Court is not the only one to ‘blame’ for some stereotypical or essentialist assumptions about applicants’ religious and cultural groups and their practices. Applicants and States do play their part.

come about. For example, why do legal representatives portray applicants in certain ways and not in others? Do they perhaps strategically exaggerate some aspects while obscuring others? Do they recognize any double-edged character involved in these strategies? To what extent do they represent applicants' lived experiences? And to what extent do these experiences get lost in legal translation?

BIBLIOGRAPHY

- Abrams, Kathryn, ““Groups” and the Advent of Critical Race Scholarship’, 1 *Issues in Legal Scholarship* (2003) Article 10
- Abrams, Kathryn, ‘Complex Claimants and Reductive Moral Judgments: New Patterns in the Search for Equality’, 57 *University of Pittsburgh Law Review* (1996) 337-362
- Abrams, Kathryn, ‘Emotions in the Mobilization of Rights’, 46 *Harvard Civil Rights-Liberties Law Review* (2011) 551-589
- Abrams, Kathryn, ‘From Autonomy to Agency: Feminist Perspectives on Self-Direction’, 40 *William and Mary Law Review* (1999) 805-846
- Abrams, Kathryn, ‘Hearing the Call of Stories’, 79 *California Law Review* (1991) 971-1051
- Abrams, Kathryn, ‘The Legal Subject in Exile’ 51 *Duke Law Journal* (2001) 27-74
- Abrams, Kathryn, ‘Title VII and the Complex Female Subject’, 92 *Michigan Law Review* (1994) 2479-2540
- Abu-Lughod, Lila, *DO MUSLIM WOMEN NEED SAVING?* (Harvard University Press, 2013)
- Addo, Michael K., ‘Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights’ 32(3) *Human Rights Quarterly* (2010) 601-664
- Ahdar, Rex and Leigh, Ian, *RELIGIOUS FREEDOM IN THE LIBERAL STATE* (Oxford University Press, 2005)
- Akbulut, Olgun, ‘Criteria Developed by the European Court of Human Rights on the Dissolution of Political Parties,’ 34(1) *Fordham International Law Journal* (2010) 46-78
- Åkermark, Sia Spiliopoulou, ‘The Added Value of the Framework Convention for the Protection of National Minorities’ in Verstichel, Aneelies et al. (eds.) *THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES: A USEFUL PAN-EUROPEAN INSTRUMENT?* (Intersentia, 2008) 69-90
- Alcoff, Linda Martin and Mohanty, Satya P., ‘Reconsidering Identity Politics: An Introduction’ in Linda Martin Alcoff, Michael Hames-Garcia, Satya P. Mohanty and Paula M.L. Moya (eds.) *IDENTITY POLITICS RECONSIDERED* (Palgrave Macmillan, 2006) 1-9
- Alexy, Robert, *A THEORY OF CONSTITUTIONAL RIGHTS* (Julian Rivers, trans., Oxford University Press, 2002)
- Alidadi, Katayoun and Foblets, Marie-Claire, ‘Framing Multicultural Challenges in Freedom of Religion Terms: Limitations of Minimal Human Rights for Managing Religious Diversity in Europe’, 30(4) *Netherlands Quarterly of Human Rights* (2012) 388-416

- Alidadi, Katayoun, 'Through the Door, Up the Stairs: Religion and its Sins Striding Up the Equality Ladder', 11(4) *International Journal of Discrimination and the Law* (2012) 201-222
- Allen, Amy, *THE POLITICS OF OUR SELVES: POWER, AUTONOMY AND GENDER IN CONTEMPORARY CRITICAL THEORY* (Columbia University Press, 2008)
- Amnesty International, 'Choice and Prejudice: Discrimination against Muslims in Europe' (2012)
- An-Na'im, Abdullahi Ahmed, *HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES A QUEST FOR CONSENSUS* (University of Pennsylvania Press, 1995)
- Appiah, Kwame Anthony 'Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction' in Charles Taylor et al. *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* (Princeton University Press, 1994) 149-164
- Appiah, Kwame Anthony, *THE ETHICS OF IDENTITY* (Princeton University Press, 2005)
- Arslan, Zühtü, 'Taking Rights Less Seriously: Postmodernism and Human Rights', 5 *Res Publica* (1999) 195-215
- Asad, Talal, 'Reading a Modern Classic: W. C. Smith's "The Meaning and End of Religion"' 40(3) *History of Religions* (2001) 205-222
- Asad, Talal, 'Reflections on Laïcité and the Public Sphere', 5(3) *Social Science Research Council Items and Issues* (2005)
- Asad, Talal, 'Thinking about Religion, Beliefs and Politics,' in Robert A. Orsi (ed), *THE CAMBRIDGE COMPANION TO RELIGIOUS STUDIES* (2012) 36-57
- Asad, Talal, *FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY* (Stanford University Press, 2003)
- Asad, Talal, *GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM* (The Johns Hopkins University Press, 1993)
- Austin, J.L., *HOW TO DO THINGS WITH WORDS* (Harvard University Press, 1975)
- Austin, Regina and Schneider, Elizabeth M., 'Mary Joe Frug's Postmodern Feminist Legal Manifesto Ten Years Later: Reflections on the State of Feminism Today' 36(1) *New England Law Review* (2001) 2-28
- Bader, Veit, Alidadi, Katayoun and Vermeulen, Floris, 'Religious Diversity and Reasonable Accommodation in the Workplace in Six European Countries: An Introduction', 13(2-3) *International Journal of Discrimination and the Law* (2013) 54-82
- Baer, Susanne 'A Closer Look at Law: Human Rights as Multi-level Sites of Struggle Over Multi-dimensional Equality', 6 *Utrecht Law Review* (2010) 56-76
- Bailey, Adrian and Boyle, Paul, 'Untying and Retying Family Migration in the New Europe', 30(2) *Journal of Ethnic and Migration Studies* (March 2004) 229-241
- Bailey, Alison, 'On Intersectionality, Empathy and Feminist Solidarity: A Reply to Naomi Zack', 19(1) *Journal for Peace and Justice Studies* (2009) 14-37
- Bainham, Andrew, 'Family Law in a Pluralistic Society', 22(2) *Journal of Law and Society* (June 1995) 234-247

- Balkin, Jack M. 'Deconstruction's Legal Career' 27 *Cardozo Law Review* (2005) 101-122
- Balkin, Jack M. and Siegel, Reva, 'The American Civil Rights Tradition: Anti-Classification or Anti-Subordination', 58(9) *University of Miami Law Review* (2003-2004) 9-33
- Balkin, Jack M., 'Deconstructive Practice and Legal Theory', 96 *Yale Law Journal* (1987) 743-786
- Balkin, Jack M., 'Nested Oppositions', Yale Law School Faculty Scholarship Series, Paper 281 (1990)
- Balkin, Jack M., 'The Constitution of Status', 106 *Yale Law Journal* (1996-1997) 2313-2374
- Ballard, 'Inside and Outside: Contrasting Perspectives on the Dynamics of Kinship and Marriage in Contemporary South Asian Transnational Networks' in Ralph Grillo (ed.) *THE FAMILY IN QUESTION: IMMIGRANT AND ETHNIC MINORITIES IN MULTICULTURAL EUROPE* (Amsterdam University Press, 2008) 37-70
- Ballard, Roger et al. 'Cultural Diversity: Challenge and Accommodation' in Ralph Grillo et al. (eds.) *LEGAL PRACTICE AND CULTURAL DIVERSITY* (Ashgate, 2009) 9-27
- Ballard, Roger et al., 'Practice and Cultural Diversity: Introduction' in Ralph, Grillo et al. (eds.) *LEGAL PRACTICE AND CULTURAL DIVERSITY* (Ashgate, 2009) 1-7
- Ballard, Roger, 'Human Rights in Contexts of Ethnic Plurality: Always a Vehicle for Liberation?' in Ralph Grillo et al. (eds.) *LEGAL PRACTICE AND CULTURAL DIVERSITY* (Ashgate, 2009) 299-329
- Ballard, Roger, 'When, Why and How Far Should Legal Systems Take Cognisance of Cultural Diversity', Presentation prepared for delivery at an International Congress on Justice and Human Values in Europe, Karlsruhe, 9th – 11th May 2007 available at <http://www.casas.org.uk/papers/pdfpapers/karlsruhe.pdf>
- Bamforth, Nicholas, Malik, Maleiha and O'Conneide, Colm, *DISCRIMINATION LAW: THEORY AND CONTEXT* (Sweet & Maxwell, 2008)
- Bandes, Susan, 'Empathy, Narrative and Victim Impact Statements', 63(2) *University of Chicago Law Review* (1996) 361-412
- Banks, Angela M., 'Deporting Families: Legal Matter or Political Question? 27(3) *Georgia State University Law Review* (2011) 489-563
- Bartlett, Katharine T., 'Feminism and Family Law', 33(3) *Family Law Quarterly* (1999) 475-500
- Bartlett, Katharine T., 'Feminist Legal Methods', 103 *Harvard Law Review* (1990) 829-888
- Bartlett, Katharine T., 'Feminist Legal Scholarship: A History through the Lens of the California Law Review', 100 *California Law Review* (2012) 381-429
- Baxi, Upendra, *THE FUTURE OF HUMAN RIGHTS* (Oxford University Press, 2002)

- Beaman, Lori G. 'Conclusion' in Lori G. Beaman (ed.) *REASONABLE ACCOMMODATION: MANAGING RELIGIOUS DIVERSITY* (University of British Columbia Press, 2012) 208-223
- Beaman, Lori G., 'Sexual Orientation and Legal Discourse : Legal Constructions of the "Normal" Family', 14 *Canadian Journal of Law and Society* (1999) 173-201
- Beaman, Lori G., 'The Missing Link: Tolerance, Accommodation ... and Equality', 9(3) *Canadian Diversity* (2012) 16-19
- Beaman, Lori G., 'The Myth of Pluralism, Diversity and Vigor: The Constitutional Privilege of Protestantism in the United States and Canada', 42(3) *Journal for the Scientific Study of Religion* (2003) 311-325
- Beaman, Lori G., 'Is Religious Freedom Impossible in Canada?', 8(2) *Law, Culture and the Humanities* (2010) 266-284
- Beckford, James A., 'The Return of Public Religion? A Critical Assessment of a Popular Claim', 23(2) *Nordic Journal of Religion and Society* (2010) 121-136
- Belelieu, Christopher D., 'The Headscarf as a Symbolic Enemy of the European Court of Human Rights' Democratic Jurisprudence: Viewing Islam through a European Legal Prism in Light of the *Şahin* Judgment,' 12 *Columbia Journal of European Law* (2006) 573-623
- Bengtson, Vern L., 'Beyond the Nuclear Family: The Increasing Importance of Multigenerational Bonds', 63 *Journal of Marriage and Family* (February 2001) 1-16
- Benhabib, Seyla, 'The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Feminist Theory', 5(4) *Praxis International* (1986) 402-424
- Benhabib, Seyla, *THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA* (Princeton University Press, 2002)
- Benwell, Bethan and Stokoe, Elizabeth, *DISCOURSE AND IDENTITY* (Edinburgh University Press, 2006)
- Berger, Benjamin L., 'Key Theoretical Issues in the Interaction of Law and Religion: A Guide for the Perplexed', 19(2) *Constitutional Forum* (2011) 41-52
- Berger, Benjamin L., 'Section 1, Constitutional Reasoning and Cultural Difference: Assessing the Impacts of *Alberta v. Hutterian Brethren of Wilson Colony*', 51 *Supreme Court Law Review* (2010) 25-46
- Berger, Benjamin, 'Law's Religion: Rendering Culture', 45(2) *Osgoode Hall Law Journal* (2007) 278-314
- Berger, Benjamin, 'Understanding Law and Religion as Culture: Making Room for Meaning in the Public Sphere', 15(1) *Constitutional Forum* (2006) 15-22
- Bergoffen, Debra, *CONTESTING THE POLITICS OF GENOCIDAL RAPE: AFFIRMING THE DIGNITY OF THE VULNERABLE BODY* (Routledge, 2012)
- Berkley Center for Religion, Peace and World Affairs, Georgetown University, Report of the Georgetown Public Symposium on 'What's So Special about Religious Freedom?' (2011)

- Berkley Center for Religion, Peace and World Affairs, Georgetown University, Report of the Georgetown Public Symposium on 'Religious Freedom and Equality: Emerging Conflicts in North America and Europe' (2012)
- Besson, Samantha, 'Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: It Takes Two to Tango in the Council of Europe' 60 *American Journal of Comparative Law* (2012) 147-180
- Bhuta, Nehal, 'Two Concepts of Religious Freedom in the European Court of Human Rights', European University Institute, Working Paper LAW 2012/33 (2012)
- Billig, Michael, 'The Language of Critical Discourse Analysis: The Case of Nominalization', 19 *Discourse and Society* (2008) 783-800
- Blackwood, Anneliese, 'The Privatisation of Religion', 12 *UCL Jurisprudence Review* (2005) 144-160
- Blomley, Nicholas, 'Flowers in the Bathtub: Boundary Crossings at the Public-Private Divide,' 36 *Geoforum* (2005) 281-296
- Bloor Meriel and Bloor Thomas, *THE PRACTICE OF CRITICAL DISCOURSE ANALYSIS: AN INTRODUCTION* (Hodder Education, 2007)
- Bonthuys, Elsje, 'Accommodating Gender, Race, Culture and Religion: Outside Legal Subjectivity', 4 *South African Journal on Human Rights* (2002) 41-58
- Bouchard, Gérard and Taylor, Charles, 'Building the Future: A Time for Reconciliation' Abridged Report (2008)
- Braidotti, Rosi, 'In Spite of the Times: The Postsecular Turn in Feminism', 25(6) *Theory, Culture and Society* (2008) 1-24
- Brems, Eva, 'Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse', 19 *Human Rights Quarterly* (1997) 136-164
- Brems, Eva, 'Human Rights as a Framework for Negotiating/Protecting Cultural Differences: An Exploration of the Case-law of the European Court of Human Rights' in Marie-Claire Foblets, Jean-François Gaudreault-Desbiens and Alison Dundes Renteln (eds.) *CULTURAL DIVERSITY AND THE LAW: STATE RESPONSES FROM AROUND THE WORLD* (Bruylant, 2010) 663-715
- Brems, Eva, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights', 56 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* [Heidelberg Journal International Law] (1996) 230-314
- Brems, Eva, *HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY* (Martinus Nijhoff, 2001)
- Brems, Eva, Janssens, Yaiza, Lecoyer, Kim, Ouald Chaib, Saila, and Vandersteen, Victoria, 'Wearing the Face Veil in Belgium: Views and Experiences of 27 Women Living in Belgium concerning the Islamic Full Face Veil and the Belgian Ban on Face Covering' (2012), available at www.ugent.be/re/publiekrecht/en/research/human-rights/faceveil.pdf

