

**Identity Politics and Discrimination Law:  
Addressing Essentialism and Assimilationism in Disability  
and Transgender Discrimination Law**

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MPhil in Law

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## **ABSTRACT**

### **Identity Politics and Discrimination Law: Addressing Essentialism and Assimilationism in Disability and Transgender Discrimination Law**

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Essentialism and assimilationism work hand in hand as well as in tension to oppress groups that are different from dominant norms in society. While integrating different groups into society, discrimination law may place undue assimilationist demands on these groups. Yet at the same time, identifying and addressing these assimilationist demands also risk essentializing these identities and ignoring the needs of individuals within these groups. This thesis aims at showing that disability discrimination law provides a framework that can perform anti-assimilationist and anti-essentialist functions, through elements such as non-essentialist grounds of discrimination, more relaxed uses of comparators and duties of reasonable accommodation. Furthermore, this framework can be applied to tackle similar concerns of other different groups in, for example, transgender discrimination law.

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CJEU	Court of Justice of the European Union
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
UK	United Kingdom of Great Britain and Northern Ireland
US	United States of America

## TABLE OF CASES

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*Goodwin v UK* [2002] ECHR 588  
*Van Kuck v Germany* [2003] ECHR 285  
*L v Lithuania* [2007] ECHR 725  
*Schlumpf v Switzerland* [2009] ECHR 36  
*H v Finland* [2014] ECHR 787  
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## South Africa

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## UK

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*Corbett v Corbett (otherwise Ashley)* [1971] P 83  
*Clark v Novacold* [1999] EWCA Civ 1091, [1999] ICR 951  
*Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467  
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Art 24(3)  
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EU Legislation

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

UK Legislation

Equality Act 2010

s 15  
s 20  
s 21  
s 149

## **I. Introduction**

*‘At the very least, [equality] affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society.’*

– Justice Sachs, South African Constitutional Court<sup>1</sup>

Our society is often afraid of differences. Historical atrocities committed on those perceived to be different are needless to mention. Even in contemporary times when equality is heralded as a universal right, we still want to ignore the differences that exist among us, or attempt to understand differences as abnormalities that are either subjects of cure or welfare. It is against this background that the notion of the ‘right to be different’, the essence of which is captured in the quote above, promises to be transformative. Equality, Justice Sachs argued, includes a right to be different. But has discrimination law, one of the most important legal vehicles to realize equality, embraced a ‘right to be different’? More importantly, how can it do so?

While differences come in many forms, this thesis is primarily concerned with those that arise from what may sometimes be known as ‘identity politics’. More specifically, it is concerned with how discrimination law should approach identities such as being disabled and being transgender.

One way in which marginalization works is through attributing certain prejudicial notions or negative stereotypes as ‘essential’ parts of certain identities so as to justify the exclusion of such identity groups from majority institutions and society. One conception about equality, perhaps the mainstream one, therefore, is that

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<sup>1</sup> *Fourie and others v Minister of Home Affairs and others* [2005] ZACC 19, [60].

<sup>2</sup> Kenji Yoshino, ‘Covering’ (2002) 111 Yale LJ 769, 771.

the aim of discrimination law is to make such identities, hence any stereotype associated with them, matter less or even not matter at all.

This is what Kenji Yoshino criticized as the grip of the ‘assimilationist dream’ on discrimination law in the US<sup>2</sup>. ‘When we see how much we all can and do change along every axis of our identity,’ he argued, ‘we should apprehend that any account of discrimination that does not take assimilation into account is fundamentally impoverished.’<sup>3</sup> This thesis hopes to demonstrate that his insights are also relevant outside the US and outside the fields of sexual orientation, race and sex discrimination that he explored in his seminal article on *Covering*. More importantly, it hopes to offer some directions as to how discrimination law might shake itself off this grip of assimilationism.

Identifying and addressing assimilation, however, comes with a risk: just as groups such as gay people were subjected to discrimination partly because of negative stereotypes about them, anti-assimilationist efforts might risk essentializing certain characteristics as ‘positively’ defining one’s ‘gay-ness’. Double discrimination might then take place – gay people are shunned from wider society, yet those who are not ‘gay enough’ would also be excluded from the gay community for assimilating into the mainstream. In addressing the anti-assimilationist demands of protected groups, discrimination law must ensure that the diversity of individual needs within those groups are catered for and challenge the oppressive system instead of the oppressed. If the demand for one’s performance of her behaviour is illegitimate, ‘energies should

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<sup>2</sup> Kenji Yoshino, ‘Covering’ (2002) 111 Yale LJ 769, 771.

