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Religion and culture in the discourse of the European Court of Human Rights: the risks of stereotyping and naturalising

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Abstract

This paper critically examines the ways in which the European Court of Human Rights represents applicants' religious and cultural practices in its legal discourse. Borrowing tools from critical discourse analysis and incorporating insights from the anti-essentialist critique, the paper suggests that the Court has most problematically depicted the practices of Muslim women, Sikhs and Roma Gypsies. The analysis reveals that, by means of a reifying language, the Court oftentimes equates these groups' practices with negative stereotypes or posits them as the group's 'paradigmatic' practice / way of life. The thrust of the argument is that these sorts of representation are problematic because of the exclusionary and inegalitarian dangers they carry both for the applicants and for their groups. In negatively stereotyping applicants' practices and in privileging certain group practices over others, these types of assessment underestimate what is at stake for the applicants and potentially exclude them from protection. Moreover, these types of reasoning risk sustaining hierarchies across and within groups. The paper concludes by sketching out an approach capable of mitigating stereotyping and essentialising risks.

I. Introduction

In examining how the law talks about people, James Boyd White (1985) 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' (1985, pp. 113–114). 'The law', he pithily pronounces, 'is a literature of caricature' (1985, p. 114).

Over the past few decades, a number of legal scholars have wrestled with the (in)capacity of the law to do full justice to individuals' complex and shifting identities on the ground (Abrams, 1994, 1996; Karst, 1995; Minow, 1997; Douzinas, 2002; Tirosh, 2007a). One of the main questions animating these debates is how the law, with its 'discomfort with uncertainty' and 'thirst for fixed answers', can be attentive and responsive to unstable lived experiences (Minow, 1997, p. 77).

The tensions and gaps between a real-life person and her 'legal persona' are particularly visible in the context of legal proceedings (Douzinas, 2000, p. 237); the law has its own recognisability 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 recognisable ways. This not only means translating everyday language into legal language (Yovel, 2010, p. 2), turning personal traits into legal arguments (Tirosh, 2007a, p. 133), transforming stories into rule-oriented narratives

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(Yovel, 2010, p. 9) and following 'rules of evidence and procedure' (Baer, 2010, p. 64). Most fundamentally, this may also mean turning particularities into generalities (Douzinas, 2002, p. 402) narratives into meta-narratives (Tirosh, 2007b, p. 7), 'characters' into 'caricatures' (White, 1985).

Applicants' real-life and complex stories may thus get lost in the various layers of judicial translation, including legal counselling, 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' (Yovel, 2010, p. 2). Law's need for clarity and certainty may therefore explain why litigants often adopt fixed notions of group identity (Minow, 1997, p. 77) in what is known as 'strategic essentialism'.[1]

The 'essentialising proclivities of law' (Cowan, Dembour and Wilson, 2001, pp. 10–11) are particularly at work in assessments of identity traits – including cultural and religious traits – as individuals inevitably come to courts as part of collectives. 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' (2010, p. 59). 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.'[2] In fact, attempts to capture any group commonality often fall prey to charges of 'essentialism'.[3] 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' (Fuss, 1989, p. xi). These properties may be attributed to 'everyone identified with a particular category' or to the 'category itself' (Phillips, 2010, pp. 50, 53). The assumption is that all within the category 'share the same inherent characteristics' (Wong, 1999, p. 275).

The risks of essentialising, as feminist and other scholars have long noted (Minow, 1997; Fraser, 2000; Benhabib, 2002; Phillips, 2007), include reducing people to 'one trait, one viewpoint and one stereotype' (Minow, 1997, p. 34), trapping people in categories that deny self-definition (Minow, 1997, p. 78), fixing differences among groups and 'imposing uniformity within them' (Appiah, 2005, p. 151) and policing group boundaries 'to regulate internal membership' (Benhabib, 2002, p. 68). Another risk of positing one group experience as paradigmatic at the expense of others – which is what essentialism is mostly about (Munro, 2006, p. 138) – is that it reinforces hierarchies within groups or categories (Hekman, 2004, p. 3). The experiences of some are thus either ignored or treated as 'different' from the 'norm' (Harris, 1990, p. 615).

Incorporating these insights from anti-essentialist critiques and borrowing tools from critical discourse analysis, this paper scrutinises 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 generalisation 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 categorisations 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 collectivisation. The challenge is distinguishing inevitable and inoffensive generalisations from more problematic ones. As Anne Phillips (2010, p. 58) puts it: 'Essentialism is a way of 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.'

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1 Strategic essentialism has been understood as the use of essential notions of identity while recognising the falsity of an essential reality (Munro, 2006, p. 144).

2 Constitutional Court of South Africa, *MEC for Education: Kwazulu-Natal and Others v. Pillay* (CCT 51/06) [2007] ZACC 21 at 54.

3 For example, in feminism, attempts to capture the experience common to all women have often fallen prey to charges of gender essentialism (Munro, 2006).

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The crucial questions then are *when* and *why* the Court's generalisations 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' (Hutchinson, 1991, p. 1555). 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 (Minow, 1997, p. 61). 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' (Karst, 1995, p. 295) 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' (Johnson, 2010, p. 72).

The thrust of my argument is that the Court's reliance on generalisations 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. I further contend that these two sorts of depiction are harmful both for the individuals (actual applicants and those likely to be affected by the Court's rulings in the future) and for their groups because of the inequalities and exclusions they sustain *across* and *within* groups.

The paper 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. The paper continues with 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 from the paper, I conclude by sketching out the basic elements of an approach capable of mitigating stereotyping and essentialising risks.