- Brems, Eva, Reconciling Universality and Diversity in International Human Rights: A Theoretical and Methodological Framework and Its Application in the Context of Islam', *Human Rights Review* (2004) 5-21
- Brems, Eva, Vrielink, Jogchum and Ouald Chaib, Saïla, 'Uncovering French and Belgian Face Covering Bans', 2 *Journal of Law, Religion and State* (2013) 69-99
- Bribosia, Emmanuelle, Ringelheim, Julie and Rorive, Isabelle, Aménager la Diversité: Le Droit de l'égalité Face a la Pluralité Religieuse', 78 *Revue Trimestrielle des Droits de l'Homme* (2009) 319-373
- Brubaker, Rogers and Cooper, Frederick, 'Beyond "Identity"', 29 *Theory and Society* (2000) 1-47
- Buchler, Andrea, 'Islamic Family Law in Europe? From Dichotomies to Discourse – or: Beyond Cultural and Religious Identity in Family Law', 8(2) *International Journal of Law in Context* (2012) 196-210
- Buckler, Sal, 'Same Old Story? Gypsy Understandings of the Injustices of Non-Gypsy Justice' in Marie-Bénédicte Dembour and Tobias Kelly (eds.) *PATHS TO INTERNATIONAL JUSTICE: SOCIAL AND LEGAL PERSPECTIVES* (Cambridge University Press, 2007) 243-261
- Bunch, Charlotte, 'Women's Rights as Human Rights: Toward a Re-vision of Human Rights' 12(4) *Human Rights Quarterly* (1990) 486-498
- Bunting, Annie, 'Theorizing Women's Cultural Diversity in Feminist International Human Rights Strategies', 20 *Journal of Law and Society* (1993) 6-22
- Butler, Judith, *GIVING AN ACCOUNT OF ONESELF* (Fordham University Press, 2005)
- Butler, Judith, *PRECARIOUS LIFE: THE POWERS AND MOURNING OF VIOLENCE* (Verso, 2006)
- Calo, Zachary R., 'Pluralism, Secularism and the European Court of Human Rights,' 26(1) *Journal of Law and Religion* (2010-2011) 261-280
- Carbado, Devon W. and Gulati, Mitu, 'The Law and Economics of Critical Race Theory', 112 *Yale Law Journal* (2003) 1757-1828
- Casanova, José, 'Public Religions Revisited' in Hent de Vries (ed.) *RELIGION: BEYOND THE CONCEPT* (Fordham University Press, 2008) 101-119
- Casanova, José, *PUBLIC RELIGIONS IN THE MODERN WORLD* (University of Chicago Press, 1994)
- Chapman, Audrey R. and Carbonetti, Benjamin, 'Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights', 33(3) *Human Rights Quarterly* (2011) 682-732
- Charlesworth, Hilary, Chinkin, Christine and Wright, Shelley, 'Feminist Approaches to International Law', 85 *American Journal of International Law* (1991) 613-645
- Charney, Robert E., 'How Can There Be Any Sin in Sincere? State Inquiries into Sincerity of Religious Belief', 51 *Supreme Court Law Review* (2010) 47-72

- Cholewinski, Ryszard, 'Family Reunification and Conditions Placed on Family Members: Dismantling a Fundamental Human Right', 4 *European Journal of Migration and Law* (2002) 271-290
- Clarke, Jessica A., 'Beyond Equality? Against the Universal Turn in Workplace Protections', 86 *Indiana Law Journal* (2011) 1219-1287
- Cook, Rebecca and Cusack, Simone, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES (University of Pennsylvania Press, 2010)
- Cook, Rebecca J., 'Women's International Human Rights: The Way Forward', 15 *Human Rights Quarterly* (1993) 230-261
- Cooper, Davina, "'And You Can't Find Me Nowhere": Relocating Identity and Structure within Equality Jurisprudence', 27(2) *Journal of Law and Society* (2000) 249-272
- Cooper, Davina, 'Talmudic Territory? Space, Law, and Modernist Discourse', 23(4) *Journal of Law and Society* (1996) 529-548
- Council of Europe, INSTITUTIONAL ACCOMMODATION AND THE CITIZEN: LEGAL AND POLITICAL INTERACTION IN A PLURALIST SOCIETY (2009)
- Cover, Robert M., 'The Origins of Judicial Activism in the Protection of Minorities', 91(7) *Yale Law Journal* (1982) 1287-1316
- Cover, Robert M., 'Violence and the Word', 95 *Yale Law Journal* (1986) 1601-1629
- Cover, Robert, 'Foreword: *Nomos* and Narrative' 97 *Harvard Law Review* (1983) 4-68
- Cowan, Jane K. et al. 'Introduction' in Jane K. Cowan et al. (eds.) CULTURE AND RIGHTS: ANTHROPOLOGICAL PERSPECTIVES (Cambridge University Press, 2001) 1-26
- Crenshaw, Kimberlé, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics', *The University of Chicago Legal Forum* (1989) 139-167
- Crenshaw, Kimberlé, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color', 43(6) *Stanford Law Review* (1991) 1241-1299
- Crenshaw, Kimberlé, Gotanda Neil, Peller Gary and Thomas, Kendal (eds.) CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (The New Press, 1995)
- Cumper, Peter and Lewis, Tom, "'Taking Religion Seriously"? Human Rights and *Hijab* in Europe: Some Problems of Adjudication,' 24(2) *Journal of Law and Religion* (2008-2009) 599-627
- Cumper, Peter, 'The Rights of Religious Minorities: The Legal Regulation of New Religious Movements' in Peter Cumper and Steven Charles Wheatley (eds.), MINORITY RIGHTS IN THE 'NEW' EUROPE (Martinus Nijhoff, 1999) 165-184
- Dahl Rendtorff, Jacob, 'Basic Ethical Principles in European Bioethics and Biolaw: Autonomy, Dignity, Integrity and Vulnerability – Towards a Foundation of Bioethics and Biolaw', 5 *Medicine, Health Care and Philosophy* (2002) 235-244
- Dallal, 'The Asylum-Seeking Family' in Rebecca Probert (ed.) FAMILY LIFE AND THE LAW: UNDER ONE ROOF (Ashgate, 2007) 224-245

- Dalton, Clare, 'An Essay in the Deconstruction of Contract Doctrine', 94 *Yale Law Journal* (1985) 997-1114
- Damon, Rita, *IDENTITY/DIFFERENCE POLITICS: HOW DIFFERENCE IS PRODUCED AND WHY IT MATTERS* (University of British Columbia Press, 2009)
- Danchin, Peter G. and Forman, Lisa, 'The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities', in Peter Danchin and Elizabeth Cole (eds.), *PROTECTING THE HUMAN RIGHTS OF RELIGIOUS MINORITIES IN EASTERN EUROPE* (Columbia University Press, 2002) 192-221
- Danchin, Peter G., 'Islam in the Secular *Nomos* of the European Court of Human Rights', 32 *Michigan Journal of International Law* (2011) 663-747
- Danchin, Peter G., 'Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law' 49 *Harvard International Law Journal* (2008) 249-321
- Danchin, Peter G., 'Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law', 33 *Yale Journal of International Law* (2008) 1-61
- Danchin, Peter G., 'Who is the "Human" in Human Rights? The Claims of Culture and Religion', 24 *Maryland Journal of International Law* (2009) 99-124
- Danielsen, Dan, 'Identity Strategies: Representing Pregnancy and Homosexuality' in Dan Danielsen and Karen Engle (eds.) *AFTER IDENTITY: A READER IN LAW AND CULTURE* (Routledge, 1995) 39-59
- Danisi, Carmelo, 'How Far Can the European Court of Human Rights Go in the Fight Against Discrimination? Defining New Standards in Its Nondiscrimination Jurisprudence', 9 *International Journal of Constitutional Law I-CON* (2011) 793-807
- Davie, Grace, 'Law, Sociology and Religion: An Awkward Threesome', 1(1) *Oxford Journal of Law and Religion* (2012) 235-247
- De Hart, Betty, 'Love the Neighbor: Family Reunification and the Rights of Insiders', 11 *European Journal of Migration and Law* (2009) 235-252
- De Varennes, Fernand, 'Ethnic Conflicts and Language in Eastern European and Central Asian States: Can Human Rights Help Prevent Them?' 5 *International Journal on Minority and Group Rights* (1997-1998) 135-174
- De Varennes, Fernand, 'The Protection of Linguistic Minorities in Europe and Human Rights: Possible Solutions to Ethnic Conflicts?' 2 *Columbia Journal of European Law* (1996) 107-143
- Degtyareva, Victoria, 'Defining Family in Immigration Law: Accounting for Nontraditional Families in Citizenship by Descent', 120 *Yale Law Journal* (2011) 862-907
- Delgado, Richard and Stefancic, Jean *CRITICAL RACE THEORY: AN INTRODUCTION* (New York University Press, 2001)
- Delgado, Richard, 'Crossroads and Blind Alleys: A Critical Examination of Recent Writing about Race', 82 *Texas Law Review* (2003) 121-125

- Delgado, Richard, 'Rodrigo's Reconsideration: Intersectionality and the Future of Critical Race Theory', 96 *Iowa Law Review* (2011) 1247-1287
- Dembour, Marie-Bénédicte and Kelly, Tobias, 'Introduction' in Marie-Benedicte Dembour and Tobias Kelly (eds.) *ARE HUMAN RIGHTS FOR MIGRANTS? CRITICAL REFLECTIONS ON THE STATUS OF IRREGULAR MIGRANTS IN EUROPE AND THE UNITED STATES* (Routledge, 2011) 1-22
- Dembour, Marie-Bénédicte, 'Gaygusuz Revisited: The Limits of the European Court of Human Rights Equality Agenda', 12(4) *Human Rights Law Review* (2012) 689-721
- Dembour, Marie-Bénédicte, 'Human Rights Law and National Sovereignty in Collusion: The Plight of Quasi-Nationals at Strasbourg', 21 *Netherlands Quarterly of Human Rights* (2003) 63-98
- Dembour, Marie-Bénédicte, 'Still Silencing the Racism Suffered by Migrants . . . The Limits of Current Developments under Article 14 ECHR', 11 *European Journal of Migration and Law* (2009) 221-234
- Dembour, Marie-Bénédicte, 'The Cases that were Not to Be: Explaining the Dearth of Case Law on Religious Freedom in Strasbourg' in Italo Pardo (ed.) *MORALS OF LEGITIMACY: BETWEEN AGENCY AND SYSTEM* (Berghahn, 2000) 205-228
- Dembour, Marie-Bénédicte, 'What Are Human Rights? Four Schools of Thought', 32(1) *Human Rights Quarterly* (2010) 1-20
- Dembour, Marie-Bénédicte, *WHO BELIEVES IN HUMAN RIGHTS? REFLECTIONS ON THE EUROPEAN CONVENTION* (Cambridge University Press, 2006)
- Donders, Yvonne M., 'Human Rights: Eye for Cultural Diversity', Inaugural Lecture Delivered Upon Appointment to the Chair of Professor of International Human Rights and Cultural Diversity at the University of Amsterdam on 29 June 2012
- Donders, Yvonne, 'Do Cultural Diversity and Human Rights Make a Good Match?' 199 *International Social Science Journal* (2010) 15-35
- Donders, Yvonne, 'Human Rights and Cultural Diversity: Too Hot to Handle', 30(4) *Netherlands Quarterly of Human Rights* (2012) 377-381
- Donnelly, Jack, 'Cultural Relativism and Universal Human Rights' 6(4) *Human Rights Quarterly* (1984) 400-419
- Donnelly, Jack, 'The Relative Universality of Human Rights' 29(2) *Human Rights Quarterly* (2007) 281-306
- Donoho, Douglas Lee, 'Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards', 27 *Stanford Journal on International Law* (1990-1991) 345-391
- Dorf, Michael C., 'A Partial Defense of an Anti-Discrimination Principle', *Issues in Legal Scholarship* Article 2 (2002)
- Douzinas, Costas, 'Identity, Recognition, Rights or What Can Hegel Teach Us About Human Rights?' 29 *Journal of Law and Society* (2002) 379-405
- Douzinas, Costas, *THE END OF HUMAN RIGHTS* (Hart Publishing, 2000)

- Dovidio, John F., Hewstone, Miles, Glick, Peter and Esses, Victoria M., 'Prejudice, Stereotyping and Discrimination: Theoretical and Empirical Overview' in John F. Dovidio et al. (eds.) *THE SAGE HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION* (SAGE, 2010) 3-28
- Edge, Peter W., 'Determining Religion in English Courts', 1(2) *Oxford Journal of Law and Religion* (2012) 402-423
- Eichner, Maxine, 'On Postmodernist Feminist Legal Theory' 36(1) *Harvard Civil Rights-Civil Liberties Law Review* (2001) 1-77
- Eisenberg, Avigail, *REASONS OF IDENTITY: A NORMATIVE GUIDE TO THE POLITICAL AND LEGAL ASSESSMENT OF IDENTITY CLAIMS* (Oxford University Press, 2009)
- Engle, Karen, 'International Human Rights and Feminisms: When Discourses Keep Meeting' in Doris Buss and Ambreena Manji (eds.) *INTERNATIONAL LAW: MODERN FEMINIST APPROACHES* (Hart Publishing, 2005) 47-66
- European Commission against Racism and Intolerance (ECRI), General Policy Recommendation No. 5 'On Combating Intolerance and Discrimination against Muslims' 16 March 2000
- European Monitoring Centre on Racism and Xenophobia, Summary Report on Islamophobia in the EU after 11 September 2001 (May 2002)
- Evans, Carolyn and Thomas, Christopher A., 'Church-State Relations in the European Court of Human Rights', *Brigham Young University Law Review* (2006) 699-725
- Evans, Carolyn, 'The "Islamic Scarf" in the European Court of Human Rights', 7 *Melbourne Journal of International Law* (2006) 52-73
- Evans, Carolyn, 'Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture', 26 *Journal of Law and Religion* (2010-2011) 321-343
- Evans, Carolyn, 'Introduction' in Peter Cane, Carolyn Evans and Zoe Robinson (eds.) *LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT* (Cambridge University Press, 2011) 1-15
- Evans, Carolyn, 'Religious Freedom in European Human Rights Law: The Search for a Guiding Conception' in Janis, Mark W. and Evans, Carolyn (eds.), *RELIGION AND INTERNATIONAL LAW* (Martinus Nijhoff, 1999) 385-400
- Evans, Carolyn, *FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (Oxford University Press, 2001)
- Evans, Malcolm and Petkoff, Peter, 'A Separation of Convenience? The Concept of Neutrality in the Jurisprudence of the European Court of Human Rights', 36(3) *Religion, State & Society* (2008) 205-223
- Evans, Malcolm D., 'Freedom of Religion and the European Convention on Human Rights: Approaches, Trends and Tensions in Peter Cane, Carolyn Evans and Zoe Robinson (eds.) *LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT* (Cambridge University Press, 2011) 291-315