<sup>3</sup> *ibid* 938-939.

be devoted to contesting that demand, rather than ascertaining whether [one's] conformity to that demand is due to choice or chance.'<sup>4</sup>

This thesis would start by clarifying the concepts of 'essentialism' and 'assimilationism' mentioned above, and introduce generally how they collude as well as come in tension with each other in oppressing certain social groups. Generally speaking, the relationship between essentialism, assimilationism and discrimination law is as follows. Through tackling stereotypes, which may be a manifestation of essentialism, discrimination law helps to achieve the integration of different groups into society. However, this process of integration risks placing assimilationist demands on these groups, especially if the norms of the dominant groups are not challenged. Discrimination law, as shall be seen, provides certain tools that allow different groups to articulate and challenge the assimilation demands that have been placed on them. However, in identifying and celebrating group differences, there is a risk of essentialising all individuals within these groups as sharing certain group characteristics, hence undermining the agency of the individual and ignoring the diverse needs of each. To avoid this risk, energies must be devoted to contesting the undue assimilationist or essentialist demands placed upon these groups, rather than how individuals perform their identities.

Following a general exposition of the key concepts and the relationship among them, the structure that follows will basically be in the form of answering two successive sets of questions of 'why' and 'how': Why are essentialism and assimilationism relevant to disability discrimination law? How can disability discrimination law address these concerns? Then, taking lessons from the previous

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<sup>4</sup> *ibid* 937.

discussion, it will be asked: Why is essentialism and assimilationism relevant to transgender discrimination law? How can transgender discrimination law address these concerns? For this thesis, the line of inquiry would stop here, hoping that some light could be shed. However, readers might replicate this structure of inquiry for other grounds of discrimination to test the tentative conclusions in this thesis.

Some might think that, among the list of identities often protected in discrimination law, disability seems an unusual starting point for a project against essentialism and assimilationism. It may be more common to think of race, religion or even gender as matters of socio-culturally constructed identities. Can disability really be a matter of identification? If not, are concepts of essentialism and assimilationism relevant?

Chapter 3 will thus answer the first ‘why’ question by exploring the literature in disability studies on this question. From an overview of this literature, it will be argued that essentialism and assimilationism work hand in hand under the medical model, which views disability as a product of some damage or disease and disabled people as having ‘something wrong’ with them, to oppress disabled people. The mobilization of group identities such as being ‘disabled’ can be understood both as anti-essentialist efforts to reject the effects of medicalization and as anti-assimilation efforts to challenge ableist norms. Anti-essentialist and anti-assimilationist concerns are even more obvious in more recent movements such as Deafhood, which explicitly advocate for the understanding of being Deaf as a cultural identity. However, the formation of disabled or Deaf identities often come with essentialism that risks ignoring individual concerns and needs in the name of collective advocacy. While such essentialism may be a strategic necessity, some balance must be struck.

Chapter 4 – answering the ‘how’ question for disability – will then make the argument that the framework of disability discrimination law, as it has evolved today, contains a number of tools to address anti-essentialist and anti-assimilationist concerns, including the tension that sometimes exist between them. Firstly, in terms of defining ‘disability’ in discrimination laws, courts have at least signalled a move towards less essentialist definitions of ‘disability’ and the Convention on the Rights of Persons with Disabilities (**CRPD**) provides a basis for further evolution in that direction. Constructs such as discrimination by perception and discrimination by association may also be understood as recognizing the cultural aspects of disabled identities.

Secondly, group-based discrimination claims such as indirect discrimination, relatively common in other discrimination laws but relatively new or unused in disability discrimination law, have been heralded for recognizing the group dimension of disability discrimination. Australian cases will be used to demonstrate the potential of these claims as a vehicle to make group-based anti-assimilationist demands.

Thirdly, the laxer use of comparators and the availability of non-comparative discrimination claims in disability discrimination law both contribute to easing the assimilationist and essentialist pressures inherent in the use of comparators.

