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STEREOTYPING AND HUMAN RIGHTS LAW: AN (UN)CONVENTIONAL APPROACH OF THE EUROPEAN COURT OF HUMAN RIGHTS[1]

Abstract. *The authors aim to conceive the so-called inconceivable, i.e. to address the issue of stereotypes in relation to human rights law. Building on stereotypes as a sociological category, the authors examine the recent jurisprudence of the European Court of Human Rights through the prism of two relevant judicial doctrines – the margin of appreciation and the 'living instrument' doctrines. An evolutionary analysis of the Court's case law on gender equality and gender identity illustrates that the gradual decrease of the former and the rise of the latter doctrine have significantly contributed to reducing the harmful effects of stereotypes in Strasbourg's courtrooms. However, while the judges have indeed become more susceptive to questions of formal and substantive equality, a progressive anti-stereotyping approach addressing the issue of structural discrimination has yet to emerge.*

Keywords: *human rights law, stereotypes, European Court of Human Rights, judicial stereotyping*

What labels me, negates me.
Søren Kierkegaard

Introduction

An individual is not solely defined by his or her being, but also by how they perceive him or herself and the way they are regarded by other members of society. It is not uncommon for these perceptions to take the form of stereotypes and prejudice that are not necessarily grounded on direct, personal contact. Stereotypes and prejudice namely do not concern an

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individual in his or her essence. They instead pertain to inborn and acquired characteristics of individuals and social groups that are accentuated in order to differentiate groups and their members from others. Such a social reduction of human beings reflects the prevailing structural power relations within a given society/state as well as among societies/states (Savery, 2007), preventing the individual from developing all their potential and thereby emancipating/empowering him or her according to the equal moral worth of every human being (Bhaskar, 1993; 2007; Norrie, 2004, 2010).

Stereotypes and prejudice in our postmodern societies have been thoroughly examined by social psychologists, sociologists and researchers at the intersection of the humanities and the social sciences, allowing us to conclude that understanding stereotypes demands studying them at all three relevant levels: individual, group and wider social. The present article does not deal with cognitive processes related to stereotyping and the formation of prejudice at the individual level. Our primary aim is to conceive the so-called inconceivable, i.e. by addressing the issue of stereotypes in relation to (international) human rights law.

Stereotyping is not an inherently legal concept that relates to any set of specific legal rules, making authors who write about stereotypes typically focus on the sociological and not the legal dimensions of human rights. Recent jurisprudence of the European Court of Human Rights (ECtHR) reveals surprising references to stereotypes. Encouraged by this evolving (un)conventional practice, we examine the role of stereotypes in the application of legal rules, if and how they interfere with human rights claims and the corresponding duties in human rights law.

The first part of the article provides a broad sociological definition of stereotypes as a social tool for establishing the Other. While the second part draws a link between stereotyping and human rights violations, the third part presents an overview of the ECtHR's recent attempts to identify and deconstruct stereotypes. We focus on the types of stereotypes and the manner in which they are dealt with by the ECtHR. Part four of the article is dedicated to a concluding critical reflection on the limited possibilities of unveiling and deconstructing stereotypes in the ECtHR's case law and in relation to human rights law in general, striving to build the grounds for a confrontation with stereotypes, including those built into current legal norms.

What do we mean when we talk about stereotypes?

The minimum conceptual framework for any discussion on stereotypes is perhaps best summarised in the idea of stereotypes as "value representations of a specific phenomenon or people, which are positive or negative judgements and supported with more or less convincing arguments"

(Šabec, 2006: 22). Stereotypes are thus false, misguided or at least oversimplified and overgeneralised conceptions of the social world. Their disposition, which can be either negative or positive, differentiates stereotypes from prejudice. Even though the two terms tend to be used interchangeably, prejudices typically relate to negative emotionally charged stereotypes about particular social groups (Mikolič, 2008: 69).