II. Methodology

2.1 Selection of cases and scope of the analysis

The analysis offered in this paper looks at the Court's legal reasoning in primarily three areas of its case-law: freedom of religion (Article 9 ECHR),[4] the right to respect for minority cultural lifestyle

4 Art. 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 art. 9 ECHR search in the Court's database 'HUDOC' (http://hudoc.echr.coe.int/). However, my sample includes 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. For ease of reference, I only include the names of the cases (all cases can be found in the 'HUDOC' database). Where both Chamber and Grand Chamber judgments are available, the case in question refers to the Grand Chamber judgment, unless otherwise indicated: *Sindicatul 'Păstorul cel Bun' v. Romania; Vojnity v. Hungary; Eweida and Others v. the United Kingdom; Ásatrúarfélagið v. Iceland; Francesco Sessa v. Italy; Gatis Kovaļkovs v. Latvia; Erçep v. Turkey; Dojan and Others v. Germany; Bayatyan v. Armenia; Association Les Témoins de Jéhovah v. France; Ouardiri v. Switzerland; Ligue des musulmans de Suisse and Others v. Switzerland; Lautsi v. Italy (Grand Chamber); Siebenhaar v. Germany; Jakóbski v. Poland; Savez crkava 'Riječ života' and Others v. Croatia; Şerife Yiğit v. Turkey; Schüth v. Germany; Obst v. Germany; Jehovah's Witnesses of Moscow and Others v. Russia; Ahmet Arslan and Others v. Turkey; Sinan Işık v. Turkey; Skugar and Others v. Russia; Lautsi v. Italy (Chamber); Appel-Irrgan v. Germany; Kimlya and Others v. Russia; Miroļubovs and Others v. Latvia; Gamaleddyn*

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(Article 8 ECHR)[5] and non-discrimination (Article 14 ECHR).[6] The reason for focusing on these ECHR Articles is because these are the provisions through which applicants have most commonly asked for 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 selection includes a mix of Grand Chamber judgments, Chamber judgments and inadmissibility decisions passed over roughly the last fifteen years.[7] Though the sample 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' religious/cultural practices and case-law involving gender and sexuality.[8] I compare the Court's

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v. France; Ghazal v. France; Aktas v. France; Bayrak v. France; Ranjit Singh v. France; Jasvir Singh v. France; Lang v. Austria; Nolan and K. v. Russia; Dogru v. France; Kervanci v. France; Mann Singh v. France; Leela Förderkreis E.V. and Others v. Germany; Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria; El Morsli v. France; Perry v. Latvia; Hasan and Eylem Zengin v. Turkey; 97 members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v. Georgia; Ivanova v. Bulgaria; Church of Scientology Moscow v. Russia; Biserica Adevărat Ortodoxă din Moldova and Others v. Moldova; Deschomets v. France; Kosteski v. the Former Yugoslav Republic of Macedonia; Kurtulmus v. Turkey; Kose and 93 Others v. Turkey; Leyla Şahin v. Turkey; Phull v. France; Supreme Holy Council of the Muslim Community v. Bulgaria; Palau-Martinez v. France; Refah Partisi and Others v. Turkey; Islamische Religionsgemeinschaft e.V. v. Germany; Metropolitan Church of Bessarabia and Others v. Moldova; Pichon and Sajous v. France; Johannische Kirche and Peters v. Germany; Dahlab v. Switzerland; Cha'are Shalom Ve Tsedek v. France; Thlimmenos v. Greece; J.L. v. Finland; Hasan and Chaush v. Bulgaria; Serif v. Greece; and *Larissis and Others v. Greece.*

5 Art. 8 ECHR covers the right to respect for home, correspondence, private and family life but the Court has derived from this provision a right to protection of one's minority way of life (see, for example, *G. and E. v. Norway*, Applications Nos. 9278/81 and 9415/81, Decision of the Commission of 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 art. 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. For ease of reference, I only include the names of the cases (all cases can be found in the HUDOC database). Where both Chamber and Grand Chamber judgments are available, the case in question refers to the Grand Chamber judgment, unless otherwise indicated: *Buckland v. the United Kingdom; Horie v. the United Kingdom; Muñoz Díaz v. Spain; Stenegry v. France; Wells v. the United Kingdom; Codona v. the United Kingdom; Johtti Sapmelaccat r.y. and Others v. Finland; Connors v. the United Kingdom; Clark and Others v. the United Kingdom; Harrison v. the United Kingdom; Smith v. the United Kingdom* (Application No 34334/96)*; Eatson v. the United Kingdom; Smith v. the United Kingdom* (Application No 40435/98)*; Porter v. the United Kingdom; Chapman v. the United Kingdom; Beard v. the United Kingdom; Coster v. the United Kingdom; Jane Smith v. the United Kingdom; Lee v. the United Kingdom; Noack and Others v. Germany;* and *From v. Sweden.*

6 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 (arts. 8, 9, 11, art. 1 of Protocol 1 and art. 2 of Protocol 1). This is because art. 14 ECHR is not autonomous but has effect only in relation to ECHR rights.

7 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 to 15 July 2013.

8 Cases concerning women and sexual minorities 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. For ease of reference, I only include the names of the cases. All cases can be found in the HUDOC database (http://hudoc.echr.coe.int/). Where both Chamber and Grand Chamber judgments are available, the case in question refers to the Grand Chamber judgment, unless otherwise indicated: *Eremia v. the Republic of Moldova; Boeckel and Gessner-Boeckel v. Germany; X and Others v. Austria; Csoma v. Romania; H. v. Finland; P and S v. Poland; X v. Turkey; B.S. v. Spain; Genderdoc-M v. Moldova; I.G. v. Moldova; Kalucza v. Hungary;*

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language in these different areas of its identity-based case-law in order to identify significant patterns – i.e. which groups of applicants (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 subsets 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 on four problematic judgments: *Leyla Şahin v. Turkey*,[9] *Dahlab v. Switzerland*,[10] *Mann Singh v. France*,[11] and *Chapman v. the United Kingdom*.[12]

2.2 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 (Fowler, 1991, p. 25). For critical discourse analysis, the language through which identities are constructed reveals 'a subject's attitudes and ideologies' (Benwell and Stokoe, 2006, p. 44). In particular, this type of discourse analysis 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 (Van Dijk, 2001, p. 300).