- Evans, Malcolm D., 'Religious Symbols: An Introduction' in Silvio Ferrari and Rinaldo Cristofori (eds.) *LAW AND RELIGION IN THE 21ST CENTURY: RELATIONS BETWEEN STATES AND RELIGIOUS COMMUNITIES* (Ashgate, 2010) 291-296
- Evans, Malcolm D., *MANUAL ON THE WEARING OF RELIGIOUS SYMBOLS IN PUBLIC AREAS* (Council of Europe, 2009)
- Evans, Malcolm, 'The Freedom of Religion or Belief and the Freedom of Expression', 4 *Religion and Human Rights* (2009) 197-235
- Fairclough, Norman, *LANGUAGE AND POWER* (Pearson Education Limited, 2001)
- Farahat, Anuscheh, 'The Exclusiveness of Inclusion: On the Boundaries of Human Rights in Protecting Transnational and Second Generation Migrants', 11 *European Journal of Migration and Law* (2009) 253-269
- Farget, Doris, 'Defining Roma Identity in the European Court of Human Rights', 19 *International Journal on Minority and Group Rights* (2012) 291-316
- Farget, Doris, 'Le Droit au Respect des Modes de Vie Minoritaires et Autochtones dans les Contentieux Internationaux des Droits de l'Homme', Ph.D. Thesis, Université de Montréal, 2010
- Ferrari, Silvio, 'Conclusion' in Silvio Ferrari and Rinaldo Cristofori (eds.) *LAW AND RELIGION IN THE 21ST CENTURY: RELATIONS BETWEEN STATES AND RELIGIOUS COMMUNITIES* (Ashgate, 2010) 369-375
- Ferrari, Silvio, 'Law and Religion in a Secular world: A European Perspective', 14(3) *Ecclesiastical Law Journal* (2012) 355-370
- Ferrari, Silvio, 'The Strasbourg Court and Article 9 of the European Convention of Human Rights: A Quantitative Analysis of the Case Law' in Jeroen Temperman (ed.) *THE LAUTSI PAPERS: MULTIDISCIPLINARY REFLECTIONS ON RELIGIOUS SYMBOLS IN THE PUBLIC SCHOOL CLASSROOM* (Martinus Nijhoff, 2012) 13-34
- Fineman, Martha Albertson, "'Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility', 20(1) *The Elder Law Journal* (2012) 71-112
- Fineman, Martha Albertson, 'Beyond Identities: The Limits of an Antidiscrimination Approach to Equality', 92 *Boston University Law Review* (2012) 1713-1770
- Fineman, Martha Albertson, 'Cracking the Foundational Myths: Independence, Autonomy and Self-sufficiency', 8 *American University Journal of Gender, Social Policy and the Law* (1999) 13-29
- Fineman, Martha Albertson, 'The Vulnerable Subject and the Responsive State', 60 *Emory Law Journal* (2010) 251-275
- Fineman, Martha Albertson, 'The Vulnerable Subject: Anchoring Equality in the Human Condition', 20(1) *Yale Journal of Law and Feminism* (2008-2009) 1-23
- Fiss, Owen M., 'Groups and the Equal Protection Clause', 5(2) *Philosophy & Public Affairs* (1976) 107-177
- Fitzgerald, Timothy, *DISCOURSE ON CIVILITY AND BARBARITY: A CRITICAL HISTORY OF RELIGION AND RELATED CATEGORIES* (Oxford University Press, 2007)

- Flagg, Barbara J., 'The Algebra of Pluralism: Subjective Experience as A Constitutional Variable', 47 *Vanderbilt Law Review* (1994) 273-337
- Flagg, Barbara J., 'Was Blind, But Now I See: White Race Consciousness and the Law' 91 *Michigan Law Review* (1993) 953-1017
- Flagg, Barbara J., 'Whiteness: Some Critical Perspectives', 18 *Washington University Journal of Law and Policy* (2005) 1-11
- Fonseca, Maria Lucinda and Ormond, Meghann, 'Defining "Family" and Bringing it Together: The Ins and Outs of Family Reunification in Portugal' in Ralph Grillo (ed.), *THE FAMILY IN QUESTION: IMMIGRANT AND ETHNIC MINORITIES IN MULTICULTURAL EUROPE* (Amsterdam University Press, 2008) 89-11
- Fortman, Bas de Gaay, 'Minority Rights: A Major Misconception?' 33(2) *Human Rights Quarterly* (2011) 265-303
- Fournier, Pascale and Yurdakul, Gökçe, 'Unveiling Distribution: Muslim Women with Headscarves in France and Germany' in Y. Michal Bodemann and Gökçe Yurdakul (eds.) *MIGRATION, CITIZENSHIP, ETHNOS* (Palgrave Macmillan, 2006) 167-185
- Fournier, Pascale, 'The "Naked Face" of Secular Exclusion: Bill 94 and the Privatization of Belief' *Windsor Yearbook of Access to Justice* (2012) 63-76
- Fowler, Roger et al., *LANGUAGE AND CONTROL* (Routledge and Kegan Paul, 1979)
- Fowler, Roger, *LANGUAGE IN THE NEWS: DISCOURSE AND IDEOLOGY IN THE PRESS* (Routledge, 1991)
- Franklin, Kris, 'A Family Like Any Other Family: Alternative Methods of Defining Family Law' 18 *New York University Review of Law and Social Change* (1990-1991) 1027-1078
- Fraser, Nancy and Nicholson, Linda J., 'Social Criticism without Philosophy: An Encounter between Feminism and Postmodernism' in Diana Tietjens Meyers (ed.) *FEMINIST SOCIAL THOUGHT: A READER* (Routledge, 1997) 132-146
- Fraser, Nancy, 'Rethinking Recognition', 3 *New Left Review* (2000) 107-120
- Fraser, Nancy, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy', 25/26 *Social Text* (1990) 56-80
- Fredman, Sandra, 'Comparative Study of Anti-discrimination and Equality Laws of the US, Canada, South Africa and India' (European Communities, 2012)
- Fredman, Sandra, 'Facing the Future: Substantive Equality under the Spotlight', Oxford University Legal Research Paper Series, Paper No. 57 (2010)
- Fredman, Sandra, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' 21 *South African Journal on Human Rights* (2005) 163-190
- Fredman, Sandra, 'Redistribution and Recognition: Reconciling Inequalities', 23 *South African Journal on Human Rights* (2007) 214-234
- Fredman, Sandra, *DISCRIMINATION LAW* (Oxford University Press, 2nd ed. 2011)
- Fredman, Sandra, *HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES* (Oxford University Press, 2008)

- Freeman, Alan David, 'Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of the Supreme Court Doctrine', 62 *Minnesota Law Review* (1978) 1049-1119
- Frug, Gerald E., 'The Ideology of Bureaucracy in American Law', 97 *Harvard Law Review* (1984) 1276-1388
- Frug, Mary Joe, 'A Postmodern Feminist Legal Manifesto (An Unfinished Draft)' 105 *Harvard Law Review* (1992) 1045-1075
- Frug, Mary Joe, 'Re-reading Contracts: A Feminist Analysis of a Contracts Casebook', 34 *American University Law Review* (1985) 1065-1140
- Fuss, Diana, *ESSENTIALLY SPEAKING: FEMINISM, NATURE AND DIFFERENCE* (Routledge, 1989)
- Gal, Susan, 'A Semiotics of the Public/Private Distinction', 13(1) *Journal of Feminist Cultural Studies* (2002) 77-95
- Gee, James Paul, *AN INTRODUCTION TO DISCOURSE ANALYSIS: THEORY AND METHOD* (Routledge, 1999/2005/2011)
- Gerards, Janneke and Senden, Hanneke, 'The Structure of Fundamental Rights and the European Court of Human Rights', 7(4) *International Journal of Constitutional Law* (2009) 619-653
- Gerards, Janneke, 'Judicial Deliberations in the European Court of Human Rights' in Nick Huls, Maurice Adams and Jacco Bomhoff (eds.) *THE LEGITIMACY OF HIGHEST COURTS' RULINGS: JUDICIAL DELIBERATIONS AND BEYOND* (Cambridge University Press, 2008) 407-436
- Ghanea, Nazila, 'Are Religious Minorities Really Minorities?' 1(1) *Oxford Journal of Law and Religion* (2012) 57-79
- Gies, Lieve, 'What Not to Wear: Islamic Dress and School Uniforms', 14 *Feminist Legal Studies* (2006) 377-389
- Gilbert, Geoff, 'Religious Minorities and Their Rights: A Problem of Approach' 5 *International Journal on Minority and Group Rights* (1997) 97-134
- Gilman, Denise, 'A "Bilingual" Approach to Language Rights: How Dialogue between U.S. and International Human Rights Law May Improve the Language Rights Framework', 24 *Harvard Human Rights Journal* (2011) 1-70
- Goldberg, Suzanne B., 'Discrimination by Comparison', 120 *Yale Law Journal* (2011) 728-812
- Golder, Ben and Fitpatrick, Peter, *FOUCAULT'S LAW* (Routledge, 2009)
- Goldston, James A., 'The Struggle for Roma Rights: Arguments that Have Worked', 32(2) *Human Rights Quarterly* (2010) 311-325
- Goodin, Robert E., *PROTECTING THE VULNERABLE: A REANALYSIS OF OUR SOCIAL RESPONSIBILITIES* (The University of Chicago Press, 1985)

- Grant, Evadne, 'Disadvantage and Discrimination: The Emerging Jurisprudence of the South African Constitutional Court', 51(2) *Northern Ireland Legal Quarterly* (2000) 174-197
- Grear, Anna, "'Framing the Project" of International Human Rights Law: Reflections on the Dysfunctional "Family" of the Universal Declaration' in Conor Gearty and Costas Douzinas (eds.) *THE CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW* (Cambridge University Press, 2012) 17-35
- Grear, Anna, "'Sexing the Matrix: Embodiment, Disembodiment and the Law – Towards the Re-gendering of Legal Rationality' in Jackie Jones, Anna Grear, Rachel Anne Fenton and Kim Stevenson (eds.) *GENDER, SEXUALITIES AND LAW* (Routledge, 2011) 39-52
- Grear, Anna, 'Challenging Corporate "Humanity": Legal Disembodiment, Embodiment and Human Rights', 7 *Human Rights Law Review* (2007) 521-534
- Grear, Anna, *REDIRECTING HUMAN RIGHTS: FACING THE CHALLENGE OF CORPORATE LEGAL HUMANITY* (Palgrave Macmillan, 2010)
- Greenawalt, Kent, 'Judicial Resolution of Issues About Religious Conviction', 81(2) *Marquette Law Review* (1998) 461-472
- Greenawalt, Kent, 'Religion as a Concept in Constitutional Law', 72(5) *California Law Review* (1984) 753-816
- Greil, Arthur L. and Bromley, David G. (eds.) *DEFINING RELIGION: INVESTIGATING THE BOUNDARIES BETWEEN THE SACRED AND THE SECULAR* (Elsevier, Science Ltd., 2003)
- Grillo, Ralph 'The Family in Dispute: Insiders and Outsiders' in Ralph Grillo (ed.) *THE FAMILY IN QUESTION: IMMIGRANT AND ETHNIC MINORITIES IN MULTICULTURAL EUROPE* (Amsterdam University Press, 2008) 15-35
- Grillo, Ralph and Shah, Prakash, 'Reasons to Ban? The Anti-Burqa Movement in Western Europe', Max Planck Institute for the Study of Religious and Ethnic Diversity, Working Paper 12-05 (2012)
- Gross, 'Rights and Normalization: A Critical Study of European Human Rights Case Law on the Choice and Change of Names', 9 *Harvard Human Rights Journal* (1996) 269-284
- Group of Eminent Persons of the Council of Europe, 'Living Together: Combining Diversity and Freedom in 21st-century Europe' (Council of Europe, 2011)
- Gunn, T. Jeremy, 'Fearful Symbols: The Islamic Headscarf and the European Court of Human Rights,' *Droit et Religion* (2008)
- Gunn, T. Jeremy, 'The Complexity of Religion and the Definition of "Religion" in International Law', 16 *Harvard Human Rights Journal* (2005) 189-215
- Hall, David D. (ed.), *LIVED RELIGION IN AMERICA* (Princeton University Press, 1997)
- Hambler, Andrew, 'A Private Matter? Evolving Approaches to the Freedom to Manifest Religious Convictions in the Workplace', 3 *Religion and Human Rights* (2008) 111–133
- Hammarberg, Thomas, *HUMAN RIGHTS IN EUROPE: NO GROUNDS FOR COMPLACENCY* (Council of Europe, 2011)

- Harris, Angela P., 'Race and Essentialism in Feminist Legal Theory', 42 *Stanford Law Review* (1990) 581-616
- Harris, David, O'Boyle, Michael, Warbrick, Colin and Bates, Edward, *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (Oxford University Press, 1995)
- Harvey, Colin and Livingstone, Stephen 'Protecting the Marginalised: The Role of the European Convention on Human Rights', 51(3) *Northern Ireland Legal Quarterly* (2001) 445-465
- Harvey, Colin, 'Protecting the Marginalized?' in John Morison, Kieran McEvoy and Gordon Anthony (eds.) *JUDGES, TRANSITION AND HUMAN RIGHTS* (Oxford University Press, 2007) 515-534
- Hasday, Jill Elaine, 'The Principle and Practice of Women's "Full Citizenship": A Case Study of Sex-Segregated Public Education', 101 *Michigan Law Review* (2002) 755-810
- Hayden, Paul T., 'Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as A Weapon against "Other People's Faiths"' 34 *William and Mary Law Review* (1993) 579-677
- Hekman, Susan J., *PRIVATE SELVES, PUBLIC IDENTITIES: RECONSIDERING IDENTITY POLITICS* (Pennsylvania State University Press, 2004)
- Henderson, Lynne N., 'Legality and Empathy' 85 *Michigan Law Review* (1987) 1574-1653
- Henrard, Kristin, 'A Patchwork of "Successful and "Missed" Synergies in the Jurisprudence of the ECHR', in Kristin Henrard and Robert Dunbar (eds.) *SYNERGIES IN MINORITY PROTECTION: EUROPEAN AND INTERNATIONAL LAW PERSPECTIVES* (Cambridge University Press, 2008) 314-364
- Henrard, Kristin, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' 5(1) *Erasmus Law Review* (2012) 59-77
- Henrard, Kristin, 'Minority Specific Rights: A Protection of Religious Minorities Going Beyond the Freedom of Religion?' *European Yearbook on Minority Issues* (2009) 5-44
- Henrard, Kristin, 'The Added Value of the Framework Convention for the Protection of National Minorities (II): The Two Pillars of An Adequate System of Minority Protection Revisited in Verstichel, Aneelies et al. (eds.) *THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES: A USEFUL PAN-EUROPEAN INSTRUMENT?* (Intersentia, 2008) 91-117
- Henrard, Kristin, 'The European Convention on Human Rights and the Protection of the Roma as a Controversial Case of Cultural Diversity', *European Diversity and Autonomy Papers* EDAP 5/2004, 5-25
- Higgins, Tracy E., "'By Reason of their Sex": Feminist Theory, Postmodernism and Justice', 80 *Cornell Law Review* (1995) 1536-1594

- Higgins, Tracy E., 'Anti-Essentialism, Relativism, and Human Rights', 19 *Harvard Women's Law Journal* (1996) 89-126
- Hirschl, Ran and Shachar, Ayelet, 'The New Wall of Separation: Permitting Diversity, Restricting Competition', 30(6) *Cardozo Law Review* (2009) 2535-2560
- Hoffmann, Florian and Ringelheim, Julie, 'Par-delà l'Universalisme et le Relativisme: La Cour Européenne des Droits de l'Homme et les Dilemmes de la Diversité Culturelle', 52 *Revue Interdisciplinaire d'Etudes Juridiques* (2004) 109-142
- Hong, Caylee, 'Feminists on the Freedom of Religion: Responses to Quebec's Proposed Bill 94', 8 *Journal of Law and Equality* (2011) 27-62
- Human Rights Centre, Ghent University, Written Comments in *S.A.S. v. France*, 9 July 2012
- Hurst, Samia A., 'Vulnerability in Research and Health Care: Describing the Elephant in the Room?' 22(4) *Bioethics* (2008) 191-202
- Hutchinson, Allan C. and Petter, Andrew, 'Private Rights/Public Wrongs: The Liberal Lie of the Charter' 38 *University of Toronto Law Journal* (1988) 278-297
- Hutchinson, Allan C., 'Identity Crisis: The Politics of Interpretation', 26 *New England Law Review* (1992) 1173-1217
- Hutchinson, Allan C., 'Inessentially Speaking (Is there Politics after Postmodernism?)', 89 *Michigan Law Review* (1991) 1549-1573
- Jagwanth, Saras, 'Expanding Equality', *Acta Juridica* (2005) 131-148
- Johnson, Paul, 'An Essentially Private Manifestation of Human Personality: Constructions of Homosexuality in the European Court of Human Rights', 10 *Human Rights Law Review* (2010) 67-97
- Kamal, Jilan, 'Justified Interference with Religious Freedom: The European Court of Human Rights and the Need for Mediating Doctrine under Article 9(2)', 46 *Columbia Journal of Transnational Law* (2008) 667-707
- Karst, Kenneth 'Religious Freedom and Equal Citizenship' 69 *Tulane Law Review* (1994) 335-372
- Karst, Kenneth L., 'Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation', 43 *University of California Law Review* (1995) 263-348
- Karst, Kenneth L., 'Paths to Belonging: The Constitution and Cultural Identity', 64 *North Carolina Law Review* (1986) 303-377
- Karst, Kenneth L., 'Why Equality Matters', 17 *Georgia Law Review* (1983) 245-289
- Kavanagh, Matthew M., 'Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard', 16 *Yale Journal of Law & Feminism* (2004) 83-143
- Kavey, Michael, 'The Public Faces of Privacy: Rewriting *Lustig-Prean and Beckett v. the United Kingdom*,' in Eva Brems (ed.) *DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR* (Cambridge University Press, 2012) 293-326
- Keogh, Mary, Fox, Noelin and Flynn, Eilionóir, 'How Far Towards Equality? A Vulnerabilities Approach to the Rights of Disabled People', University College Dublin