Whereas social psychologists strive to isolate stereotypes and create controlled conditions to examine them, a growing number of sociologists draw attention to the social context in which stereotypes are (re)produced and in which they wither. Stereotypes are not born in a social vacuum. According to Wetherell (1996/2009: 195), cognitive processes cannot be located solely in individual consciousness and therefore the process of the (re)production of stereotypes should be traced in communications and in wider social relations. The 'true nature' of stereotypes could even be described as a discursive one, assuming that stereotypes are not formed and not only manifest in spoken or written words but also in nonverbal communication and everyday practices that reinforce social relations and structures (Wetherell, 1996/2009: 195; Mikolič, 2008: 70). Although stereotyping is most visible at the individual level, the analysis of stereotype formation needs to ponder group, collective and general social positioning.[2] Perceiving stereotyping as a discursive practice emphasises the role of stereotypes in construction of the social world. Stereotypes as micro-ideologies of everyday life create expectations for members of specific groups and/or implicitly summarise prescribed patterns of behaviour (Pratto, Henkel and Lee, 2013: 169–170). Active stereotyping on one hand and passive internalisation of stereotypes on the other guarantee continuous mutual constitution of the Other. Stereotypes function as an intermediary factor between the existing and possible alternatives to it, with the result that they legitimise the existing social order and hierarchy (Šabec, 2006: 23). There is more room for stereotyping in societies that are characterised by intense intercultural contacts. Yet exemptions from this unwritten rule and the complexity of stereotypes prove that stereotypes often function as pretexts, following the principle of intertextuality (Šabec, 2006: 31; Mikolič, 2008: 71).

Providing a basis or legitimisation for social inequality, stereotypes are in conflict with the underlying principles and the very purpose of human rights since they create grounds for the (re)production of structural discrimination. Historically, stereotypes and prejudice were above all tied to gender, sexual orientation, ethnicity, nationality, race, religion and social status (Ule, 2005: 27; Šabec, 2006: 31; Lovec and Bojinović Fenko, 2016). That is why

[2] *Stereotypes appear when cognitive shortcuts coincide with specific power relations in the existing social structures (Wetherell, 1996/2009: 195–196).*

human rights movements in the past invested all their efforts into including special clauses for the protection of these particular kinds of diversity in general legal documents and thematic human rights conventions.

Identifying and confronting stereotypes is hindered by the element of irrationality in them, but even more by the quality shift in postmodern stereotyping. Ule (2005: 21–23) notes that stereotypes did not wither away as we entered (post)modernity. Stereotypes are instead transforming, they are becoming less visible and are increasingly rooted in the field of the symbolic (see also Raškovič and Svetličič, 2011). The ruling belief/political correctness prevents stereotypes and prejudice from being expressed in a direct public form and hence they are becoming 'privatised', manifesting themselves in ignorance and avoidance of contact with members of the marginalised groups.

The Role of Stereotypes in the Application of Legal Rules

Despite the idea of justice being intrinsic to law, the past attempts to formulate, declare and codify human rights did not give *de facto* access to recognised rights and the (re)production of human rights discourse to stigmatised and marginalised groups. Even the French Declaration of the Rights of Man and the Citizen (DRMC) (1789) – one of the key historical milestones in the modern codification of human rights – was written with reference to particular images of a human and of a citizen. Although the DRMC was not a legally binding document, it enabled further institutionalisation of the gap between the image of the dominant group and the negative stereotypes attached to marginal groups (women, slaves, inhabitants of colonies...). Moreover, subsequent attempts to establish a list of universal human rights, their codification and interpretation were founded on a stereotypical image of a human that corresponded with the existing social order.