Of particular relevance for my analysis are some notions developed by a critical discourse scholar, Theo van Leeuwen (2008), in his work on the representation of social actors and social actions. Van Leeuwen critically examines the transformations that take place in the recontextualisation of social practices – that is, in discourse (2008, pp. 3–6). These transformations may include substituting, excluding and adding elements of such practices (e.g. social actors, time, location) by way of different representational choices (2008, pp. 17–22). Each of these choices, in turn, takes place through 'specific linguistic or rhetorical realizations' (2008, p. 25). 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 involved in the facts – is at the heart of the adjudication enterprise (Karst, 1995, p. 281). Another reason lies in the purpose of Van Leeuwen's scheme, which coincides with the main purpose of my investigation: scrutinising the ways in which actors and practices are represented in discourse. Moreover, some of the notions from Van Leeuwen's scheme are – per my hypothesis – potentially highly relevant to the selected cases. My study of the Court's discourse has particularly benefited from his notions

Konstantin Markin v. Russia; Gas and Dubois v. France; Vejdeland and Others v. Sweden; V.C. v. Slovakia; S.H. and Others v. Austria; Omeredo v. Austria; R.R. v. Poland; Andrle v. the Czech Republic; A. B. and C. v. Ireland; P.V. v. Spain; Alekseyev v. Russia; A v. Croatia; J. M. v. the United Kingdom; P.B. and J.S. v. Austria; N v. Sweden; Schalk and Kopf v. Austria; Kozak v. Poland; Rantsev v. Cyprus and Russia; Opuz v. Turkey; Schlumpf v. Switzerland; Bevacqua and S. v. Bulgaria; E.B. v. France; Kontrová v. Slovakia; Bączkowski and Others v. Poland; Tysiąc v. Poland; R and F v. the United Kingdom; Parry v. the United Kingdom; Grant v. the United Kingdom; M.C. v. Bulgaria; Van Kück v. Germany; Karner v. Austria; Christine Goodwin v. the United Kingdom; I v. the United Kingdom; Fretté v. France; Mata Estevez v. Spain; Salgueiro da Silva Mouta v. Portugal; Lustig-Prean and Beckett v. the United Kingdom; Smith and Grady v. the United Kingdom; and *Sheffield and Horsham v. the United Kingdom.*

9 Application No 44774/98, 10 November 2005.

10 Application No 42393/98, 15 February 2001.

11 Application No 24479/07, 13 November 2008.

12 Application No 27238/95, 18 January 2001.

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of the *exclusion* of social actors, the *objectivation* of social actions and assimilation of social actors by *collectivisation*.

On the exclusion of social actors, Van Leeuwen observes (2008, p. 29): '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.' He makes a further distinction between the full exclusion of social actors, which he calls 'suppression' (the actors are referred to 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') (2008, p. 29). The objective is to identify patterns of inclusion/exclusion and to combine them with the ways in which social actors are represented (2008, p. 32). 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' (2008, p. 63). In turn, collectivisation of social actors is a form of assimilation 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) (2008, p. 37).

The exclusion of social actors and the objectivation of their social actions may take place through various linguistic forms, including 'nominalisation' and 'passivisation'. Nominalisation consists in 'turning verbs into nouns' (Fowler, Hodge, Kress and Trew, 1979, p. 14) and passivisation in privileging the passive voice over the active voice (Billig, 2008, p. 785). An example of nominalisation would be '*the attack* on demonstrators'; an example of passivisation, 'demonstrators were *attacked*' (Billig, 2008, p. 785).

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.

III. Stereotyping and naturalising in the Court's discourse

In this part, I introduce the areas of the Court's case-law where I have most commonly found the two problematic modes of reasoning presented earlier 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.

3.1 Key findings

My first (and broad) level of analysis of the Court's discourse on identity traits reveals a widespread use of collectivisations of the applicants and objectivations of their traits. 'Transsexualism',[13] 'pregnancy',[14] 'homosexuality'[15] and the 'Gypsy way of life'[16] are but a few examples of the objectivations of applicants' traits. 'Transsexuals',[17] 'women' (or 'a

13 See, for example, *Christine Goodwin v. the United Kingdom*, Application No 28957/95, 11 July 2002 at paras. 81 and 92.

14 See, for example, *R.R. v. Poland*, Application No 27617/04, 26 May 2011 at paras. 181, 195 197 and 203, and *P and S v. Poland*, Application No 57375/08, 30 October 2012 at paras. 109, 111 and 148.

15 See, for example, *Lustig-Prean and Beckett v. the United Kingdom*, Applications Nos 31417/96 and 32377/96, 27 September 1999 at paras. 89 and 95. See also *Alekseyev v. Russia*, Applications Nos 4916/07, 25924/08 and 14599/09, 21 October 2010 at para. 86.

16 See, for example, *Chapman v. the United Kingdom*, Application No 27238/95, 18 January 2001 at para. 96.

17 See, for example, *I v. the United Kingdom*, Application No 25680/94, 11 July 2002 at paras. 59, 72 and 83 and *Christine Goodwin v. the United Kingdom*, Application No 28957/95, 11 July 2002 at paras. 79 and 82.

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woman'),[18] 'sexual minorities'[19] and 'Jehovah's Witnesses'[20] are, in turn, just some instances of collectivisations.

On one side, I have found that sometimes the deployment of objectivations and collectivisations 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,[21] men and women[22]). 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',[23] under Polish law 'abortion is lawful where *pregnancy* poses a threat to *the woman's* life or health',[24] French law opens up the possibility of 'adoption by *a single homosexual*'[25]).

On the other side, my findings also demonstrate that, at other times, collectivised representations of applicants and objectivised depictions of their traits have resulted in two types of problematic portrayal. The first kind of problematic depiction involves negative stereotyping: following the applicant's reduction to and disappearance behind an objectivised trait or a collectivised representation, the Court associates the trait or group in question with a stereotype that 'assigns difference' (Cook and Cusack, 2010, p. 16). This form of stereotyping generally reflects 'prejudice or bias' about a group and may exacerbate its subordination (2010, p. 16). Briefly put, 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 favourably than a non-membership group (the out-group) or its members' (Dovidio, Hewstone, Glick and Esses, 2010, pp. 3, 5).

The second type of problematic representation entails what I will refer to as 'naturalising': following the applicant's reduction to and disappearance behind an objectivised trait or a collectivised 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' (Phillips, 2010, pp. 53, 57).

My examination suggests that these two problematic modes of reasoning feature most frequently in cases concerning members of religious and cultural minorities. In particular, negative stereotypes appear to a seemingly greater extent in cases concerning Muslim women and naturalisations in cases involving Sikhs and Roma Gypsies.

3.2 Negative stereotypes

The cases exhibiting the first form of problematic representation concern Muslim women prohibited from wearing the headscarf.[26] What these cases have in common is that the Court tends to neglect the

18 See, for example, *Konstantin Markin v. Russia*, Application No 30078/06, 22 March 2012 at paras. 132, 139 and 140 and *A. B. and C. v. Ireland*, Application No 25579/05, 16 December 2010 at paras. 253, 254 and 258.

19 See, for example, *Alekseyev v. Russia*, Applications Nos 4916/07, 25924/08 and 14599/09, 21 October 2010 at paras. 82, 83 and 86.