Working Papers in Law, Criminology & Socio-Legal Studies, Research Paper No. 29 (2010)

- Kilkelly, Ursula, 'The Right to Respect for Private and Family Life: A Guide to the Implementation of Article 8 of the European Convention on Human Rights', *Human Rights Handbooks No. 1* (Council of Europe, 2001)
- Koenig, Mathias, 'Governance of Religious Diversity at the European Court of Human Rights' in Jane Boulden and Will Kymlicka (eds.), *INTERNATIONAL APPROACHES TO GOVERNING ETHNIC DIVERSITY* (Oxford University Press, forthcoming 2014)
- Kofman, Eleonore, 'Family-Related Migration: A Critical Review of European Studies', 30(2) *Journal of Ethnic and Migration Studies* (2004) 243-262
- Koppelman, Andrew, 'Is It Fair to Give Religion Special Treatment?' 3 *University of Illinois Law Review* (2006) 571-603
- Kottow, Michael H., 'The Vulnerable and the Susceptible', 17(5) *Bioethics* (2003) 460-471
- Kottow, Michael H., 'Vulnerability: What Kind of Principle is It?' 7 *Medicine, Health Care and Philosophy* (2004) 281-287
- Kramer, Zachary A., 'Of Meat and Manhood', 89(2) *Washington University Law Review* (2011) 287-322
- Kymlicka, Will, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (Oxford University Press, 1996)
- Laborde, Cécile, 'State Paternalism and Religious Dress Code' 10(2) *International Journal of Constitutional Law I-CON* (2012) 398-410
- Laborde, Cécile, 'The Politics of Religious Freedom: Protecting Freedom of Religion in the Secular Age', Blog 'The Immanent Frame' (2012) <<http://blogs.ssrc.org/tif/2012/04/23/protecting-freedom-of-religion-in-the-secular-age/>> accessed 6 June 2013
- Lambert, Hélène, 'The European Court of Human Rights and the Right of Refugees and Other Persons in Need of Protection to Family Reunion', 11 *International Journal of Refugee Law* (1999) 427-450
- Landes, Joan B., 'Further Thoughts on the Public/Private Distinction', 15(2) *Journal of Women's History* (2003) 28-39
- Langlaude, Sylvie, 'Indoctrination, Secularism, Religious Liberty, and the ECHR', 55(4) *International and Comparative Law Quarterly* (2006) 929-944
- Lau, Holning, 'Identity Scripts and Democratic Deliberation', 94 *Minnesota Law Review* (2010) 897-970
- Lavrysen, Laurens, 'Poverty and Human Rights: A European Perspective' (manuscript on file with author)
- Lawrence III, Charles R., 'Forward Ace, Muculturalism and the Jurisprudence of Transformation' 47 *Stanford Law Review* (1995) 819-847

- Lawrence, Charles R. III, 'Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment', *Villanova Law Review* (1992) Symposium Hate Speech and the First Amendment: On a Collision Course? 787-804
- Lawrence, Charles R. III, 'The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism', 39 *Stanford Law Review* (1987) 317-388
- Lawrence, Charles R. III, 'Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, The Ego, and Equal Protection"', 40 *Connecticut Law Review* (2008) 931-977
- Leigh, Ian, 'The European Court of Human Rights and Religious Neutrality' in D'Costa, Gavin et al. (eds.) *RELIGION IN A LIBERAL STATE* (Cambridge University Press, 2013) 38-65
- Lenhardt, Robin A., 'Understanding the Mark: Race, Stigma, and Equality in Context', 78 *New York University Law Review* (2004) 803-931
- Letsas, George, 'The Truth in Autonomous Concepts: How to Interpret the ECHR', 15(2) *European Journal of International Law* (2004) 279-305
- Letsas, George, 'Two Concepts of the Margin of Appreciation', 26(4) *Oxford Journal of Legal Studies* (2006) 705-732
- Liddy, Jane, 'The Concept of Family Life under the ECHR', 1 *European Human Rights Law Review* (1998) 15-25
- Loenen, Titia and Goldschmidt, Jenny E. (eds.) *RELIGIOUS PLURALISM AND HUMAN RIGHTS IN EUROPE* (Intersentia, 2007)
- Loenen, Titia, 'Indirect Discrimination: Oscillating between Containment and Revolution', in Titia Loenen and Peter R. Rodrigues (eds.) *NON-DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES* (Martinus Nijhoff, 1999) 195-212
- Loenen, Titia, van Rossum, Wibo and Tigchelaar, Jet, 'Introduction: Human Rights Law as a Site of Struggle over Multicultural Conflicts: Comparative and Multidisciplinary Perspectives', 6(2) *Utrecht Law Review* (2010) 1-16
- Loucaides, Loukis G., 'The limitations of Human Institutions', available at <http://www.errc.org/cikk.php?page=8&cikk=361>
- Luna, Florencia, 'Elucidating the Concept of Vulnerability: Layers Not Labels', 2(1) *International Journal of Feminist Approaches to Bioethics* (2009) 121-139
- M.M. Bakhtin, *THE DIALOGICAL IMAGINATION: FOUR ESSAYS*, edited by Michael Holquist and translated by Caryl Emerson and Michael Holquist (University of Texas Press, 1981)
- MacKinnon, Catharine A., 'Crimes of War, Crimes of Peace', 4 *UCLA Women's Law Journal* (1993-1994) 59-86
- MacKinnon, Catharine A., 'Points against Postmodernism', 75 *Chicago-Kent Law Review* (2000) 687-712
- Mackinnon, Catharine, *TOWARD A FEMINIST THEORY OF THE STATE* (Harvard University Press, 1989)

- MacKinnon, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (Harvard University Press, 1987)
- Macklin, Ruth, 'Bioethics, Vulnerability and Protection', 17(5) *Bioethics* (2003) 472-486
- Mahajan, Gurpreet, 'Reconsidering the Private-Public Distinction', 12(2) *Critical Review of International Social and Political Philosophy* (2009) 133-143
- Mahmood, Saba, 'Religious Reason and Secular Affect: An Incommensurable Divide?', 35 *Critical Inquiry* (2009) 836-862
- Malik, Maleiha, 'Complex Equality: Muslim Women and the "Headscarf"', 68 *Droit et Société* (2008) 127-152
- Malik, Maleiha, 'Religious Freedom, Free Speech and Equality: Conflict or Cohesion?', 17 *Res Publica* (2011) 21-40
- Malik, Maleiha, 'The "Other" Citizens: Religion in a Multicultural Europe' in Camil Ungureanu and Lorenzo Zucca (eds.) *LAW, STATE AND RELIGION IN THE NEW EUROPE: DEBATES AND DILEMMAS* (Cambridge University Press, 2012) 93-114
- Malik, Maleiha, 'Feminism and Its "Others": Female Autonomy in an Age of Difference', 30(6) *Cardozo Law Review* (2009) 2613-2628
- Malik, Maleiha (ed.) *ANTI-MUSLIM PREJUDICE: PAST AND PRESENT* (Routledge, 2010)
- Mancini, Susanna, 'Patriarchy as the Exclusive Domain of the Other: The Veil Controversy, False Projection and Cultural Racism', 10(2) *International Journal of Constitutional Law I-CON* (2012) 411-428
- Mancini, Susanna, 'The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence', 30(6) *Cardozo Law Review* (2009) 2629-2668
- Mark C. Taylor (ed.), *CRITICAL TERMS FOR RELIGIOUS STUDIES* (University of Chicago Press, 1998)
- Marks, Stephen P., 'From the Single Confused Page to the Decalogue for Six Billion Persons: The Roots of the Universal Declaration of Human Rights in the French Revolution' 20 *Human Rights Quarterly* (1998) 459-514
- Marshall, Jill, 'Conditions of Freedom? European Human Rights Law and the Islamic Headscarf Debate', 30(3) *Human Rights Quarterly* (2008) 631-654
- Marshall, Jill, 'Feminist Constructions of Universalism and the Discourse of Human Rights', 5(1) *International Journal of Law in Context* (2009) 87-92
- Marshall, William P., 'Religion as Ideas: Religion as Identity', 7 *Journal of Contemporary Legal Studies* (1996) 385-406
- Martínez-Torrón, Javier, 'Limitations on Religious Freedom in the Case Law of the European Court of Human Rights', 19 *Emory International Law Review* (2005) 587-636
- Martínez-Torrón, Javier, 'The (Un)Protection of Individual Religious Identity in the Strasbourg Case Law', *Oxford Journal of Law and Religion* (2012) 1-25
- Massaro, Toni M. 'Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?' 87 *Michigan Law Review* (1989) 2099-2151

- Matsuda, Mari J., 'I and Thou and We and the Way to Peace', *Issues in Legal Scholarship*, Article 6 (2002)
- Matsuda, Mari J., 'Who is Excellent?' 1 *Seattle Journal for Social Justice* (2002) 29-43
- McCall, Leslie, 'The Complexity of Intersectionality', 30(3) *Signs: Journal of Women in Culture and Society* (2005) 1771-1800
- McCrudden, Christopher, 'Legal and Roman Catholic Conceptions of Human Rights: Convergence, Divergence and Dialogue?', 1(1) *Oxford Journal of Law and Religion* (2012) 185-201
- McDannell, Colleen, *MATERIAL CHRISTIANITY: RELIGION AND POPULAR CULTURE IN AMERICA* (Yale University Press, 1998)
- McGlynn, Clare, 'Families and European Union Law' in Rebecca Probert (ed.) *FAMILY LIFE AND THE LAW: UNDER ONE ROOF* (Ashgate, 2007) 247-258
- McGoldrick, Dominic, 'Religion in the European Public Square and in European Public Life – Crucifixes in the Classroom?' 11(3) *Human Rights Law Review* (2011) 451-502
- McGoldrick, Dominic, *HUMAN RIGHTS AND RELIGION: THE ISLAMIC HEADSCARF DEBATE IN EUROPE* (Hart Publishing, 2006)
- McGuire, Meredith B., *LIVED RELIGION: FAITH AND PRACTICE IN EVERYDAY LIFE* (Oxford University Press, 2008)
- McLane Wardlaw, Kim, 'Umpires, Empathy and Activism: Lessons from Judge Cardozo', 85 *Notre Dame Law Review* (2010) 1629-1662
- Meerschaut, Karen and Gutwirth, Serge, 'Legal pluralism and Islam in the Scales of the European Court of Human Rights: The Limits of Categorical Balancing' in Eva Brems (ed.), *CONFLICTS BETWEEN FUNDAMENTAL RIGHTS* (Intersentia, 2008) 431-465
- Merry, Sally Engle, 'Changing Rights, Changing Culture' in Jane K. Cowan et al. (eds.), *CULTURE AND RIGHTS: ANTHROPOLOGICAL PERSPECTIVES* (Cambridge University Press, 2001) 31-55
- Minow, Martha and Spelman, Elizabeth V., 'In Context', 63 *Southern California Law Review* (1990) 1597-1651
- Minow, Martha, 'Feminist Reason: Getting It and Losing It', 38 *Journal of Legal Education* (1988) 47-60
- Minow, Martha, 'Surviving Victim Talk', 40 *University of California Law Review* (1993) 1411-1445
- Minow, Martha, 'The Supreme Court 1986 Term: Justice Engendered', 101 *Harvard Law Review* (1987) 10-95
- Minow, Martha, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* (Cornell University Press, 1990)
- Minow, Martha, *NOT ONLY FOR MYSELF: IDENTITY, POLITICS AND THE LAW* (The New York Press, 1997)
- Mitnick, Eric J., 'Law, Cognition and Identity', 67 *Louisiana Law Review* (2007) 823-869

- Modood, Tariq, 'Anti-essentialism, Multiculturalism and Religious Groups', 6(4) *Journal of Political Philosophy* (1998) 378-399
- Modood, Tariq, 'Is There a Crisis of Secularism in Western Europe?', *Sociology of Religion* (2012) 1-20
- Modood, Tariq, 'Moderate Secularism, Religion as Identity and Respect for Religion', 81(1) *The Political Quarterly* (2010) 4-14
- Moens, Gabriel, 'The Action-Belief Dichotomy and Freedom of Religion,' 12 *Sydney Law Review* (1989-1990) 195-217
- Moller Okin, Susan, IS MULTICULTURALISM BAD FOR WOMEN? (Princeton University Press, 1999)
- Moon, Richard (ed.), LAW AND RELIGIOUS PLURALISM IN CANADA (University of British Columbia, 2008)
- Moors, A., Gezichtssluiers: Draagsters en Debatten [Face Veils: Wearers and Debates], Amsterdam School for Social Science Research, 31 January 2009, available at www.e-quality.nl/assets/e-quality/dossiers/Moslimas/Onderzoek%20Gezichtssluiers%20draagsters%20en%20debatten.pdf
- Morawa, Alexander H.E., 'The European Court of Human Rights and Minority Rights: The "Special Consideration" Standard in Light of Gypsy Council', 10 *International Journal on Minority and Group Rights* (2004) 97-109
- Morawa, Alexander H.E., 'Vulnerability as Concept of International Human Rights Law', 6 *Journal of International Relations and Development* (2003) 139-155
- Mossman, Mary Jane, 'Feminism and Legal Method: The Difference it Makes', 3 *Wisconsin Women's Law Journal* (1987) 147-168
- Munro, Vanessa E., 'Resemblances of Identity: Ludwig Wittgenstein and Contemporary Feminist Legal Theory', 12(2) *Res Publica* (2006) 137-162
- Murdoch, Jim, 'Freedom of Thought, Conscience and Religion: A Guide to the Implementation of Article 9 of the European Convention on Human Rights', Human Rights Handbooks No. 9 (Council of Europe, 2007)
- Murphy, Ann V., 'Reality Check: Rethinking the Ethics of Vulnerability', in Renée J. Heberle and Victoria Grace (eds.) THEORIZING SEXUAL VIOLENCE (Routledge, 2009) 55-71
- Murray, Melissa, 'The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers', 94 *Virginia Law Review* (2008) 385-455
- Mutua, Makau, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' 42 *Harvard International Law Journal* (2001) 201-245
- Naffine, Ngaire, 'Who are Law's Persons? From Cheshire Cats to Responsible Subjects', 66(3) *The Modern Law Review* (2003) 346-367
- Narayan, Uma, 'Essence of Culture and a Sense of History: A Feminist Critique of Cultural Essentialism', 13(2) *Hypatia* (1998) 86-106