Lastly, the recognition of duties of reasonable accommodation allows greater focus on the scrutiny of the reasonableness of the demands placed on the disabled or Deaf plaintiff, rather than a scrutiny of the plaintiff’s characteristics. The presence of duties of reasonable accommodation coupled with group-based indirect discrimination claims reflects a dual concern for the group and the individual in

disability discrimination law, and provides room for the individual to choose to resist being essentialized by her group membership.

Having outlined the ways in which various tools in disability discrimination law could be used to perform anti-essentialist and anti-assimilationist functions, the next 2 chapters will take the lessons from that discussion for the purpose of answering the ‘why’ and ‘how’ questions in a different context – transgender discrimination.

Chapter 5 will explain why essentialism and assimilationism are relevant concerns in transgender discrimination – more specifically, in ‘legal gender recognition’. Recent jurisprudence recognizing a right for transgender people to have their preferred gender recognised according to certain pathologized criteria is a valuable progress. However, by essentializing transgender people as pathologised beings, transgender people are assimilated as an intelligible exception to the largely undisrupted general norms of gender in society. Essentialism thus works hand in hand with assimilationism to oppress transgender people. Anti-assimilationist attempts to break away from that binary, for example by creating non-binary gender categories such as the ‘third gender’, are also not without their problems, such as the risk of re-inviting essentialism about these new gender categories. The law must therefore find a way to address the collusion and tension between essentialism and assimilationism, and the focus in doing so must be on tackling the essentialist and assimilationist demands placed upon transgender people rather than how they perform their gender.

Chapter 6 will then see how transgender discrimination law might address those anti-essentialist and anti-assimilationist concerns. Comparative and formal conceptions of discrimination law are unhelpful in this regard, but lessons could be learnt from the previous discussion on disability discrimination law. Two of them will

be discussed in particular: the use of non-comparative discrimination reasoning, and the recognition of duties of reasonable accommodation.

If the preceding chapters are convincing, certain conclusions about discrimination law more generally may be reached. Doctrinally, this thesis may reinforce the case for extending such elements as non-comparative discrimination claims and reasonable accommodation to tackle essentialism and assimilationism in other grounds of discrimination. Theoretically, this thesis provides a reason for the common idea of disability discrimination law as an *exception to* discrimination law to give way to the idea that it is indeed an *ideal of* discrimination law.

Discrimination law is a complex project with multiple aims that often reinforce each other but are also sometimes in tension with each other. The right to equality must firmly encompass a right to be different, but there is a fine, and perhaps hazy, line between celebrating ‘the vitality that difference brings to any society’ and re-converting such differences into bases for oppression. It is important, however, for those who are currently oppressed on the basis of their differences to be allowed into the political, social and cultural conversations that shape how we see such differences. Discrimination law is one part of those conversations, and this thesis hopefully can be one small but constructive dialogue in that regard.

## **II. Essentialism, Assimilationism and Discrimination Law**

As mentioned above, this chapter will clarify the concepts of ‘essentialism’ and ‘assimilationism’, as well as to propose the general relationship between essentialism, assimilationism and discrimination law, that will set the scene for the later, more contextualized, discussions.

Essentialism is the idea that there are certain defining and fixed attributes of a group. Biological essentialism, for example, is the idea that there are certain essential biological attributes of certain groups such as men and women. Stereotyping may be a manifestation of essentialist beliefs, in that people associate certain stereotypes with certain groups and hold erroneously that such stereotypes are always true with such groups. However, essentialism can also be a ‘placeholder’ notion, in that people can believe that a group possesses some kind of essential characteristics without knowing what such an essence is<sup>5</sup>. Hence, even if someone rejects many stereotypical notions about, say, the difference between men and women, one can still believe that there is some essentialist difference between the two groups.

Much of discrimination law is aimed at eliminating differential treatment based on stereotypes, and to this extent it helps in tackling certain manifestations of essentialism. However, discrimination law may also uphold the idea that certain groups are fundamentally different even in a very limited way, and sex discrimination law is one such example. This is evident in, for example, the US jurisprudence on sex discrimination which allocates an intermediate level of scrutiny to sex discrimination

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<sup>5</sup> DL Medin and A Ortony, ‘Psychological essentialism’ in S Vosniadou and A Ortony (eds) *Similarity and Analogical Reasoning* (CUP 1989) 179.

because there are certain ‘inherent’, or at least ‘physical’, differences between men and women, even though such differences should not be the cause for inequality<sup>6</sup>.