20 See, for example, *Jehovah's Witnesses of Moscow and Others v. Russia*, Application No 302/02, 10 June 2010 at para. 133.

21 See, for example, *Schalk and Kopf v. Austria*, Application No 30141/04, 24 June 2010 at para. 99.

22 See, for example, *Konstantin Markin v. Russia*, Application No 30078/06, 22 March 2012, at paras. 132 and 133.

23 *Leyla Şahin v. Turkey*, Application No 44774/98, 10 November 2005 at para. 116 (emphasis added).

24 *Tysiąc v. Poland*, Application No 5410/03, 20 March 2007 at para. 104 (emphasis added).

25 *E.B. v. France*, Application No 43546/02, 22 January 2008 at para. 94 (emphasis added).

26 These cases include *Dahlab v. Switzerland*, Application No 42393/98, 15 February 2001; *Leyla Şahin v. Turkey*, Application No 44774/98, 10 November 2005 and *Köse and Others v. Turkey*, Application No 26625/02, 24

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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 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).[27]

3.2.1 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.'[28] (emphasis added)

In this passage, the Court backgrounds the applicant through nominalisation. 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 nominalisation, the Court does not only background the agent (the applicant) but also objectivises 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 remain there, albeit in collectivised forms ('very young children', 'applicant's pupils', 'children'). In fact, the Court names the applicant only once: when it talks about her alleged victims.

January 2006. The problematic, stereotypical representations developed in *Dahlab*, *Şahin* and *Köse* are reproduced in the principles of *Dogru v. France* and *Kervanci v. France* but do not feature expressly in the Court's analysis of the particular circumstances of the cases. Application No 27058/05 and Application No 31645/04, both from 4 December 2008 at paras. 64, 66 and 71. See also, *Gamaleddyn v. France*, Application No 18527/08; *Ghazal v. France*, Application No 29134/08; *Aktas v. France*, Application No 43563/08 and *Bayrak v. France*, Application No 14308/08, 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.

27 In addition, the Court examined *Leyla Şahin* under art. 2 of Protocol 1 (no violation) and under arts. 8, 10 and 14 ECHR (no violation), and *Dahlab* under art. 14 ECHR (manifestly ill-founded).

28 *Dahlab v. Switzerland*, Application No 42393/98, 15 February 2001 at p. 13.

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In *Leyla Şahin*, in turn, in assessing whether 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.'[29] (emphasis added).

Here, the Court also backgrounds the applicant and objectivises her practice through nominalisation ('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. Whereas the agency of Leyla Şahin is de-emphasised by way of nominalisations, the agency of the supposed victims is emphasised by the use of the word 'choose' in 'those who choose not to wear it'.[30] Moreover, while the applicant is fully displaced by an objectivised version of her practice, her alleged victims remain in the text, albeit in a collectivised and somehow indeterminate form.

What is furthermore distinctive about the Court's representation of the headscarf in *Leyla Şahin* is the deletion of agency through 'passivisation'. 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 labelling of 'compulsory'.

One of the reasons why critical discourse scholars have long viewed nominalisations with suspicion is because they facilitate reification (Billig, 2008, p. 786). Critical discourse scholar Roger Fowler (1991, p. 80) explains how, by way of nominalisation, 'processes and qualities assume the status of things: impersonal, inanimate, capable of being amassed and counted, paraded like possessions'. This is precisely what happens in *Dahlab* and *Leyla Şahin*: nominalisation 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.

3.2.2 The harmful impact on the case

The representational moves described above entail several negative implications 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.

29 *Leyla Şahin v. Turkey*, Application No 44774/98, 10 November 2005 at para. 115.

30 I am grateful to an anonymous reviewer for this point.

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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. Indeed, the Court does not just disregard the motivations behind their decisions to wear the headscarf.[31] It pays no attention to the suffering and loss caused to the applicants by the prohibitions (Evans, 2010–2011, p. 330; Rorive, 2009, p. 2683). In this way, the Court excludes 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 reification of the applicants' religious practices 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 teaching[32] – the Court searches for a location elsewhere, namely in the headscarf itself. As the *Dahlab* 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. As 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).

A third troubling consequence flowing from the Court's objectivation of the applicants' practices is their delegitimation. By reference to the authority of national courts, the Court resorts to what Van Leeuwen calls 'authorisation'[33] in order to delegitimise 'the wearing of the headscarf'. Indeed, many of the 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.[34] Similarly, 'as the [Swiss] Federal Court noted', the Court states that the wearing of the headscarf is hard to square with gender equality.[35]

But this is not the only way in which the Court delegitimises 'the wearing of the headscarf'. The Court employs another form of delegitimation, which Van Leeuwen (2008, p. 110) dubs 'moral evaluation'. This sort of delegitimation is based on 'specific discourses of moral value' (2008, p. 110). One explicit value on the basis of which the Court delegitimises the Islamic headscarf is 'gender equality', a Council of Europe value[36] and, ultimately, a value of any democratic society.[37] Thus, in *Dahlab*, it finds it 'difficult to reconcile the wearing of an Islamic headscarf with the

31 See *Dahlab v. Switzerland*, Application No 42393/98, 15 February 2001 at p. 1 and *Leyla Şahin v. Turkey*, Application No 44774/98, 29 June 2004, at para. 85 (Chamber Judgment).

32 *Dahlab v. Switzerland*, Application No 42393/98, 15 February 2001 at p. 12.

33 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' (2008, p. 105).

34 *Leyla Şahin v. Turkey*, Application No 44774/98, 10 November 2005 at para. 115.

35 *Dahlab v. Switzerland*, Application No 42393/98, 15 February 2001 at p. 13.

36 *Leyla Şahin v. Turkey*, Application No 44774/98, 10 November 2005 at para. 115.

37 *Dahlab v. Switzerland*, Application No 42393/98, 15 February 2001 at p. 13.

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message of tolerance, respect for others and, above all, equality and non-discrimination'.[38] In *Leyla Şahin*, and as Judge Tulkens observes in her dissent, the majority considers that wearing the headscarf is 'synonymous with the alienation of women'.[39]

By failing to 'see' the specific circumstances and motivations of the applicants and by relying instead on the domestic courts' preconceptions of 'the headscarf', the Court ultimately falls into a kind of essentialism referred to as 'one of over-generalisation [and] stereotyping' (Phillips, 2010, p. 50). 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' (Dovidio *et al.*, 2010, p. 8). As Carolyn Evans (2006, p. 73) notes, the Strasbourg Court implicitly advocates two contradicting stereotypes: Muslim women as victims of oppression in need of protection and Muslim women as aggressors from whom everyone needs protection. These generalisations are easily made, without being concretely substantiated with statistics or other evidence in the particular cases (Evans, 2006, p. 54).