- Nathwani, Niraj, 'Islamic Headscarves and Human Rights: A Critical Analysis of the Relevant Case Law of the European Court of Human Rights', 25(2) *Netherlands Quarterly of Human Rights* (2007) 221-254
- Neal, Mary, 'Not Gods but Animals: Human Dignity and Vulnerable Subjecthood', 33(3) *Liverpool Law Review* (2012) 177-200
- NeJaime, Douglas, 'Inclusion, Accommodation, and Recognition: Accounting for Differences Based on Religion and Sexual Orientation' 32 *Harvard Journal of Law & Gender* (2009) 303-381
- Nieuwenhuis, Aernout, 'The Concept of Pluralism in the Case-Law of the European Court of Human Rights,' 3(3) *European Constitutional Law Review* (2007) 367-384
- Nussbaum, Martha C., FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW (Oxford University Press, 2010)
- Nussbaum, Martha C., LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY (Basic Books, 2008)
- Nussbaum, Martha, 'Equity and Mercy', 22(2) *Philosophy and Public Affairs* (1993) 83-125
- O'Connell, Rory, 'Cinderella Comes to the Ball: Article 14 and the Right to Non-discrimination in the ECHR', 29(2) *Legal Studies* (2009) 211-229
- O'Connell, Rory, 'Realising Political Equality: the European Court of Human Rights and Positive Obligations in a Democracy', 61(3) *Northern Ireland Legal Quarterly* (2010) 263-279
- O'Connell, Rory, 'Substantive Equality in the European Court of Human Rights?' 107 *Michigan Law Review First Impressions* (2009) 129-133
- O'Nions, Helen, MINORITY RIGHTS PROTECTION IN INTERNATIONAL LAW: THE ROMA OF EUROPE (Ashgate, 2007)
- Olsen, Frances E., 'The Family and the Market: A Study of Ideology and Legal Reform', 96(7) *Harvard Law Review* (1983) 1497-1578
- Olsen, Frances, 'The Sex of Law' in David Kairys (ed.), THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (Basic Books, 1998) 692-707
- Open Society Foundations, 'Unveiling the Truth: Why 32 Muslim Women Wear the Full-face Veil in France' (2011) available at: www.soros.org/publications/unveilingtruth-why-32-muslim-women-wear-full-face-veil-france
- Open Society Justice Initiative, Written Comments in *S.A.S. v. France*, 10 July 2012
- Orsi, Robert A. (ed.), THE CAMBRIDGE COMPANION TO RELIGIOUS STUDIES (Cambridge University Press, 2012)
- Orsi, Robert A., 'Is the Study of Lived Religion Irrelevant to the World We Live In?' 42 *Journal for the Scientific Study of Religion* (2003) 169-174
- Otto, Dianne, 'Disconcerting "Masculinities": Reinventing the Gendered Subject(s) of International Human Rights Law', in Doris Buss and Ambreena Manji (eds.) INTERNATIONAL LAW: MODERN FEMINIST APPROACHES (Hart Publishing, 2005) 105-129

- Otto, Dianne, 'Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law' in Anne Orford (ed.) *INTERNATIONAL LAW AND ITS OTHERS* (Cambridge University Press, 2006) 318-356
- Otto, Dianne, 'Rethinking the Universality of Human Rights Law', 29 *Columbia Human Rights Law Review* (1997) 1-46
- Ouald Chaib, Saila and Peroni, Lourdes, 'Jakóbski v. Poland: Is the Court Opening the Door to Reasonable Accommodation?' (2010) Blog 'Strasbourg Observers' available at <http://strasbourgobservers.com/2010/12/08/jak%CF%8Cbski-v-poland-is-the-court-opening-the-door-to-reasonable-accommodation/>
- Ouald Chaib, Saila, 'Religious Accommodation in the Workplace: Improving the Legal Reasoning of the ECtHR' in Alidadi, Katayoun, Foblets, Marie-Claire and Vrielink, Jogchum (eds.) *A TEST OF FAITH? RELIGIOUS DIVERSITY AND ACCOMMODATION IN THE EUROPEAN WORKPLACE* (Aldershot, Ashgate, 2012) 33-58
- Ouald Chaib, Saila, 'Suku Phull v. France Rewritten from a Procedural Justice Perspective: Taking Religious Minorities Seriously' in Eva Brems (ed.), *DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR* (Cambridge University Press, 2013) 218-240
- Parekh, Bhikhu, *A NEW POLITICS OF IDENTITY: POLITICAL PRINCIPLES FOR AN INTERDEPENDENT WORLD* (Palgrave Macmillan, 2008)
- Parekh, Bhikhu, *RETHINKING MULTICULTURALISM: CULTURAL DIVERSITY AND POLITICAL THEORY* (Palgrave Macmillan, 2000)
- Parker, M. Todd, 'The Freedom to Manifest Religious Belief: An Analysis of the Necessity Clauses of the ICCPR and the ECHR', 17 *Duke Journal of Comparative and International Law* (2006) 91-129
- Parliamentary Assembly of the Council of Europe (PACE), Resolution 1743 'Islam, Islamism and Islamophobia in Europe' (Council of Europe, 2010)
- Patten, Alan and Kymlicka, Will, 'Introduction Language Rights and Political Theory: Context, Issues, and Approaches' in Will Kymlicka and Alan Patten (eds.), *LANGUAGE RIGHTS AND POLITICAL THEORY* (Oxford University Press 2003) 1-51
- Patterson, 'Postmodernism/Feminism/Law', 77 *Cornell Law Review* (1992) 254-317
- Peller, Gary, 'The Metaphysics of American Law', 73 *California Law Review* (1985) 1151-1290
- Pentassuglia, Gaetano, 'Evolving Protection of Minority Groups: Global Challenges and the Role of International Jurisprudence,' 11(2) *International Community Law Review* (2009) 185-218
- Pentassuglia, Gaetano, 'The Strasbourg Court and Minority Groups: Shooting in the Dark or a New Interpretive Ethos?' 19 *International Journal on Minority and Group Rights* (2012) 1-23

- Peterson, V. Spike and Parisi, Laura, 'Are Women Human? It's Not an Academic Question' in Tony Evans (ed.) *HUMAN RIGHTS FIFTY YEARS ON: A REAPPRAISAL* (Manchester University Press, 1998) 132-160
- Petkoff, Peter, '*Forum Internum* and *Forum Externum* in Canon Law and Public International Law with a Particular Reference to the Jurisprudence of the European Court of Human Rights,' *7 Religion and Human Rights* (2012) 183-214
- Petkoff, Peter, 'Religious Symbols between *Forum Internum* and *Forum Externum*' in Silvio Ferrari and Rinaldo Cristofori (eds.) *LAW AND RELIGION IN THE 21ST CENTURY: RELATIONS BETWEEN STATES AND RELIGIOUS COMMUNITIES* (Ashgate, 2010) 297-304
- Phillips, Anne, 'What's wrong with Essentialism?' *20 Distinktion: Scandinavian Journal of Social Theory* (2010) 47-60
- Phillips, Anne, *MULTICULTURALISM WITHOUT CULTURE* (Princeton University Press, 2007)
- Plant, Raymond, 'Religion, Identity and Freedom of Expression', *17(1) Res Publica* (2011) 7-20
- Post, Robert C., 'Who is Afraid of Jurispathic Courts?: Violence and Reason in *Nomos* and Narrative' *17(9) Yale Journal of Law and the Humanities* (2005) 9-16
- Post, Robert C., *PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW* (Duke University Press, 2001)
- Preis, Ann-Belinda, 'Human Rights as Cultural Practice: An Anthropological Critique', *18(2) Human Rights Quarterly* (1996) 286-315
- Razack, Sherene H., *CASTING OUT: THE EVICTION OF MUSLIMS FROM WESTERN LAW AND POLITICS* (University of Toronto Press, 2007)
- Reher, David Sven, 'Family Ties in Western Europe: Persistent Contrasts', *24(2) Population and Development Review* (1998) 203-234
- Renteln, Alison Dundes, 'Relativism and the Search for Human Rights' *90(1) American Anthropologist* (1988) 56-72
- Ringelheim, Julie 'Chapman *Redux*: The European Court of Human Rights and Roma Traditional Lifestyle' in Eva Brems (ed.), *DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR* (Cambridge University Press, 2013) 426-444
- Ringelheim, Julie 'Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory' in Camil Ungureanu and Lorenzo Zucca (eds.) *LAW, STATE AND RELIGION IN THE NEW EUROPE: DEBATES AND DILEMMAS* (Cambridge University Press, 2012) 283-306
- Ringelheim, Julie, 'Minority Rights in a Time of Multiculturalism – The Evolving Scope of the Framework Convention on the Protection of National Minorities' *10(1) Human Rights Law Review* (2010) 99-128
- Ringelheim, Julie, *DIVERSITÉ CULTURELLE ET DROITS DE L'HOMME: LA PROTECTION DES MINORITÉS PAR LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME* (Bruylant, 2006)

- Ristroph, Alice and Murray, Melissa, 'Disestablishing the Family', 119 *Yale Law Journal* (2010) 1236-1279
- Roberts, Dorothy E., 'Why Culture Matters to Law: The Difference Politics Make', in Austin Sarat and Thomas R. Kearns (eds.) *CULTURAL PLURALISM, IDENTITY POLITICS, AND THE LAW* (The University of Michigan Press, 1999) 85-110
- Rorive, Isabelle 'Religious Symbols in the Public Space: In Search of a European Answer,' 30 *Cardozo Law Review* (2009) 2669-2697
- Rosenblum, Nancy L. (ed.), *OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH: RELIGIOUS ACCOMMODATION IN PLURALIST DEMOCRACIES* (Princeton University Press, 2000)
- Rubinson, Robert, 'The Polyphonic Courtroom: Expanding the Possibilities of Judicial Discourse', 101(1) *Dickinson Law Review* (1996) 3-40
- Sajó, András, 'Emotions in Constitutional Design', 8 *International Journal of Constitutional Law* (2010) 354-384
- Sajó, András, *CONSTITUTIONAL SENTIMENTS* (Yale University Press, 2011)
- Sarat, Austin and Kearns, Thomas R., 'Responding to the Demands of Difference: An Introduction' in Austin Sarat and Thomas R. Kearns (eds.) *CULTURAL PLURALISM, IDENTITY POLITICS, AND THE LAW* (The University of Michigan Press, 1999) 2-25
- Satz, Ani B., 'Disability, Vulnerability and the Limits of Antidiscrimination', 83 *Washington Law Review* (2008) 513-568
- Scassa, Teresa, 'National Identity, Ethnic Surnames and the State', *Canadian Journal of Law and Society*, 11 (1996) 167-190
- Scharffs, Brett G., 'Symposium Introduction: The Freedom of Religion and Belief Jurisprudence of the European Court of Human Rights: Legal, Moral, Political and Religious Perspectives' 26 *Journal of Law and Religion* (2010-2011) 249-260
- Schneider, Elizabeth M., 'Feminism and the False Dichotomy of Victimization and Agency' 38 *New York Law School Law Review* (1993) 387-399
- Scott, Joan W., 'Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism', 14(1) *Feminist Studies* (1988) 33-50
- Scott, Joan W., 'Sexularism', RSCAS Distinguished Lecture 2009/01, Robert Schuman Center for Advanced Studies Ursula Hirschmann Annual Lecture on Gender and Europe, European University Institute, 23 April 2009
- Scott, Joan Wallach, *THE POLITICS OF THE VEIL* (Princeton University Press, 2010)
- Scully, Pamela, 'Vulnerable Women: A Critical Reflection on Human Rights Discourse and Sexual Violence', 23 *Emory International Law Review* (2009) 113-123
- Seymor Michael (ed.), *THE PLURAL STATES OF RECOGNITION* (Palgrave Macmillan, 2010)
- Shachar, Ayelet, 'Demystifying Culture', 0 *International Journal of Constitutional Law I-CON* (2011) 1-20
- Shachar, Ayelet, 'Two Critiques of Multiculturalism', 23(1) *Cardozo Law Review* (2001) 253-297

- Shakman Hurd, Elizabeth, 'Rethinking Secularism: A Suspension of (Dis)Belief', Blog 'The Immanent Frame' (2011) available at <http://blogs.ssrc.org/tif/2011/09/02/a-suspension-of-disbelief/>
- Shakman Hurd, Elizabeth, 'The Politics of Religious Freedom: Believing in Religious Freedom', Blog 'The Immanent Frame' (2012) available at <http://blogs.ssrc.org/tif/2012/03/01/believing-in-religious-freedom/>
- Shin, Patrick S., 'The Substantive Equality of Equal Treatment', 15 *Legal Theory* (2009) 149-172
- Shweder, Richard A., Minow, Martha and Markus, Hazel Rose 'Introduction' in Richard A. Shweder, Martha Minow and Hazel Rose Markus (eds.) *ENGAGING CULTURAL DIFFERENCES: THE MULTICULTURAL CHALLENGE IN LIBERAL DEMOCRACIES*, (Russell Sage Foundation, 2002) 1-15
- Sieder, Rachel and Witchell, Jessica, 'Advancing Indigenous Claims through the Law: Reflections on the Guatemalan Peace Process' in Jane K. Cowan et al. (eds.), *CULTURE AND RIGHTS: ANTHROPOLOGICAL PERSPECTIVES* (Cambridge University Press, 2001) 201-225
- Siegel, Neil S. and Siegel, Reva B., 'Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination and Sex Discrimination', 59 *Duke Law Journal* (2010) 771-798
- Siegel, Reva B., 'Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown', 117 *Harvard Law Review* (2003-2004) 1470-1547
- Smet, Stijn 'Eweida, Part II: The Margin of Appreciation Defeats and Silences All', Blog 'Strasbourg Observers' (2013) available at <http://strasbourgobservers.com/2013/01/23/eweida-part-ii-the-margin-of-appreciation-defeats-and-silences-all/>
- Smet, Stijn, 'Freedom of Religion v. Freedom from Religion: Putting Religious Duties Back on the Map' in Jeroen Temperman (ed.) *THE LAUTSI PAPERS: MULTIDISCIPLINARY REFLECTIONS ON RELIGIOUS SYMBOLS IN THE PUBLIC SCHOOL CLASSROOM* (Martinus Nijhoff, 2012) 113-142
- Smith, Steven D., 'The Rise and Fall of Religious Freedom in Constitutional Discourse', 140 *University of Pennsylvania Law Review* (1991) 149-240
- Spielmann, Dean, 'Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' Centre for European Legal Studies Working Paper Series (2012)
- Spijkerboer, Thomas, 'Structural Instability: Strasbourg Case Law on Children's Family Reunion', 11 *European Journal of Migration and Law* (2009) 271-293
- Sraimer, Clara, 'Vulnerable or Invisible? Asylum Seekers with Disabilities in Europe', *New Issues in Refugee Research*, Research Paper No. 194, The UN Refugee Agency (2010)