The latter explains why the prohibition of discrimination on the grounds of any personal circumstances (inborn or acquired) is the key underlying principle of modern human rights law. Article 2 of the Universal Declaration of Human Rights (UDHR) (General Assembly of the United Nations, 1948) – that has entered international customary law – reads: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Modern human rights law does not foresee limitations in the form of general restrictions on human rights. One of the final provisions of the UDHR recalls the duties of the holders of rights while other universal and regional legal documents (including the Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe, 1950)) point to

possible restrictions by limiting the scope of specific rights or to conditions that allow temporary suspension of their implementation (Oraá Oraá, 2009: 113). As already indicated in the UDHR, any attempt to narrow the scope of rights is conditioned by the principles of legality (there has to be a legal basis for any limitation) and legitimacy (temporary restrictions typically refer to securing the rights and freedoms of others, public order, morality, general welfare...) (*ibid.*).

The present article, however, does not deal with such limitations. It instead focuses on potentially lawful but illegitimate restrictions of the rights of certain right holders. We are particularly interested in stereotypes as blanket restrictions (assumptions about groups of individuals that determine what groups of individuals can or cannot do and that translate into law) or justifications for discriminatory interpretation and application of human rights law (stereotypes as legitimisation for disparate treatment) (Brems and Timmer, 2011: 3–4). Such stereotypes shrouded with a 'veil of law' are difficult to identify and uncover. Nevertheless, the ECtHR's (un)conventional practice suggests that this prominent judicial body has started identifying and confronting postmodern stereotypes (*cf.* Timmer, 2011: 709).

Bringing Identity Preconceptions Into The Courtroom: Stereotypes At The European Court Of Human Rights

Rather than considering access to justice a mere procedural guarantee, it must be understood as a self-standing human right enabling the realisation of all other substantive fundamental rights (Francioni, 2007: 102–107). When harmful preconceived beliefs about singled-out social groups enter the courtroom *via* the decision makers therein, access to justice and justice itself can quickly be distorted. This practice has been termed 'judicial stereotyping' and manifests in two distinct, yet interrelated practices of judges: first, in the ascription to an individual of "specific attributes, characteristics or roles by reason only of her or his membership in a particular social group" and, second, in "perpetuating harmful stereotypes through /judges'/ failure to challenge stereotyping" (Cusack, 2014: ii). In this respect, judges' quest for justice in cases of human rights violations rooted in stereotypes must stretch beyond issues of formal and substantive equality, striving for a transformative equality approach addressing structural forms of discrimination (Timmer, 2011: 710–713).

For decades, Europe has been considered the sanctuary of human rights precisely because the Council of Europe, the Convention and the ECtHR have established the most comprehensive regime of human rights protection in the world (Moravcsik, 1995: 169–173). However, as Shany (2006: 924) rightfully points out, "all institutions, including international courts, have

inherent biases, which affect the way they interpret and apply international law". In order to untangle the ECtHR's approach to stereotypes through its case law, it is therefore necessary to sketch the most pertinent explanatory mechanisms that help us understand how the ECtHR reads and understands the Convention. The following subsections will thus first address two of such mechanisms and continue with a basic blueprint showing the ECtHR's (in)consistency in handling structural discrimination. Due to limitations in scope, two specific thematic areas pointing to the (potential lack of) evolution in Strasbourg's treatment of stereotypes will be considered in the second subsection, namely, gender equality in relation to family life (Art. 8) and transsexuals' rights in relation to respect for private and family life (Art. 8) and the right to marry (Art. 12).

Two Doctrines of the Strasbourg Bench, Two Prisms of Analysis

Human rights tribunals and particularly the ECtHR have over the years developed the most dynamic, flexible and programmatic approach to the interpretation and application of human rights norms, aiming for individual rights to become practical and effective (Shaw, 2008: 937–938). Although the ECtHR is not formally bound by its own precedent, judges have developed several doctrines that guide their understanding of particular rights and their limits, and in most cases rely on them heavily when recalling their past decisions (Lupu and Voeten, 2010: 3). Two of such doctrines must be briefly sketched out in order to trace the ECtHR's understanding and treatment of stereotypes – 'the margin of appreciation' and the 'living instrument' doctrines.