The Court's reliance on stereotypes 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 (Cook and Cusack, 2010, p. 61). As feminist legal theorists have shown, stereotyping may cause distributional harms to stereotyped group members (Cook and Cusack, 2010, pp. 59–60; Timmer, 2011, pp. 715–716). The harm of 'maldistribution' involves the denial of the resources necessary to participate in social life (Fraser, 2000, pp. 116–118).

3.2.3 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 legal framework' it produces for human rights adjudication (Johnson, 2010, p. 74). This perception gives the Court's representational discourse singular and influential force beyond the particular cases. Indeed, the Court's legal 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 (Muslims in general and Muslim women in particular). The 'misrecognition' harm caused through stereotyping (Cook and Cusack, 2010, pp. 59–60; Timmer, 2011, pp. 715–716) operates by constituting groups 'as inferior, excluded, wholly other, or simply invisible – in other words, as less than full partners in social interaction' (Fraser, 2000, p. 113).

The stereotype that Muslim women are oppressed embeds a mix of stereotypical assumptions (gender/religious/orientalist) that constitute Muslims and Muslim women as 'inferior' and 'wholly other'. Thus, this stereotype implies that Muslim men are 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' (Vojdik, 2010, p. 676). Moreover, this stereotype implicitly portrays a religion, 'Islam', as 'barbaric' and 'backward' compared with the 'West' (Malik, 2012, p. 112). As Marie-Bénédicte Dembour (2006, p. 213) notes, the Court 'puts the West on a pedestal and demonizes Islam'.

In negatively stereotyping Muslims and Muslim women, the Court thus implicitly 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 (2011, p. 715) argues,

38 *Ibid.*

39 *Leyla Şahin v. Turkey*, Application No 44774/98, 10 November 2005, Dissenting Opinion of Judge Françoise Tulkens at para. 11.

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'often serve to maintain existing power relationships', upholding 'a symbolic and real hierarchy between "us" and "them"'. The Court (re)creates these hierarchies by implicitly relying on a series of dichotomies (agency/victimisation and reason/culture) and by further associating one group with the 'positive' side (agency/reason) and the other group with the 'negative' side (victimisation/culture). Thus, whereas Muslim women are assumed to be wholly *determined* and *victimised* by their cultures (their religious practices are 'imposed' on them by the Koran), non-Muslims are assumed to be *rationally choosing agents*. As Leti Volpp (2001, p. 1192) notes in another context, '[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'.

Besides the misrecognition implications for the applicants' groups, the Court's stereotyping reasoning has potentially damaging implications for future applicants. 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.[40] Future applicants will therefore most likely have a hard time showing that they do not match the Court's well-established negative image of 'the Islamic headscarf' or challenging the image itself.

3.3 Naturalisations

The cases examined in this section involve the second kind of flawed depiction in the Court's legal discourse; 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 'naturalisation' because it makes 'natural' what in fact is historically contingent or socially constructed (Warne, 2000, p. 141). This sort of portrayal seems to appear most often in cases concerning Sikhs[41] and Roma Gypsies.[42]

I analyse 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 licence 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.

40 See, for example, *Dogru v. France*, Application No 27058/05 and *Kervanci v. France*, Application No 31645/04, both from 4 December 2008 at para. 64.

41 See, for example, *Mann Singh v. France*, Application No 24479/07, 13 November 2008; *Ranjit Singh v. France*, Application No 27561/08, 30 June 2009 and *Jasvir Singh v. France*, Application No 25463/08, 30 June 2009.

42 See, for example, *Chapman v. the United Kingdom*, Application No 27238/95 and four more cases decided by the Grand Chamber the same day: *Beard v. the United Kingdom*, Application No 24882/94; *Coster v. the United Kingdom*, Application No 24876/94; *Jane Smith v. the United Kingdom*, Application No 25154/94 and *Lee v. the United Kingdom*, Application No 25289/94 (all from 18 January 2001). 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, for example, *Eatson v. the United Kingdom*, Application No 39664/98; *Smith v. the United Kingdom*, Application No 40435/98; *Porter v. the United Kingdom*, Application No 47953/99 (all from 30 January 2001); *Harrison v. the United Kingdom*, Application No 32263/96 and *Smith v. the United Kingdom*, Application No 34334/96 (both from 3 May 2001) and *Clark and Others v. the United Kingdom*, Application No 28575/95, 22 May 2001. See also *Horie v. the United Kingdom*, Application No 31845/10, 1 February 2011.

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3.3.1 The entrance of 'the turban' and 'the Gypsy way of life'

In both *Mann Singh* and *Chapman*, the Court backgrounds the applicants and objectivises their practices, albeit through different representational means. The linguistic move in *Mann Singh* is passivisation – 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.'[43] (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.[44] 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, objectivises 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.[45]

In *Chapman*, in turn, the Court's preferred representational form to push the applicant aside is collectivisation. 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*.'[46] (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 collectivisation, therefore, the Court separates the applicant from her group, sending her backstage and bringing her group centre stage.

In another of 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*.'[47] Here, the Court, first of all, objectivises the applicant's

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43 *Mann Singh v. France*, Application No 24479/07, 13 November 2008 at p. 5 (author's translation).

44 In fact, this characterisation comes from the applicant himself. Mann Singh's Application of 11 June 2007 at p. 10.

45 Several cases concerning Sikh applicants show how one of Mann Singh's claims has travelled around without him. See, for example, *Ranjit Singh v. France*, Application No 27561/08, 30 June 2009 and *Jasvir Singh v. France*, Application No 25463/08, 30 June 2009 at p. 6. For an analysis of *Mann Singh* along similar lines, see Peroni (forthcoming 2014).

46 *Chapman v. the United Kingdom*, Application No 27238/95, 18 January 2001 at para. 73.

47 *Ibid.*, at para. 96 (emphasis added).

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lifestyle by representing it statically rather than dynamically: 'the Gypsy way of life'.[48] 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 (Farget, 2010, p. 250).