- Stalford, Helen, 'Concepts of Family under EU Law: Lessons from the ECHR', 16 *International Journal of Law, Policy and the Family* (2002) 410-434
- Steedly, Mary Margaret, 'What Is Culture? Does It Matter?' in Marjorie Garber, Paul B. Franklin and Rebecca L. Walkowitz (eds.), *FIELD WORK: SITES IN LITERARY AND CULTURAL STUDIES* (Routledge, 1996) 18-25
- Stein, Michael Ashley, 'Disability Human Rights', 95 *California Law Review* (2007) 75-121
- Sullivan, Donna J., 'Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination', 82 *American Journal of International Law* (1988) 487-520
- Sullivan, Winnifred Fallers, 'Judging Religion', 81(2) *Marquette Law Review* (1998) 441-460
- Sullivan, Winnifred Fallers, 'Neutralizing Religion; Or, What Is the Opposite of "Faith-Based"?'', 41(4) *History of Religions* (2002) 369-390
- Sullivan, Winnifred Fallers, 'We Are All Religious Now. Again', 76(4) *Social Research* (2009) 1181-1198
- Sullivan, Winnifred Fallers, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* (Princeton University Press, 2005)
- Sunder, Madhavi, 'Cultural Dissent' 54 *Stanford Law Review* (2001) 495-567
- Sunder, Madhavi, 'Piercing the Veil', 112 *Yale Law Journal* (2004) 1399-1472
- Taylor, Charles 'The Politics of Recognition', in Amy Gutmann (ed.) *MULTICULTURALISM AND 'THE POLITICS OF RECOGNITION': AN ESSAY BY CHARLES TAYLOR*, (Princeton University Press, 1992)
- Taylor, Charles, *A SECULAR AGE* (Harvard University Press, 2007)
- Taylor, Paul M., *FREEDOM OF RELIGION: UN AND EUROPEAN HUMAN RIGHTS LAW AND PRACTICE* (Cambridge University Press, 2005)
- Thio, Li-ann, 'Judges and Religious Questions: Adjudicating Claims to Wear Religious Dress in Public Schools', 2 *Religion and Human Rights* (2007) 119-148
- Thorson Plesner, Ingvill, 'The European Court on Human Rights between Fundamentalism and Liberal Secularism', Paper for the Seminar on The Islamic Headscarf Controversy and the Future of Freedom of Religion or Belief, Strasbourg, France 28-30 July 2005 available at <http://www.jus.uio.no/smr/om/aktuelt/arrangementer/historikk/forum/plesnerpaper.pdf>
- Thym, Daniel 'Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?' 57 *International and Comparative Law Quarterly* (2008) 87-112
- Timmann Mjaaland, Marius, Sigurdson, Ola and Thorgeirsdottir, Sigrídur, 'Introduction' in Marius Timmann Mjaaland, Ola Sigurdson and Sigrídur Thorgeirsdottir (eds.) *THE BODY UNBOUND: PHILOSOPHICAL PERSPECTIVES ON POLITICS, EMBODIMENT AND RELIGION* (Cambridge Scholars Publishing, 2010) 1-22

- Timmer, Alexandra, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights', in Martha Fineman and Anna Grear (eds.) *VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS* (Ashgate 2013) 147-170
- Timmer, Alexandra, 'Missed Chance at Condemning Paternalism: *S.H. and others v. Austria*, Part Two' (2010) Blog 'Strasbourg Observers' available at <http://strasbourgobservers.com/2010/04/26/missed-chance-at-condemning-paternalism-s-h-and-others-v-austria-part-two/>
- Timmer, Alexandra, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights', 11 *Human Rights Law Review* (2011) 707-738
- Tirosh, Yofi, 'A Name of One's Own: Gender and Symbolic Legal Personhood in the European Court of Human Rights', 33 *Harvard Journal of Law and Gender* (2010) 248-307
- Tirosh, Yofi, 'Adjudicating Appearance: From Identity to Personhood', 19 *Yale Journal of Law and Feminism* (2007) 101-174
- Tirosh, Yofi, 'Protecting Transgressive Identities: A Contemporary Challenge for Antidiscrimination Law', Paper presented at a Seminar at New York University Law School, New York (2007)
- Toner, Helen, 'Immigration Law and Family Life – A Happy Marriage?' in Rebecca Probert (ed.) *FAMILY LIFE AND THE LAW: UNDER ONE ROOF* (Ashgate, 2007) 197-221
- Torres, Gerald and Milun, Kathryn, 'Stories and Standing: The Legal Meaning of Identity' in Dan Danielsen and Karen Engle (eds.) *AFTER IDENTITY: A READER IN LAW AND CULTURE* (Routledge, 1995) 129-142
- Trigg, Roger, *EQUALITY, FREEDOM AND RELIGION* (Oxford University Press, 2012)
- Tulkens, Françoise and Piedimonte, Stefano, 'La Protection des Minorités Nationales dans la Jurisprudence de la Cour Européenne des Droits de l'Homme', 7th Meeting, Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN), Strasbourg, 12-13 March, 2008
- Tulkens, Françoise, 'The European Convention on Human Rights and Church-State Relations: Pluralism vs. Pluralism,' 30(6) *Cardozo Law Review* (2009) 2575-2591
- Turner, Bryan S., *VULNERABILITY AND HUMAN RIGHTS* (The Pennsylvania State University Press, 2006)
- Turner, Maximilien, 'The Price of a Scarf: The Economics of Strict Secularism', 26 *University of Pennsylvania Journal of International Economic Law* (2005) 321-346
- Uitz, Renata, 'Rethinking *Deschomets v. France*: Reinforcing the Protection of Religious Liberty through Personal Autonomy in Custody Disputes in Eva Brems (ed.), *DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR* (Cambridge University Press 2012) 173-191
- United Nations Human Rights Office of the High Commissioner, 'Minority Rights: International Standards and Guidance for Implementation' (2010)

- Vakulenko, Anastasia, “‘Islamic Headscarves’ and the European Convention on Human Rights: An Intersectional Perspective’ 16(2) *Social and Legal Studies* (2007) 183-199
- Van Der Schyff, Gerard, *LIMITATION OF RIGHTS: A STUDY OF THE EUROPEAN CONVENTION AND THE SOUTH AFRICAN BILL OF RIGHTS* (Wolf Legal Publishers, 2005)
- Van Dijk, Teun, ‘Principles of Critical Discourse Analysis’ in Margaret Wetherell, Stephanie Taylor and Simeon J. Yates (eds.) *DISCOURSE THEORY AND PRACTICE: A READER* (Sage Ltd., 2001) 300-317
- Van Leeuwen, Theo, *DISCOURSE AND PRACTICE: NEW TOOLS FOR CRITICAL DISCOURSE ANALYSIS* (Oxford University Press, 2008)
- Vandenhole, Wouter and Ryngaert, Julie, ‘Mainstreaming Children’s Rights in Migration Litigation: ECtHR, *Muskhadzhiyeva and others v. Belgium*, 19 January 2010’ in Eva Brems (ed.) *DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR* (Cambridge University Press, 2012) 68-92
- Vasquez, Manuel A., *MORE THAN BELIEF: A MATERIALIST THEORY OF RELIGION* (Oxford University Press, 2011)
- Vickers, Lucy, *RELIGIOUS FREEDOM, RELIGIOUS DISCRIMINATION AND THE WORKPLACE* (Hart Publishing, 2008)
- Vojdik, Valorie K., ‘Politics of the Headscarf in Turkey: Masculinities, Feminism, and the Construction of Collective Identities’, 33 *Harvard Journal of Law and Gender* (2010) 661-685
- Volpp, Leti, ‘Feminism versus Multiculturalism’, 101(5) *Columbia Law Review* (2001) 1181-1218
- Volpp, Leti, ‘The Culture of Citizenship’, 8 *Theoretical Inquiries in Law* (2007) 571-601
- Warne, Randi R., ‘Gender’ in Willi Braun and Russell T. McCutcheon (eds.), *GUIDE TO THE STUDY OF RELIGION* (Continuum, 2000) 140-154
- Warner, Michael, ‘Rethinking Secularism: Was Antebellum America Secular?’, Blog ‘The Immanent Frame’ (2012) <<http://blogs.ssrc.org/tif/2012/10/02/was-antebellum-america-secular/>> accessed 6 June 2013
- Webber, Jeremy, ‘Understanding the Religion of Freedom of Religion’ in Peter Cane, Carolyn Evans and Zoe Robinson (eds.) *LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT* (Cambridge University Press, 2011) 26-43
- Weinrib, Sara, ‘An Exemption for Sincere Believers: The Challenge of *Alberta v. Hutterian Brethren of Wilson Colony*’, 56(2) *McGill Law Journal* (2011) 719-750
- Weintraub, Jeff, ‘The Theory and Politics of the Public/Private Distinction,’ in Jeff Weintraub and Krishan Kumar (eds.) *PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE: PERSPECTIVES ON A GRAND DICHOTOMY* (University of Chicago Press, 1997)
- West, Robin, ‘The Anti-Empathic Turn’, Georgetown Public Law and Legal Theory Research Paper No. 11-97 (2011)
- White, James Boyd, ‘Response to Judging Religion by Winnifred Fallers Sullivan’, 81(2) *Marquette Law Review* (1998) 509-511

- White, James Boyd, *THE LEGAL IMAGINATION* (The University of Chicago Press, 1973/1985)
- Wildman, Stephanie M, 'Language and Silence: Making Systems of Privilege Visible', 35(3) *Santa Clara Law Review* (1995) 881-906
- Williams, Joan Chalmers, 'Dissolving the Sameness/Difference Debate: A Post-Modern Path beyond Essentialism in Feminist and Critical Race Theory', *Duke Law Journal* (1991) 296-323
- Wishik, Heather Ruth, 'To Question Everything: The Inquiries of Feminist Jurisprudence', 1 *Berkeley Women's Law Journal* (1985) 64-77
- Wizner, Stephen, 'Passion in Legal Argument and Judicial Decision Making: A Comment on Goldberg v. Kelly', 10 *Cardozo Law Review* (1988) 179-192
- Wong, Jane, 'The Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond', 5 *William & Mary Journal of Women and the Law* (1999) 273-296
- Wray, Helena, 'Moulding the Migrant Family', 29(4) *Legal Studies* (2009) 592-618
- Xenos, Dimitris, 'The Human Rights of the Vulnerable', 13(4) *The International Journal of Human Rights* (2009) 591-614
- Yoshino, Kenji, 'Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"' 108 *Yale Law Journal* (1998-1999) 485-571
- Yoshino, Kenji, 'Empathy and Judgment', 57 *Cleveland State Law Review* (2009) 683-701
- Yoshino, Kenji, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (New York: Random House, 2007)
- Young, Iris Marion, 'Equality of Whom? Social Groups and Judgments of Injustice', 9(1) *Journal of Political Philosophy* (2001) 1-18
- Young, Iris Marion, 'Gender as Seriality: Thinking about Women as a Social Collective', 19 *Signs: Journal of Women in Culture and Society* (1994) 713-738
- Young, Iris Marion, 'Status Inequality and Social Groups', *Issues in Legal Scholarship*, Article 9 (2002)
- Young, Iris Marion, 'The Generality of Law and the Specific of Cases: A Comment on Elizabeth Schneider', 57 *University of Pittsburgh Law Review* (1996) 549-552
- Yourow, Charles, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* (Martinus Nijhoff, 1996)
- Yovel, Jonathan, 'Language and Power in a Place of Contingencies: Law and the Polyphony of Lay Argumentation', Yale Law School Faculty Scholarship Series Paper (2010)

CASE LAW¹²⁸⁶

Cultural Practice/Lifestyle

- ECtHR, *Buckland v. the United Kingdom*, Application No. 40060/08, 18 September 2012
- ECtHR, *Horie v. the United Kingdom*, Application No. 31845/10, 1 February 2011
- ECtHR, *Muñoz Díaz v. Spain*, Application No. 49151/07, 8 December 2009
- ECtHR, *Stenegry v. France*, Application No. 40987/05, 22 May 2007
- ECtHR, *Wells v. the United Kingdom*, Application No. 37794/05, 16 January 2007
- ECtHR, *Codona v. the United Kingdom*, Application No. 485/05, 7 February 2006
- ECtHR, *Johtti Sapmelacat r.y. and Others v. Finland*, Application No. 42969/98, 18 January 2005
- ECtHR, *Connors v. the United Kingdom*, Application No. 66746/01, 27 May 2004
- ECtHR, *The Gypsy Council and Others v. the United Kingdom*, Application No. 66336/01, 14 May 2002
- ECtHR, *Clark and Others v. the United Kingdom*, Application No. 28575/95, 22 May 2001
- ECtHR, *Harrison v. the United Kingdom*, Application No. 32263/96, 3 May 2001
- ECtHR, *Beatrice and John Smith v. the United Kingdom*, Application No. 34334/96, 3 May 2001
- ECtHR, *Eatson v. the United Kingdom*, Application No. 39664/98, 30 January 2001
- ECtHR, *Smith v. the United Kingdom*, Application No. 40435/98, 30 January 2001
- ECtHR, *Porter v. the United Kingdom*, Application No. 47953/99, 30 January 2001
- ECtHR (GC), *Chapman v. the United Kingdom*, Application No. 27238/95, 18 January 2001
- ECtHR (GC), *Beard v. the United Kingdom*, Application No. 24882/94, 18 January 2001
- ECtHR (GC), *Coster v. the United Kingdom*, Application No. 24876/94, 18 January 2001
- ECtHR (GC), *Jane Smith v. the United Kingdom*, Application No. 25154/94, 18 January 2001
- ECtHR (GC), *Lee v. the United Kingdom*, Application No. 25289/94, 18 January 2001
- ECtHR, *Muonio Saami Village v. Sweden*, Application No. 28222/95, 9 January 2001
- ECtHR, *Noack and Others v. Germany*, Application No. 46346/99, 25 May 2000
- ECmmHR, *From v. Sweden*, Application No. 34776/94, 4 March 1998
- ECmmHR, *Konkama and 38 Others Sami Villages v. Sweden*, Application No. 27033/95, 25 November 1996
- ECmmHR, *P. v. the United Kingdom*, Application No. 14751/89, 12 December 1990
- ECtHR, *G. and E. v. Norway*, Application Nos. 9278/81 and 9415/81, 3 October 1983

¹²⁸⁶ The case law is organized by theme and arranged in chronological order.