The margin of appreciation doctrine represents an interpretive tool allowing judges to balance individual rights against various aspects of the (national) public interest. In the 1976 case of *Handyside v. United Kingdom* concerning the imposition of limits on the freedom of expression in relation to the requirements of public morals, the majority argued that "/b/y reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them" (para. 48). This reasoning reveals that the ECtHR largely devolved the abovementioned balancing exercise to lower levels by providing national institutions with manoeuvring space for fulfilling their Convention obligations (Greer, 2010: 2). The idea of a margin of appreciation follows Moravscik's (1995: 157–159) contention that international human rights regimes will only be successful when domestic actors are already inclined to facilitate the protection of rights.

Although the extent and the exact *modus operandi* of this doctrine is uncertain, studies show that the doctrine has been widely used particularly in respect of violations of rights commonly associated with discrimination-laden cases (Legg, 2012: 27–31), making it all the more relevant to the inquiry into judicial stereotyping. According to Greer (2010: 3), this means that use of the doctrine "inevitably involves weighing difficult and controversial political questions, rather than addressing narrow technical legal issues". Hence, when the ECtHR affords a margin of appreciation – although the doctrine itself was never meant for establishing blanket exceptions or discriminatory justifications – it becomes open to the influence of the stereotypical and (potentially) discriminatory reasoning of an individual member state.

The second doctrine relevant to the present contribution is that of a 'living instrument'. It was established in *Tyrer v. United Kingdom*, a case concerning judicially ordered corporal punishment of a minor, where the ECtHR found the respondent state in violation of Article 3 of the Convention (degrading treatment), emphasising that "the Convention is a living instrument which /.../ must be interpreted in the light of present-day conditions" (para. 31). Such an approach is extremely important in the field of human rights law given that technological advances and alterations of public interest and morality bear vital significance for the very substance of rights. The doctrine is not only relevant because it inescapably touches on morally sensitive issues – privacy, sexuality, physical integrity, gender equality etc. – that represent a breeding ground for stereotypes, but also because it juxtaposes the treatment of such sensitive issues in the prevailing moral climate of the respondent state with broader developments in the Council of Europe as a whole. Therein, the ECtHR does not assign decisive significance to what the respondent state understands as an acceptable standard, but to what the vast majority of parties to the Convention considers a common or a shared standard (Letsas, 2013: 108–109, 112).

The 'living instrument' doctrine also raises the question of positive obligations, i.e. actions required to be taken by states for the purpose of securing full enjoyment of the rights guaranteed by the Convention. Such actions range from carrying out investigations and adopting/amending legislation to making substantial changes in the institutional design of the state apparatus. While a general theory of positive obligations elaborated by the ECtHR remains absent, the positive obligations implied through judicial creativity in specific cases have strived to "ensure that the relevant rights are 'practical and effective' in their exercise" (Mowbray, 2004: 221). Nevertheless, when it comes to extending the 'living interpretation' doctrine into the realm of positive obligations in morally sensitive cases, Strasbourg judges often shy away from such an excursion. Wildhaber (2004: 86) ascribes this shyness to the fact that the bench would first have to identify a clear evolution of

morals backed with scientific evidence and then look further for corresponding evolution in the law and practice of parties to the Convention. Given that stereotypes in an era of postmodernity tend to be rooted in the field of the symbolic rather than the explicit, it is reasonable to assume that the ECtHR's comprehensive tackling of stereotypes and structural discrimination would be all the more difficult.