Collectivisations and objectivations 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' (Phillips, 2010, p. 57). While in *Mann Singh* the defining characteristic is the turban, in *Chapman* the defining trait is travelling.

Now, on what basis does the Court characterise 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 practised homogenously 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' (Eisenberg, 2009, p. 131). In *Mann Singh*, in turn, the Court simply states 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.

3.3.2 The impact on the cases

In contrast to *Dahlab* and *Leyla Şahin*, the Court's reliance on generalisable and reducible (group) traits in *Chapman* and *Mann Singh* serves, to some extent, to better understand the applicants' positions.[49] Indeed, the essentialist construction of Chapman's and Mann Singh's practices leads to their recognition in the 'scope' stage of the analysis. This is the threshold stage at which the Court establishes whether the claim in question attracts the protection of an ECHR provision.

For instance, in *Mann Singh*, the turban counted as 'a manifestation' of the applicant's religion for the purposes of Article 9(1) ECHR,[50] largely because the practice was viewed at the core of 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 recognises that at stake is not just the applicant's right to respect for her 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 generalisable 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.[51] 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

48 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, 2008, p. 63).

49 I thank an anonymous reviewer for this point.

50 The notion of 'manifestation' of religion stems from the text of art. 9 ECHR, according to which freedom of religion includes the right to 'manifest' one's religion 'in worship, teaching, practice and observance'.

51 The positive obligation is merely procedural; it requires that state authorities show that they have taken into account the Roma's cultural situation both in policy-making and in decision-making in particular cases. *Chapman v. the United Kingdom*, Application No 27238/95, 18 January 2001 at para. 98.

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> 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.'[52]

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 essentialised traits are either completely eclipsed by the state's alleged countervailing interests or expressly used to diminish the weight of the applicants' interests. Indeed, in *Mann Singh* the applicant's essentialised practice plays no role in the proportionality analysis. Mann Singh and what is at stake for him – including the alleged importance initially recognised in 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 licence picture was necessary in a democratic society.[53]

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 analysis. The Court says: '[T]he present case is not concerned as such with the traditional itinerant Gypsy lifestyle.'[54] In the eyes of the Court, the applicant's lifestyle did not fit 'the Gypsy way of life' because she no longer lived a nomadic lifestyle. The Court found that she was actually 'resident on site' during considerable periods.[55] The conclusion was therefore that the applicant did not 'wish to pursue an itinerant lifestyle'.[56]

What follows is that the applicant is no longer viewed as a ('proper' or 'authentic') group member but just as an individual who 'chose' to settle.[57] Julie Ringelheim (2012, p. 433) persuasively 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*.'

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 in this regard. They rejected the government's argument that the applicant's intention to settle should detract from the seriousness of the interference.[58] 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'.[59]

52 *Ibid.*, at para. 96.

53 *Mann Singh v. France*, Application No 24479/07, 13 November 2008 at p. 7.

54 *Chapman v. the United Kingdom*, Application No 27238/95, 18 January 2001 at para. 105.

55 *Ibid.*

56 *Ibid.*

57 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.*, at paras. 105–116.

58 *Ibid.* Joint Dissenting Opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Strážnická, Lorenzen, Fischbach and Casadevall at p. 38.

59 *Ibid.*

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There are two troubling consequences flowing from the majority's essentialist approach in the *Chapman* proportionality analysis. In the first place, in positing one form of lifestyle as 'the' group's paradigmatic type, the Court sets a standard against which the applicant's practice falls short. 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 vulnerability dimensions. 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 such element was the disadvantageous impact of the planning regulations on the applicant's lifestyle as a member of a particularly vulnerable group. This time, the Court fails to address inter-group exclusion and inequality, as only those group members whose concerns are not taken into account by the regulatory norms suffer detrimental consequences.

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.[60] This argument should be 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: the applicant relies on essentialism 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 (1993, pp. 11–13, 17, 18) 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. Given the authoritative force of the Court's essentialist depictions, it may be problematic to rely on naturalising depictions even when applicants do it themselves.

In summary, 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 minimise the seriousness of what was at 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 belonged to' (Ringelheim, 2012, p. 432). As with *Leyla Şahin* and *Dahlab*, the Court thus reduces the weight of Chapman's interests in the proportionality analysis 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 mould it esteems.

3.3.3 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 delegitimising 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

60 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*, at paras. 95, 118, 123, 151 and 160 (referring to the traditional 'Gypsy way of life').

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section and those examined in this section. 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 'naturalising'. One of the problems arising from naturalising is that it sets up 'a standard by which to judge deviation' (Warne, 2000, p. 141). The danger of this sort of reasoning therefore lies in the exclusions and inequalities it sustains by deeming some lifestyles or practices 'natural' or 'normal' and others 'deviant'. The Court's naturalising language in *Chapman* and *Mann Singh* 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' (Phillips, 2010, p. 57). Chapman herself is a tragic example.

Moreover, the Court's naturalising 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 Traveller who had pursued a nomadic lifestyle for almost three decades.[61] 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'.[62] The Court hereby reaffirms the natural or immutable status of 'travelling' in the Gypsy tradition, albeit by a different criterion – birth[63] – 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 practising itinerant lifestyles such as Ms Horie's from legal 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 (Farget, 2012, p. 303). For instance, in *Connors v. the United Kingdom*, the Court has refused to deploy the sort of generalisations that 'would identify the nomadic lifestyle as the essence of gypsy life and culture' (Brems, 2009, p. 674).[64] Moreover, in several post-*Chapman* inadmissibility decisions, the Court has toned down its naturalising discourse by dropping one of the most problematic sentences[65] and by accepting that the applicants remained Gypsies even though they had switched to a more sedentary way of life.[66]

All this, however, does not necessarily mean that the problem posed by naturalising 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, reaffirms the *Chapman* rationale by concluding that the applicants' cases did not

61 *Horie v. the United Kingdom*, Application No 31845/10, 1 February 2011.

62 *Ibid.*, at para. 28.

63 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. Application No 27238/95, 18 January 2001 at para. 10.

64 *Connors v. the United Kingdom*, Application No. 66746/01, 27 May 2004 at para. 93.

65 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, for example, *Harrison v. the United Kingdom, Application* No 32263/96, 3 May 2001 at p. 11.

66 *Ibid.*, at p. 12.

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ultimately concern 'traditional itinerant gypsy life styles'.[67] 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 us.