Religion

- ECtHR (GC), *Sindicatul "Păstorul cel Bun" v. Romania*, Application No. 2330/09, 9 July 2013
- ECtHR, *Vojnity v. Hungary*, Application No. 29617/07, 12 February 2013
- ECtHR, *Austrianu v. Romania*, Application No. 16117/02, 12 February 2013
- ECtHR, *Eweida and Others v. the United Kingdom*, Applications Nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013
- ECtHR, *Dimitras and Others v. Greece*, Application Nos. 44077/09, 15369/10 and 41345/10, 8 January 2013
- ECtHR, *Schilder v. the Netherlands*, Application No. 2158/12, 16 October 2012
- ECtHR, *Ásatrúarfélagið v. Iceland*, Application No. 22897/08, 18 September 2012
- ECtHR, *Fusu Arcadie and Others v. the Republic of Moldova*, Application No. 22218/06, 17 July 2012
- ECtHR, *Fernández Martínez v. Spain*, Application No. 56030/07, 15 May 2012
- ECtHR, *Francesco Sessa v. Italy*, Application No. 28790/08, 3 April 2012
- ECtHR, *Gatis Kovaļkovs v. Latvia*, Application No. 35021/05, 31 January 2012
- ECtHR, *Feti Demirtas v. Turkey*, Application No. 5260/07, 17 January 2012
- ECtHR, *Tsaturyan v. Armenia*, Application No. 37821/03, 10 January 2012
- ECtHR, *Bukharatyan v. Armenia*, Application No. 37819/03, 10 January 2012
- ECtHR, *Erçep v. Turkey*, Application No. 43965/04, 22 November 2011
- ECtHR, *Dimitras and Others (No. 2)*, Application Nos. 34207/08 and 6365/09, 3 November 2011
- ECtHR, *Dojan and Others v. Germany*, Application No. 319/08, 13 September 2011
- ECtHR (GC), *Bayatyan v. Armenia*, Application No. 23459/03, 7 July 2011
- ECtHR *Association Les Témoins de Jéhovah v. France*, Application No. 8916/05, 30 June 2011
- ECtHR, *Ouardiri v. Switzerland*, Application No. 65840/09, 28 June 2011
- ECtHR, *Ligue des musulmans de Suisse and Others v. Switzerland*, Application No. 66274/09, 28 June 2011
- ECtHR (GC), *Lautsi and Others v. Italy*, Application No. 30814/06, 18 March 2011
- ECtHR, *Wasmuth v. Germany*, Application No. 12884/03, 17 February 2011
- ECtHR, *Siebenhaar v. Germany*, Application No. 18136/02, 3 February 2011
- ECtHR, *Boychev and Others v. Bulgaria*, Application No. 77185/01, 27 January 2011
- ECtHR, *Jakóbski v. Poland*, Application No. 18429/06, 7 December 2010
- ECtHR, *Savez crkava "Riječ života" and Others v. Croatia*, Application No. 7798/08, 9 December 2010
- ECtHR, *Ali v. Romania*, Application No. 20307/02, 9 November 2010
- ECtHR (GC), *Şerife Yiğit v. Turkey*, Application No. 3976/05, 2 November 2010

- ECtHR, *Schiuth v. Germany*, Application No. 1620/03, 23 September 2010
- ECtHR, *Obst v. Germany*, Application No. 425/03, 23 September 2010
- ECtHR, *Grzelak v. Poland*, Application No. 7710/02, 15 June 2010
- ECtHR, *Jehovah's Witnesses of Moscow and Others v. Russia*, Application No. 302/02, 10 June 2010
- ECtHR, *Dimitras and Others v. Greece*, Application Nos. 42837/06 3237/07 3269/07 35793/07 and 6099/08, 3 June 2010
- ECtHR, *Ahmet Arslan and Others v. Turkey*, Application No. 41135/98, 23 February 2010
- ECtHR, *Sinan Işık v. Turkey*, Application No. 21924/05, 2 February 2010
- ECtHR, *Koppi v. Austria*, Application No. 33001/03, 10 December 2009
- ECtHR, *Skugar and Others v. Russia*, Application No. 40010/04, 3 December 2009
- ECtHR, *Lautsi and Others v Italy*, Application No. 30814/06, 3 November 2009
- ECtHR, *Appel-Irrgan v. Germany*, Application No. 45 216/07, 6 October 2009
- ECtHR, *Kimlya and Others v. Russia*, Applications Nos. 76836/01 and 32782/03, 1 October 2009
- ECtHR, *Miroļubovs and Others v. Latvia*, Application No. 798/05, 15 September 2009
- ECtHR, *Gamaleddyn v. France*, Application No. 18527/08, 30 June 2009
- ECtHR, *Ghazal v. France*, Application No. 29134/08, 30 June 2009
- ECtHR, *Aktas v. France*, Application No. 43563/08, 30 June 2009
- ECtHR, *Bayrak v. France*, Application No. 14308/08, 30 June 2009
- ECtHR, *Ranjit Singh v. France*, Application No. 27561/08, 30 June 2009
- ECtHR, *Jasvir Singh v. France*, Application No. 25463/08, 30 June 2009
- ECtHR, *Masaev v. Moldova*, Application No. 6303/05, 12 May 2009
- ECtHR, *Lang v. Austria*, Application No. 28648/03, 19 March 2009
- ECtHR, *Gutl v. Austria*, Application No. 49686/99, 12 March 2009
- ECtHR, *Loffelmann v. Austria*, Application No. 42967/98, 12 March 2009
- ECtHR, *Nolan and K. v. Russia*, Application No. 2512/04, 12 February 2009
- ECtHR, *Holy Synod of the Bulgarian Orthodox Church and Others v. Bulgaria*, Application Nos. 412/03 and 35677/04, 22 January 2009
- ECtHR, *Dogru v. France*, Application No. 27058/05, 4 December 2008
- ECtHR, *Kervanci v. France*, Application No. 31645/04, 4 December 2008
- ECtHR, *Mann Singh v. France*, Application No. 24479/07, 13 November 2008
- ECtHR, *Leela Förderkreis E.V. and Others v. Germany*, Application No. 58911/00, 6 November 2008
- ECtHR, *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, Application No. 40825/98, 31 July 2008
- ECtHR, *El Morsli v. France*, Application No. 15585/06, 4 March 2008
- ECtHR, *Alexandridis v. Greece*, Application No. 19516/06, 21 February 2008
- ECtHR, *Perry v. Latvia*, Application No. 30273/03, 8 November 2007

- ECtHR, *Hasan and Eylem Zengin v. Turkey*, Application No. 1448/04, 9 October 2007
- ECtHR, *Svyato-Mykhaylivska Parafiya v. Ukraine*, Application No. 77703/01, 14 June 2007
- ECtHR, *97 members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v. Georgia*, Application No. 71156/01, 3 May 2007
- ECtHR, *Ivanova v. Bulgaria*, Application No. 52435/99, 12 April 2007
- ECtHR, *Church of Scientology Moscow v. Russia*, Application No. 18147/02, 5 April 2007
- ECtHR, *Biserica Adevărat Ortodoxă din Moldova and Others v. Moldova*, Application No. 952/03, 27 February 2007
- ECtHR, *Kuznetsov and Others v. Russia*, Application No. 184/02, 10 January 2007
- ECtHR, *Igors Dmitrijevs v. Latvia*, Application No. 61638/00, 30 November 2006
- ECtHR, *Agga v. Greece (No. 3)*, Application No. 32186/02, 13 July 2006
- ECtHR, *Agga v. Greece (No. 4)*, Application No. 33331/02, 13 July 2006
- ECtHR, *Deschomets v. France*, Application No. 31956/02, 16 May 2006
- ECtHR, *Kosteski v. the Former Yugoslav Republic of Macedonia*, Application No. 55170/00, 13 April 2006
- ECtHR, *Kurtulmus v. Turkey*, Application No. 65500/01, 24 January 2006
- ECtHR, *Kose and 93 Others v. Turkey*, Application No. 26625/02, 24 January 2006
- ECtHR, *Mikolenko v. Estonia*, Application No. 16944/03, 5 January 2006
- ECtHR (GC), *Leyla Şahin v. Turkey*, Application No. 44774/98, 10 November 2005
- ECtHR, *Jones v. the United Kingdom*, Application No. 42639/04, 13 September 2005
- ECtHR, *Phull v. France*, Application No. 35753/03, 11 January 2005
- ECtHR, *Supreme Holy Council of the Muslim Community v. Bulgaria*, Application No. 39023/97, 16 December 2004
- ECtHR, *Vergos v. Greece*, Application No. 6550/01, 24 June 2004
- ECtHR, *Palau-Martinez v. France*, Application No. 64927/01, 16 December 2003
- ECtHR, *Poltoratskiy v. Ukraine*, Application No. 38812/97, 29 April 2003
- ECtHR, *Kuznetsov v. Ukraine*, Application No. 39042/97, 29 April 2003
- ECtHR, *Porter v. the United Kingdom*, Application No. 15814/02, 8 April 2003
- ECtHR(GC), *Refah Partisi and Others v. Turkey*, Applications Nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003
- ECtHR *Islamische Religionsgemeinschaft e.V. v. Germany*, Application No. 53871/00, 5 December 2002
- ECtHR, *Agga v. Greece (No. 2)*, Application Nos. 50776/99 52912/99, 17 October 2002
- ECtHR *Metropolitan Church of Bessarabia and Others v. Moldova*, Application No. 45701/99, 13 December 2001
- ECtHR *Pichon and Sajous v. France*, Application No. 49853/99, 2 October 2001
- ECtHR *Johannische Kirche and Peters v. Germany*, Application No. 41754/98, 10 July 2001

- ECtHR *Dahlab v. Switzerland*, Application No. 42393/98, 15 February 2001
- ECtHR(GC), *Cha'are Shalom Ve Tsedek v. France*, Application No. 27417/95, 27 June 2000
- ECtHR (GC), *Thlimmenos v. Greece*, Application No. 34369/97, 6 April 2000
- ECtHR, *J.L. v. Finland*, Application No 32526/96, 16 November 2000
- ECtHR, *Hasan and Chaush v. Bulgaria*, Application No 30985/96, 26 October 2000
- ECtHR, *Serif v. Greece*, Application No. 38178/97, 14 December 1999
- ECtHR, *Buscarini and Others v. San Marino*, Application No. 24646/94, 18 February 1999
- ECtHR, *Larissis and Others v. Greece*, Applications Nos. 23372/94 26377/94 and 26378/94, 24 February 1998
- ECtHR, *Kalaç v. Turkey*, Application No. 20704/92, 1 July 1997
- ECtHR, *Efstathiou v. Greece*, Application No. 24095/94, 18 December 1996
- ECtHR, *Valsamis v. Greece*, Application No. 21787/93, 18 December 1996
- ECmmHR, *Konttinen v. Finland*, Application No. 24949/94, 3 December 1996
- ECtHR, *Manoussakis and Others v. Greece*, Application No. 18748/91, 26 September 1996
- ECtHR, *Van Den Dungen v. the Netherlands*, Application No. 22838/93, 22 February 1995
- ECtHR, *Holy Monasteries v. Greece*, Application No. 13092/87, 9 December 1994
- ECtHR, *Kokkinakis v. Greece*, Application No. 14307/88, 25 May 1993
- ECtHR, *Hoffmann v. Austria*, Application No. 12875/87, 23 June 1993
- ECmmHR, *H.B. v. the United Kingdom*, Application No. 11991/86, 18 July 1986
- ECmmHR, *C. v. the United Kingdom*, Application No. 10358/83, 15 December 1983
- ECmmHR, *D. v. France*, Application No. 10180/82, 6 December 1983
- ECmmHR, *X. v. Austria*, Application No. 8652/79, 15 October 1981
- ECmmHR, *X. v. the United Kingdom*, Application No. 8160/78, 12 March 1981
- ECmmHR, *X. v. the United Kingdom*, Application No. 7992/77, 12 July 1978

Language

- ECtHR, *Şükran Aydın and Others v. Turkey*, Applications Nos. 49197/06, 23196/07, 50242/08, 60912/08 and 14871/09, 22 January 2013
- ECtHR (GC), *Catan and Others v. Moldova and Russia*, Applications Nos. 43370/04, 8252/05 and 18454/0619, October 2012
- ECtHR, *Mehmet Nuri Özen and Others v. Turkey*, Applications Nos. 15672/08, 24462/08, 27559/08, 28302/08, 28312/08, 34823/08, 40738/08, 41124/08, 43197/08, 51938/08 and 58170/08, 11 January 2011
- ECtHR, *Birk-Levy v. France*, Application No. 39426/06, 21 September 2010

- ECtHR, *Kemal Taşkın and Others v. Turkey*, Application Nos. 30206/04, 37038/04, 43681/04, 45376/04, 12881/05, 28697/05, 32797/05 et 45609/05, 2 February 2010
- ECtHR, *İrfan Temel and Others v. Turkey*, Application No. 36458/02, 3 March 2009
- ECtHR, *Senger v. Germany*, Application No. 32524/05, 3 February 2009
- ECtHR, *Güzel Erdagöz v. Turkey*, Application No. 37483/02, 21 October 2008
- ECtHR, *Baylac-Ferrer and Suarez v. France*, Application No. 27977/04, 25 September 2008
- ECtHR, *Bulgakov v. Ukraine*, Application No. 59894/00, 11 September 2007
- ECtHR, *Ulusoy and Others v. Turkey*, Application No. 34797/03, 3 May 2007
- ECtHR, *Kuharec alias Kuhareca v. Latvia*, Application No. 71557/01, 7 December 2004
- ECtHR, *Mentzen v. Latvia*, Application No. 71074/01, 7 December 2004
- ECtHR, *Podkolzina v. Latvia*, Application No. 46726/99, 9 April 2002
- ECtHR, *Kozlovs v. Latvia*, Application No. 50835/99, 10 January 2002
- ECtHR, *Association Ekin v. France*, Application No. 39288/98, 17 July 2001
- ECtHR (GC), *Cyprus v. Turkey*, Application No. 25781/94, 10 May 2001
- ECmmHR, *Association "Andecha Astur" v. Spain*, Application No. 34184/96, 7 July 1997
- ECmmHR, *Fryske Nasjonale Partij and Others v. the Netherlands*, Application No. 11100/84, 12 December 1985
- ECmmHR, *Clerfayt Legros v. Belgium*, Application No. 10650/83, 17 May 1985
- ECmmHR, *A Group of Inhabitants of Sint-Pieters-Leeuw v. Belgium*, 16 December 1968
- ECtHR (Plenary), *Case 'Relating to certain aspects of the laws on the use of languages in education in Belgium'*, Applications Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, 23 July 1968

Group Vulnerability

- ECtHR, *Horváth and Kiss v. Hungary*, Application No. 11146/11, 29 January 2013
- ECtHR, *Yordanova v. Bulgaria*, Application No. 25446/06, 24 April 2012
- ECtHR, (GC) *Aksu v. Turkey*, Application Nos. 4149/04 and 41029/04, 15 March 2012
- ECtHR, *V.C. v Slovakia*, Application No 18968/07, 8 November 2011
- ECtHR, *Kiyutin v. Russia*, Application No. 2700/10, 10 March 2011
- ECtHR (GC), *M.S.S. v. Belgium and Greece*, Application No. 30696/09, 21 January 2011
- ECtHR, *Milanović v. Serbia*, Application No. 44614/07, 14 December 2010
- ECtHR, *Alajos Kiss v. Hungary*, Application No. 38832/06, 20 May 2010
- ECtHR (GC), *Oršuš and Others v. Croatia*, Application No. 15766/03, 16 March 2010
- ECtHR, *Budina v. Russia*, Application No. 45603/05, 18 June 2009
- ECtHR, *Sampanis and Others v. Greece*, Application No. 32526/05, 5 June 2008
- ECtHR (GC), *D.H. and Others v. the Czech Republic*, Application No. 57325/00, 13 November 2007

- ECtHR, *Hoogendijk v. the Netherlands*, Application No. 58641/00, 6 January 2005
- ECtHR, *M.Y.H. and Others v. Sweden*, Application No. 50859/10, 27 June 2003
- ECtHR, *Larioshina v. Russia*, Application No. 56869/00, 23 April 2002
- ECtHR, *Hugh Jordan v. the United Kingdom*, Application No. 24746/94, 4 May 2001