Stereotypes on Trial in Strasbourg: A Clash of Doctrines with Partial Outcomes

The first thematic area under consideration concerns Article 14 (prohibition of discrimination) in conjunction with Article 8 (respect for family and private life) of the Convention. Two seminal cases before the court demanded that judges struggle with stereotypical household roles creating breadwinner/caregiver divisions between men and women and the legal consequences thereof regarding some of their parenting rights, namely, paternity leave. In the 1998 case of *Petrovic v. Austria,* the majority provided a borderline schizophrenic judgement on this harmful identity preconception. On one hand, it acknowledged that gender equality represented an important goal for all member states of the Council of Europe and stressed that "very weighty reasons would be needed for such a difference in treatment to be regarded as compatible with the Convention" (para. 37). On the other, the majority emphasised that welfare measures such as parental leave were "primarily intended to protect mothers and to enable them to look after very young children" (para. 40). Because contracting states at the time of the judgement lacked a common position, the majority decided that Austria had stayed within an allowed margin of appreciation by refusing the applicant the right to paternity leave (para. 43). Such argumentation confirms that the margin of appreciation doctrine leaves judges open to the influence of harmful stereotypical reasoning. This was also the essence of a strong dissenting opinion that maintained it was precisely the discrimination against fathers which perpetuated the traditional distribution of household roles potentially having negative consequences for the mother as well as the entire family.[3]

This position changed significantly with the 2012 Grand Chamber judgement in *Konstantin Markin v. Russia*. Applying the 'living instrument' approach and relying heavily on relevant international and comparative law materials (paras. 49–75), an overwhelming majority reasoned that "contemporary European societies have moved towards a more equal sharing

[3] *See Petrovic v. Austria, Application no. 20458/92, Joint Dissenting Opinion of Judges Bernhardt and Spielmann, 27 March 1998.*

between men and women of responsibility for the upbringing of their children and that men's caring role has gained recognition" (para. 140), hence ruling that precluding the applicant from attaining parental leave was contrary to the Convention. This case illustrates how the 'living instrument' doctrine is able to narrow down or even dismiss a previously set margin of appreciation. However, an emerging (domestic) consensus across the vast majority of contracting parties remains a precondition for members of the court to undertake a more "moral reading" (Letsas, 2013: 133–135) of the Convention and alter its previous position. This may well prove even more difficult when dealing with preconceived beliefs that often differ significantly from state to state, from culture to culture.[4]

The second substantive area concerns gender identity and touches on three seminal cases that over a period of 16 years have shown how the ECtHR gradually accommodated and eventually reversed its reasoning on the rights of transsexuals. In the 1986 case of *Rees v. United Kingdom,* a female-to-male transsexual person argued that the state did not confer upon him a legal status corresponding to his *de facto* condition by refusing to appropriately change his sex in the register of births, having as a consequence – according to English law – the inability to marry a female. The bench recognised the "seriousness of the problems affecting these persons and the distress they suffer" as well as the "need for appropriate legal measures /.../ /to/ be kept under review having regard particularly to scientific and societal developments" (para. 47). The majority, however, held that the positive obligations inherent to effective respect for private life may nonetheless be subject to a state's margin of appreciation and the consequent balancing of the individual's and society's interests. Since the applicant's request would require fundamental administrative modifications and impose weighty new duties on the respondent state, the bench concluded its balancing exercise in favour of the latter (paras. 36, 43–6). Thereafter, the judges, in a matter of a few short paragraphs, confirmed the validity of the United Kingdom's opposite sex requirement to enter into marriage by linking it to the traditional concept of marriage, unanimously finding no violation of Article 12 of the Convention (paras. 27, 49–51).

The ECtHR came to virtually identical conclusions four years later in the similar case of *Cossey v. United Kingdom*, reasoning that "gender reassignment surgery did not result in the acquisition of all the biological characteristics of the other sex" (para. 40) and that the "traditional concept of marriage /provided/ sufficient reason for the continued adoption of biological criteria for determining a person's sex for the purposes of marriage, this

[4] *For cultural differences in Central and Eastern Europe, for example, see Udovič and Podgornik (2016).*

being a matter encompassed within the power of the Contracting States /.../" (para. 46). In comparison with the *Rees* case, however, the bench barely achieved a majority in finding no violation of respect for private and family life (ten votes to eight). Moreover, four judges found there had in fact been a violation of the right to marry, pointing in their dissenting opinions to "an ever-growing awareness of the essential importance of everyone's identity /.../ /and/ a growing tolerance for, and even comprehension of, modes of human existence which differ from what is considered 'normal'",[5] and calling for humane solutions that respect the psychological and physical objective facts making transsexuals members of either the female or male sex and socially accepted as such.[6]