IV. 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 traits.[68] In this part, I point to four ways in which the Court's wider discourse has mostly avoided stereotyping and naturalising pitfalls.

4.1 Rejecting unfounded generalisations

Aware of the lack of evidence in several cases, the Court has either refrained from making generalisations about the applicants' practices/traits or rejected governments' general assumptions as justifications for restrictions on their rights. Take the case of *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.[69] The case of Ms Eweida, a British Airways employee and the only one of the applicants to win the case, is especially illustrative. The airline justified the prohibition 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.'[70]

Another example is *Lautsi v. Italy*, a case concerning a mother's unsuccessful attempt to have crucifixes removed from her children's state school.[71] 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.'[72]

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'.[73] And 'Ms Eweida's cross was *discreet* and cannot have detracted from her professional appearance'.[74] The properties of these symbols ('passive' and 'discreet') are exactly the opposite of the attributes used to characterise 'the headscarf' ('powerful' and 'ostentatious'). Moreover, whereas the headscarf's inherent

67 *Ibid.*

68 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 in *S. H. and Others v. Austria*, see Timmer (2010).

69 *Eweida and Others v. the United Kingdom*, Applications Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013.

70 *Ibid.*, at para. 94.

71 *Lautsi and Others v. Italy*, Application No 30814/06, 18 March 2011.

72 *Ibid.*, at para. 66.

73 *Ibid.*, at para 72 (emphasis added).

74 *Eweida and Others v. the United Kingdom*, Applications Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013 at para. 94 (emphasis added).

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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 minimise 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.

Jehovah's Witnesses of Moscow v. Russia is another good case in point.[75] 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.'[76]

In other cases, the Court has examined governments' allegations of improper proselytism in the 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 evidence[77] or its lack thereof[78] in order to accept or dismiss governments' reasons to protect others from proselytisers' pressure. The same approach surfaces in various cases concerning claims of religious discrimination in child custody and access disputes.[79] 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.'[80]

Several examples from the Court's sexual orientation case-law illustrate a similar approach. Emphasising 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"'[81]. 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.[82] 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'.[83]

4.2 '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*.[84] At the heart of the controversy was the prosecution of members

75 *Jehovah's Witnesses of Moscow and Others v. Russia*, Application No 302/02, 10 June 2010.

76 *Ibid.*, at para. 144. The Court rejects several other alleged justifications based on lack of evidence. *Ibid.*, at paras. 110, 112, 132 and 139.

77 See, for example, *Larissis and Others v. Greece*, Applications Nos 23372/94, 26377/94 and 26378/94, 24 February 1998 at para. 52.

78 See, for example, *Ahmet Arslan and Others v. Turkey*, Application No 41135/98, 23 February 2010 at para. 51 and *Ivanova v. Bulgaria*, Application No 52435/99, 12 April 2007 at para. 82.

79 See, for example, *Vojnity v. Hungary*, Application No 29617/07, 12 February 2013 at para. 38 (concerning an adherent of the 'Congregation of the Faith') and *Deschomets v. France*, Application No 31956/02, 16 May 2006 at p. 13 (concerning an adherent of the Brethren movement).

80 Application No 64927/01, 16 December 2003 at para. 42.

81 *Alekseyev v. Russia*, Applications Nos 4916/07, 25924/08 and 14599/99, 21 October 2010 at para. 86.

82 *Smith and Grady v. the United Kingdom*, Application Nos 33985/96 and 33986/96, 27 September 1999 at para. 99.

83 *X and Others v. Austria*, Application No 19010/07, 19 February 2013 at para. 146.

84 *Ahmet Arslan and Others v. Turkey*, Application No 41135/98, 23 February 2010.

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of the group 'Aczimendi tarikatı' 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.'[85]

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'.[86]

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: '[T]he importance for the second applicant of being permitted to manifest her religion by wearing her cross visibly must weigh heavily in the balance.'[87] 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 transsexuals, the Court has actually condemned one state for not 'seeing' the applicant, more precisely, for substituting its own general assumptions for the applicant's views. 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.'[88]

4.3 Limiting generalisations

In a number of cases, the Court has confined generalisations 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 a corporate image in general. Rather, the Court limits the assessment to those items worn by the applicant, Ms Eweida, and 'by other employees' and to their impact on a particular corporate image, that of British Airways.[89]

Even in *Lautsi*, when the symbol in question was worn by no one – it was hanging on a wall – and the levels of objectivation and generalisation were therefore higher, the Court does not just speak of 'the crucifix'. It also speaks of 'crucifixes in the classroom'.[90] There is therefore a significant difference of degree in the generalisations 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 generalisations

85 *Ibid.*, at para. 50 (author's translation; emphasis added).

86 *Leyla Şahin v. Turkey*, Application No 44774/98, 29 June 2004 (Chamber Judgment) at para. 85.

87 *Eweida and Others v. the United Kingdom*, Applications Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013 at para. 99.

88 *Van Kück v. Germany*, Application No. 35968/97, 12 June 2003 at para. 81.

89 *Eweida and Others v. the United Kingdom*, Applications Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013 at para. 94.

90 *Lautsi and Others v. Italy*, Application No 30814/06, 18 March 2011 at paras. 73, 74, 76.

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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'.[91] 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.[92] 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 overstatement that '(all) Muslim women are oppressed' made in *Dahlab* and *Leyla Şahin*.

4.4 'Seeing' social constructions

Contrary to the approach adopted in *Mann Singh* and *Chapman*, the Court has sometimes acknowledged the socially created character of the generalisation 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 emphasised 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'.[93] 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'.[94]

To be sure, there is a collectivised form of representing the applicants – 'the transsexual' – and a generalisation of their experiences and feelings. However, the emphasis is on the 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 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 recognised in the legal reasoning. In positing these traits as relational (as arising from deficits in legal arrangements) rather than as inherent in transsexuals, the Court treats these generalised 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: group membership would not necessarily be conferred by birth or by the fixed nature of certain practices/traits but may be shaped by a range of other factors.

V. In search of explanations

5.1 Negative stereotypes

One possible explanation for why negative stereotypes are most likely to be expected in cases touching upon Muslim women – in particular, when governments invoke arguments based on gender equality and the protection of the rights of others – can be found in the stereotypical images of Muslims dominating contemporary public discourses in Europe. These sorts of stereotypes are so embedded in such discourses that the Court probably does not notice that it is contributing to their perpetuation.