Family Life

- ECtHR, *Berisha v. Switzerland*, Application No. 948/12, 30 July 2013
- ECtHR, *Hasanbasic v. Switzerland*, Application No. 52166/09, 11 June 2013
- ECtHR, *Maskhadova and Others v. Russia*, Application No. 18071/05, 6 June 2013
- ECtHR (GC), *De Souza Ribeiro v. France*, Application No. 22689/07, 13 December 2012
- ECtHR, *Butt v. Norway*, Application No. 47017/09, 4 December 2012
- ECtHR, *Imamovic v. Sweden*, Application No. 57633/10, 13 November 2012
- ECtHR, *M.S. v. the United Kingdom*, Application No. 56090/08, 16 October 2012
- ECtHR, *Samsonnikov v. Estonia*, Application No. 52178/10, 3 July 2012
- ECtHR, *Nacic and Others v. Sweden*, Application No. 16567/10, 15 May 2012
- ECtHR, *Akbulut v. the United Kingdom*, Application No. 53586/08, 10 April 2012
- ECtHR, *Balogun v. the United Kingdom*, Application No. 60286/09, 10 April 2012
- ECtHR, *A.H. v. the United Kingdom*, Application No. 6222/10, 20 December 2011
- ECtHR *Alim v. Russia*, Application No. 39417/07, 27 September 2011
- ECtHR, *A.A. v. the United Kingdom*, Application No. 8000/08, 20 September 2011
- ECtHR, *Schneider v. Germany*, Application No. 17080/07, 15 September 2011
- ECtHR, *Osman v. the United Kingdom*, Application No. 38058/09, 14 June 2011
- ECtHR, *Anam v. the United Kingdom*, Application No. 21783/08, 7 June 2011
- ECtHR, *N.M. and M.M. v. the United Kingdom*, Application Nos. 38851/09 and 39128/09, 25 January 2011
- ECtHR, *Bousarra v. France*, Application No. 23 September 2010
- ECtHR, *Miah v. the United Kingdom*, Application No. 53080/07, 27 April 2010
- ECtHR, *Iyisan v. the United Kingdom*, Application No. 7673/08, 9 February 2010
- ECtHR, *Yesufa v. the United Kingdom*, Application No. 7347/08, 26 January 2010
- ECtHR, *A. W. Khan v. the United Kingdom*, Application No. 47486/06, 12 January 2010
- ECtHR, *Onur v. the United Kingdom*, Application No. 27319/07, 17 February 2009
- ECtHR (GC), *Maslov v. Austria*, Application No. 1638/03, 23 June 2008
- ECtHR, *Emre v. Switzerland*, Application No. 42034/04, 22 May 2008
- ECtHR, *Emonet and Others v. Switzerland*, Application No. 39051/03, 13 December 2007
- ECtHR, *Konstatinov v. the Netherlands*, Application No. 16351/03, 26 April 2007
- ECtHR, *Kilic v. Denmark*, Application No. 20277/05, 22 January 2007
- ECtHR, *Kaya v. Germany*, Application No. 31753/02, 28 June 2007
- ECtHR, *Kaftailova v. Latvia*, Application No. 59643/00, 22 June 2006

- ECtHR, *Shevanova v. Latvia*, Application No. 58822/00, 15 June 2006
- ECtHR, *Aoulmi v. France*, Application No. 50278/99, 17 January 2006
- ECtHR, *Dorochenko v. Estonia*, Application No. 10507/03, 5 January 2006
- ECtHR, *Nagula v. Estonia*, Application No. 39203/02, 25 October 2005
- ECtHR, *Sisojeva and Others v. Latvia*, Application No. 60654/00, 16 June 2005
- ECtHR, *Pini and Others v. Romania*, Application Nos. 78028/01 and 78030/01, 22 June 2004
- ECtHR, *L. v the Netherlands*, Application No. 45582/99, 1 June 2004
- ECtHR, *Ivanov v. Latvia*, Application No. 55933/00, 25 March 2004
- ECtHR, *Kolosovskiy v. Latvia*, Application No. 50183/99, 29 January 2004
- ECtHR (GC), *Slivenko v Latvia*, Application No. 48321/99, 9 October 2003
- ECtHR, *Benhebba v. France*, Application No. 53441/99, 10 July 2003
- ECtHR, *Şen v. the Netherlands*, Application No. 31465/96, 21 December 2001
- ECtHR, *Lakatoš v. the Czech Republic*, Application No. 42052/98, 23 October 2001
- ECtHR (GC), *K. and T. v. Finland*, Application No. 25702/94, 12 July 2001
- ECtHR, *Javeed v. the Netherlands*, Application No. 47390/99, 3 July 2001
- ECtHR, *Ezzouhdi v. France*, Application No. 47160/99, 13 February 2001
- ECtHR, *Deljijaj v. Germany*, Application No. 35424/97, 8 February 2001
- ECtHR, *Kwakye-Nti and Dufie v. the Netherlands*, Application No. 31519/96, 7 November 2000
- ECtHR (GC), *Scozzari and Giunta v. Italy*, Application Nos. 39221/98 and 41963/98, 13 July 2000
- ECtHR, *Baghli v. France*, Application No. 34374/97, 30 November 1999
- ECtHR, *Bronda v. Italy*, Application No. 22430/93, 9 June 1998
- ECtHR, *Boujlifa v. France*, Application No. 122/1996/741/940, 21 October 1997
- ECtHR, *El Boujaïdi v. France*, Application No. 25613/94, 26 September 1997
- ECtHR (GC), *X, Y and Z v. the United Kingdom*, Application No. 21830/93, 22 April 1997
- ECtHR, *Bouchelkia v. France*, Application No. 23078/93, 29 January 1997
- ECtHR, *Ahmut v. the Netherlands*, Application No. 21702/93, 28 November 1996
- ECtHR, *C. v. Belgium*, Application No. 21794/93, 7 August 1996
- ECtHR, *Boughanemi v. France*, Application No. 22070/93, 24 April 1996
- ECtHR, *Gül v. Switzerland*, Application No. 23218/94, 19 February 1996
- ECtHR, *Nasri v. France*, Application No. 19465/92, 13 July 1995
- ECtHR, *Kroon and Others v. the Netherlands*, Application No. 18535/91, 27 October 1994
- ECtHR, *Hokkanen v. Finland*, Application No. 19823/92, 23 September 1994
- ECmmHR, *N. and Family v. Sweden*, Application No. 22806/93, 10 March 1994
- ECmmHR, *Anderson, Anderson and Duffy*, Application No. 20478/92, 1 September 1993

- ECmmHR, *McDonnell v. the United Kingdom*, Application No. 20480/92, 1 September 1993
- ECmmHR, *Kinsella and Mulvaney v. the United Kingdom*, Application No. 19200/91, 1 September 1993
- ECmmHR, *Armstrong v. the United Kingdom*, 20483/92, 1 September 1993
- ECmmHR, *McCombe v. the United Kingdom*, Application No. 19785/92, 1 September 1993
- ECmmHR, *Holmes, McGeough and Holmes v. the United Kingdom*, Application No. 19786/92, 1 September 1993
- ECmmHR, *Boyle v the United Kingdom*, Application No. 16580/90, 9 February 1993
- ECmmHR, *T.A. and H.N. v. the United Kingdom*, Application No. 19577/92, 8 January 1993
- ECmmHR, *P.K., M.K. and B.K v. the United Kingdom*, Application No. 19085/91, 9 December 1992
- ECmmHR, *McCotter v. the United Kingdom*, Application No. 18632/91, 9 December 1992
- ECmmHR, *Daldal-Uslu v. the Netherlands*, Application No. 17546/90, 7 December 1992
- ECmmHR, *Akhtar, Johangir and Johangir v. the Netherlands*, Application No. 14852/89, 29 June 1992
- ECtHR, *Moustaquim v. Belgium*, Application No. 12313/86, 18 February 1991
- ECmmHR, *Lawlor v. the United Kingdom*, Application No. 12763/87, 14 July 1988
- ECmmHR, *Price v. the United Kingdom*, Application No. 12402/86, 9 March 1988
- ECmmHR, *K. v. the United Kingdom*, Application No. 11468/85, 15 October 1986
- ECmmHR, *S. and S. v. the United Kingdom*, Application No. 10375/ 83, 10 December 1984
- ECmmHR, *X. v. France*, Application No. 9993/82, 5 October 1982
- ECmmHR, *X. v. Switzerland*, Application No. 8924/80, 10 March 1981
- ECtHR (Plenary), *Marckx v Belgium*, Application No. 6833/74, 13 June 1979

Gender and Sexuality

- ECtHR, *Eremia v. the Republic of Moldova*, Application No. 3564/11, 28 May 2013
- ECtHR, *Boeckel and Gessner-Boeckel v. Germany*, Application No. 8017/11, 7 May 2013
- ECtHR (GC), *X. and Others v. Austria*, Application No. 19010/07, 19 February 2013
- ECtHR, *Csoma v. Romania*, Application No. 8759/05, 15 January 2013
- ECtHR, *H. v. Finland*, Application No. 37359/09, 13 November 2012 (referred to the Grand Chamber)
- ECtHR, *P. and S. v. Poland*, Application No. 57375/08, 30 October 2012
- ECtHR, *X. v. Turkey*, Application No. 24626/09, 9 October 2012

- ECtHR, *B.S. v. Spain*, Application No. 47159/08, 24 July 2012
- ECtHR, *Genderdoc-M v. Moldova*, Application No. 9106/06, 12 June 2012
- ECtHR, *I.G. v. Moldova*, Application No. 53519/07, 15 May 2012
- ECtHR, *Kalucza v. Hungary*, Application No. 57693/10, 24 April 2012
- ECtHR (GC), *Konstantin Markin v. Russia*, Application No. 30078/06, 22 March 2012
- ECtHR, *Gas and Dubois v. France*, Application No. 25951/07, 15 March 2012
- ECtHR, *Vejdeland and Others v. Sweden*, Application No. 1813/07, 9 February 2012
- ECtHR (GC), *S.H. and Others v. Austria*, Application No. 57813/00, 3 November 2011
- ECtHR, *Omeredo v. Austria*, Application No. 8969/10, 20 September 2011
- ECtHR, *R.R. v. Poland*, Application No. 27617/04, 26 May 2011
- ECtHR, *Andrle v. the Czech Republic*, Application No. 6268/08, 17 February 2011
- ECtHR (GC), *A. B. and C. v. Ireland*, Application No. 25579/05, 16 December 2010
- ECtHR, *P.V. v. Spain*, Application No. 35159/09, 30 November 2010
- ECtHR, *Alekseyev v. Russia*, Applications Nos. 4916/07, 25924/08 and 14599/09, 21 October 2010
- ECtHR, *A. v. Croatia*, Application No. 55164/08, 14 October 2010
- ECtHR, *J. M. v. the United Kingdom*, Application No. 37060/06, 28 September 2010
- ECtHR, *P.B. and J.S. v. Austria*, Application No. 18984/02, 22 July 2010
- ECtHR, *N. v. Sweden*, Application No. 23505/09, 20 July 2010
- ECtHR, *Schalk and Kopf v. Austria*, Application No. 30141/04, 24 June 2010
- ECtHR, *Kozak v. Poland*, Application No. 13102/02, 2 March 2010
- ECtHR, *Rantsev v. Cyprus and Russia*, Application No. 25965/04, 7 January 2010
- ECtHR, *Opuz v. Turkey*, Application No. 33401/02, 9 June 2009
- ECtHR, *Schlumpf v. Switzerland*, Application No. 29002/06, 8 January 2009
- ECtHR, *Bevacqua and S. v. Bulgaria*, Application No. 71127/01, 12 June 2008
- ECtHR (GC), *E.B. v. France*, Application No. 43546/02, 22 January 2008
- ECtHR, *Kontrová v. Slovakia*, Application No. 7510/04, 31 May 2007
- ECtHR, *Bączkowski and Others v. Poland*, Application No. 1543/06, 3 May 2007
- ECtHR (GC), *Tysiąc v. Poland*, Application No. 5410/03, 20 March 2007
- ECtHR, *R. and F. v. the United Kingdom*, Application No. 35748/05, 28 November 2006
- ECtHR, *Parry v. the United Kingdom*, Application No. 42971/05, 28 November 2006
- ECtHR, *Grant v. the United Kingdom*, Application No. 32570/03, 23 May 2006
- ECtHR, *M.C. v. Bulgaria*, Application No. 39272/98, 4 December 2003
- ECtHR, *Van Kück v. Germany*, Application No. 35968/97, 12 June 2003
- ECtHR, *Karner v. Austria*, Application No. 40016/98, 24 July 2003
- ECtHR (GC), *Christine Goodwin v. the United Kingdom*, Application No. 28957/95, 11 July 2002
- ECtHR (GC), *I. v. the United Kingdom*, Application No. 25680/94, 11 July 2002
- ECtHR, *Fretté v. France*, Application No. 36515/97, 26 February 2002
- ECtHR, *Mata Estevez v. Spain*, Application No. 56501/00, 15 May 2001

- ECtHR, *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96, 21 December 1999
- ECtHR, *Lustig-Prean and Beckett v. the United Kingdom*, Applications Nos. 31417/96 32377/96, 27 September 1999
- ECtHR, *Smith and Grady v. the United Kingdom*, Applications Nos. 33985/96 and 33986/96, September 1999
- ECtHR (GC), *Sheffield and Horsham v. the United Kingdom*, Applications Nos. 22985/93 and 23390/94, 30 July 1998

Other

- ECtHR, *Koky and Others v. Slovakia*, Application No. 13624/03, 12 December 2012
- ECtHR, *Fedorchenko and Lozenko v. Ukraine*, Application No. 387/03, 20 September 2012
- ECtHR, *Mižigárová v. Slovakia*, Application No. 74832/01, 14 December 2010
- ECtHR (GC), *Sejdić and Finci v. Bosnia and Herzegovina*, Application No. 27996/06, 22 December 2009
- ECtHR, *Daróczy v. Hungary*, Application No. 44378/05, 1 July 2008
- ECtHR (GC), *N. v. the United Kingdom*, Application No. 26565/05, 27 May 2008
- ECtHR, *Johansson v. Finland*, Application No. 10163/02, 6 September 2007
- ECtHR (GC), *Folgerø and Others v. Norway*, Application No. 15472/02, 29 June 2007
- ECtHR, *Timishev v. Russia*, Applications Nos. 55762/00 and 55974/00, 13 December 2005
- ECtHR (GC), *Nachova and Others v. Bulgaria*, Application No. 43577/98, 6 July 2005
- ECtHR, *Ünal Tekeli v. Turkey*, Application No. 29865/96, 16 November 2004
- ECtHR (GC), *Gorzelik and Others v. Poland*, Application No. 44158/98, 17 February 2004
- ECtHR, *Glaser v. the United Kingdom*, Application No. 32346/96, 19 September 2000
- ECtHR, *Salonen v. Finland*, Application No. 27868/95, 2 July 1997
- ECtHR, *Stjerna v. Finland*, Application No. 18131/91, 25 November 1994
- ECtHR, *Burghartz v. Switzerland*, Application No. 16213/90, 22 February 1994
- ECtHR, *Guillot v. France*, Application No. 22500/93, 24 October 1993
- ECmmHR, *T.B. v. Sweden*, Application No. 16878/90, 29 June 1992
- ECtHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Application Nos. 9214/80; 9473/81 and 9474/81, 28 May 1985
- ECtHR, *Tyryer v. the United Kingdom*, Application No. 5856/72, 25 April 1978
- ECtHR (Plenary), *Engel and Others v. the Netherlands*, Application Nos. 5100/71; 5101/71; 5102/71; 5354/72 and 5370/72, 8 June 1976

TREATIES, CONSTITUTIONS AND LEGISLATION

- Constitution of the Republic of Turkey (1982)
- Convention on the Elimination of all Forms of Discrimination against Women, adopted 18 Dec. 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., U.N. Doc. A/34/46 (1980), 1249 U.N.T.S. 13 (entered into force 3 Sept. 1981)
- Convention on the Elimination of Racial Discrimination, adopted 21 Dec. 1965, G.A. Res. 2106 (XX), U.N. GAOR, 20th Sess., U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195 (entered into force 4 Jan. 1969)
- Convention on the Rights of Persons with Disabilities, adopted 13 Dec. 2006, G.A. Res. 61/106, U.N. GAOR, 61st Sess., Agenda Item 67(b), U.N. Doc. A/RES/61/106 (2006) (entered into force 3 May 2008)
- Convention on the Rights of the Child, adopted 20 Nov. 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., U.N. Doc. A/44/49 (1989), 1577 U.N.T.S. 3 (entered into force 2 Sept. 1990)
- Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification
- Council of Europe Framework Convention for the Protection of National Minorities (1995)
- Council Regulation (EC) No. 343/2003 of 18 February 2003
- European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
- International Commission on Civil Status (ICCS) Convention No. 14 on the Recording of Surnames and Forenames in Civil Status Registers (1973)
- Regulation 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection
- Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc A/819, Dec. 10, 1948