A more progressive approach finally emerged in the 2002 *Goodwin v. United Kingdom* case. Seeking recourse in clearly identifiable international trends in socially accepting transsexuals and legally recognising their post-operative sex, the bench unanimously – after conducting a balancing of the individual's and society's interests – reasoned that no significant factors of public interest existed that would preclude the recognition of transsexuals in all respects, emphasising that states no longer enjoyed a margin of appreciation in this regard (paras. 84–5, 93). The bench also unanimously reversed its perspective on transsexuals' right to marry. It maintained that, while the state was still to determine the conditions and formalities of their marriage, it was impermissible to determine their gender by purely biological criteria (paras. 100, 103). Despite the unanimous decision, the bench neither in the judgement nor in the concurring opinions attempted to tackle the idea of the 'traditional concept of marriage' which represented the basis of the ECtHR's reasoning in the *Rees* and *Cossey* cases.

Conclusion

The above cases involving gender equality and gender identity open several intriguing legal and sociological questions. Some have argued that the rise of evolutive interpretation will lead to a continuous narrowing of the margin of appreciation (Ita, 2015), pushing the ECtHR to address harmful preconceptions as a basis of human rights violations. Others, however, have questioned the interpretive substance of the 'living instrument' approach, claiming that a constant search for a 'European consensus' could frustrate the legitimacy of the court itself, *inter alia* by appealing to a majoritarian judicial logic that walks on the edge of state consent (Dzehtsiarou, 2015: 116–121, 149–154).

[5] *Cossey v. United Kingdom, Dissenting Opinion of Judge Mertens, para. 5.5.*

[6] *Cossey v. United Kingdom, Joint Dissenting Opinion of Judges Palm, Foighel and Pekkanen, para. 5.*

While a discussion on the boundaries of judicial activism lies beyond the scope of this contribution, it is precisely the lack of benches' broader discussion (e.g. in the form of *obiter dicta*) that prevents the ECtHR from developing a genuine anti-stereotyping approach, even in its progressive landmark cases. In *Konstantin Markin v. Russia*, the majority indeed identified issues of gender inequality correctly, yet it also failed to produce any sort of contextual analysis that would uncover pertinent gender stereotypes and "dislodge the underlying structures that are male-defined and excluding of women" (Timmer, 2011: 729). In *Goodwin v. United Kingdom*, the ECtHR ruled in favour of the applicant, but at the same time a) avoided challenging in any way the traditional concept of marriage and b) built a discourse around transsexualism that is based on sexuality rather than gender, thereby recuperating a stereotypical logic of heterosexuality and (unconsciously) constructing homosexuality as the fundamental deviation (Sandland, 2003: 204).

Essentially, while the trend of evolutive interpretation is reducing direct forms of judicial stereotyping, an approach by the ECtHR that would deconstruct harmful preconceptions as the foundation of structural discrimination has yet to see the light of day. Given that structural discrimination also entails structural violence (Wight, 2003; Žižek, 2008), the deconstruction and overcoming of such a structural hegemony would also call for anti-hegemonic projects (Joseph, 2002). Nevertheless, one cannot expect the ECtHR to play such a role alone. The court as well as the Convention, including its Protocol 12, are both structural constraints and structural enablements for such projects at the national and then at the European level. However, furthering the dissemination of the (general) non-discrimination rule and limiting the pervasiveness of stereotyping in human rights law will largely depend on non-governmental organisations and other civil society actors that are most likely to act as 'norm entrepreneurs' in such cases (Finnemore and Sikkink, 1998: 898; Björkdahl, 2002; Peter and Brglez, 2007).

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