91 *Rantsev v. Cyprus and Russia*, Application No 25965/04, 7 January 2010 at para. 294.

92 *Opuz v. Turkey*, Application No 33401/02, 9 June 2009 at para. 194. See also, *N v. Sweden*, Application No 23505/09, 20 July 2010 at para. 57.

93 *Christine Goodwin v. the United Kingdom*, Application No 28957/95, 11 July 2002 at para. 77.

94 *Ibid.*

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Indeed, there is ample material pointing to the widespread use of negative stereotypes of Muslims and Muslim women in these discourses (Group of Eminent Persons of the Council of Europe, 2011, pp. 15–16; Parliamentary Assembly of the Council of Europe, 2010, p. 1; European Commission against Racism and Intolerance, 2000). For example, Thomas Hammarberg (2011, p. 40), former Council of Europe Commissioner for Human Rights, regrets 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'. The Court's discourse in fact meshes noticeably well with wider post-September-11 discourses. As Sherene Razack (2008, p. 5) notes, three kinds of stereotype have come to dominate discourses after September 11: 'the dangerous Muslim man, the imperilled Muslim woman and the civilized European'. These kinds of representation seem to have a long history (Abu-Lughod, 2013, p. 6). For instance, in a genealogical study of female subjectivity in international human rights law, Dianne Otto has identified the 'victim' as one of the recurring female subjectivities. This subject, Otto (2006, p. 320) explains, embodies colonial gender narratives and is 'created by the masculine bearer of "civilization" who rescues "native" women from "barbarian" men'.

Though Islamic rules and practices are certainly not the only victims of the Court's negative stereotypical constructions,[95] they appear to be the most frequent target. 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 – authorisation and moral evaluation – the Court has stated that sharia, with its rules on the legal status of women, 'clearly diverges from Convention values'.[96] 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 tradition which places women at a clear disadvantage, not to say in a situation of dependence and inferiority, compared to men.'[97]

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 go unnoticed by Judge Kovler who regrets that the majority did not refrain 'from making any assessment of the complexity of the rules of Islamic marriage, rather than portraying it in a reductive and highly subjective manner'.[98]

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

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95 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 delegitimising 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.' Application No 302/02, 10 June 2010 at para. 144.

96 *Refah Partisi and Others v. Turkey*, Applications Nos 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003 at para. 123.

97 Application No 3976/05, 2 November 2010 at para. 81.

98 *Ibid.*, Concurring Opinion of Judge Kovler at p. 27.

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surviving spouse status for social benefits purposes due to the lack of recognition of Roma marriage.[99] In this case, the Court views the Roma community as exhibiting certain positive characteristics – own, well-established and deeply rooted values in Spanish society – which make the applicant's beliefs worth being taken into consideration in the assessment of her good faith.[100] Contrary to Islamic marriage, Roma marriage is thereby legitimised.

S.A.S. v. France,[101] a case currently pending before the Court's Grand Chamber, will be a crucial test on whether the Court is more likely to fall 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 (Grillo and Shah, 2012). Indeed, one of the most influential arguments in favour 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' (Grillo and Shah, 2012, p. 27). In *S.A.S.*, the French government has actually made the gender equality argument in these terms.[102]

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). However, this time 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 coerced by their male relatives but rather wear it out free choice.[103] 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.[104]

5.2 Naturalisations

Offering a hypothesis for why the Court is most likely to portray applicants' traits as the unchanging essence of their group identity is in certain cases a more difficult venture. A partial and tentative explanation includes a mix of elements, most notably applicants' arguments, the Court's own 'assumptions of orthodoxy' (Beaman, 2012, p. 19) about groups with which it is not 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 naturalising language in *Chapman* and *Mann Singh*: the applicants' naturalised self-representations,[105] the Court's own assumptions that all Gypsies travel in caravans since birth or that all Sikhs wear the turban,[106] and the absence of

99 *Muñoz Díaz v. Spain*, Application No 49151/07, 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.

100 *Ibid.*, at paras. 56, 59 and 68.

101 *S.A.S. v. France* (Application No 43835/11) introduced on 11 April 2011.

102 French Government's Observations, 29 May 2012 at paras. 85–89 and 98.

103 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.

104 Written Comments of the Open Society Justice Initiative in *S.A.S v. France*, 10 July 2012 at p. 8.

105 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*, at paras. 95, 118, 123, 151 and 160.

106 The Court has expressed similar assumptions in cases concerning Jehovah's Witnesses. See, for example, *Bayatyan v. Armenia*, Application No 23459/03, 7 July 2011 at para. 111, *Jehovah's Witnesses of Moscow*

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dispute by the governments.[107] A look at the Court's broader case-law suggests that the lack of dispute by other parties is in fact crucial in making naturalising 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 questioned either from the inside (group authorities)[108] or from the outside (governments),[109] the Court has avoided assumptions of orthodoxy.

VI. Conclusion

In unpacking and challenging two major pitfalls arising from the Court's assessment of cultural and religious practices – negative stereotyping and naturalising – this paper hopes to push for a more critical use of group generalisations and categorisations in the Court's freedom of religion and right to respect for cultural lifestyle discourse.

Ironically, the Court's own case-law suggests four ways of keeping 'a keen eye on generalizations' (Carbado and Gulati, 2003, p. 1776), that is to say, four ways of dispelling the perils of negative stereotyping and naturalising: seeing the (lack of) evidence, seeing the applicants, seeing social constructions and keeping generalisations limited. In making sure to incorporate these levels of inquiry – which can be roughly referred to as evidentiary, individual and contextual – the Court is most likely to keep generalisations 'under control'.

A supranational court ruling in an increasingly pluralised Europe cannot delegitimise or privilege some group practices over others based on negative stereotypes or presumptions – rather than on demonstrable facts – without risking its own delegitimation.

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v. Russia, Application No 302/02, 10 June 2010 at paras. 133 and 150 and *Thlimmenos v. Greece*, Application No 34369/97, 6 April 2000 at para. 42. The Court, however, appears more open and inclusive in its assumptions: 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.

107 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 at paras. 3.5 and 3.13 (4) c.

108 See, for example, *Gatis Kovaļkovs v. Latvia*, Application No 35021/05, 31 January 2012 at para. 18.

109 See, for example, *Jakóbski v. Poland*, Application No 18429/06, 7 December 2010 at paras. 38 and 39.

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