On the one hand, discrimination law has come to appreciate the importance of differences, and that differences among groups should sometimes be celebrated but not assimilated<sup>7</sup>. Justice Sachs of the South African Constitutional Court gave one of the most eloquent judicial statements of this idea in arguing that the right to equality must include a ‘right to be different’:

‘Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society.’<sup>8</sup>

On the other hand, however, recognition and celebration of group differences runs the risk of essentializing what being in a group means. For example, Katherine Franke criticizes the US sex discrimination jurisprudence for its essentialist belief in fundamental biological differences between men and women<sup>9</sup>. As many gender theorists have argued, many of the differences between men and women, on closer examination, are not based on biology but are ‘performed’ in accordance with the social practice of what being a ‘man’ or ‘woman’ means. This does not mean that biological differences are not real, but that what we consider to be the biological differences that signal the categories of ‘men’ and ‘women’ are socially and culturally constructed. The law, Franke argued, fails to ‘account for the manner in which every

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<sup>6</sup> *US v Virginia*, 518 U.S. 515, 533-534 (Justice Ginsburg).

<sup>7</sup> See e.g. Sandra Fredman, *Discrimination Law* (2<sup>nd</sup> ed, OUP 2011) 8-14.

<sup>8</sup> *Fourie* (n 1) [60].

<sup>9</sup> Katherine Franke, ‘The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender’ (1995) 144 *UPenn L Rev* 1.

sexual biological fact is meaningful only within a gendered frame of reference’, that ‘every observation about biology ultimately collapses into normative gender roles, both as a matter of history and as a matter of contemporary social reality.’<sup>10</sup> In other words, sex is not a distinctly biological construct as opposed to gender as a social construct; social norms of gender also constitute our idea of ‘sex’.

Moreover, as Franke argued, when courts essentialize biological differences between men and women, they are not simply recognizing a fact, but their actions also become part of the cultural practice that constitutes the differences between men and women; courts ‘may say they are acting descriptively, but in fact they are acting performatively’<sup>11</sup>. This is especially evident in, for example, legal gender recognition cases where courts resort to biological essentialism in order to classify the sex of transgender persons. In doing so, therefore, this US jurisprudence not only recognizes but also reifies biological essentialism in relation to sex/gender and constricts the agency of those transgressing gender norms, including transgender persons.

In an interesting attempt to bridge assimilationist and essentialist elements in the law, Kenji Yoshino took the performative conception of identities to argue for a model of understanding assimilation that focuses on cultural instead of biological determinants of group differences. In his seminal article on Covering, Yoshino helpfully identified three forms of assimilation demands placed on minority groups: ‘conversion’ (altering one’s identity), ‘passing’ (hiding one’s identity) to ‘covering’ (downplaying one’s identity)<sup>12</sup>. As an example, Yoshino suggested that a lesbian could be demanded to change her sexual orientation to become straight (conversion),

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<sup>10</sup> *ibid* 98.

<sup>11</sup> *ibid* 52.

<sup>12</sup> Yoshino (2002) (n 2) 772 and 783-874.

or to present herself as being straight (passing), or to make it easier for others to ‘disattend’ to her sexual orientation by, say, avoiding public displays of same-sex affection or prioritizing other identities (covering).

The classical understanding of assimilation, as Yoshino observed, is that conversion, passing and covering represent successively decreasing levels of assimilationist harms in relation to a certain core, biological, substrate of racial or sexual orientation or gender identities. In rejecting this classical understanding, Yoshino argued, in line with performative conceptions of identity as discussed above, that identity is at least partially constituted by one’s acts and social situation, hence certain demands to change our identity-related behavior can be as assimilative as demands for outright conversion. There is no pre-discursive or pre-cultural substrate for an identity, and what is most important to an identity may be culturally constructed. In order to respect and affirm differences, therefore, the law must be attentive to undue covering demands as much as conversion or passing demands.

Yet, tension remains between addressing undue assimilationist demands and risks of essentialism. As Yoshino recognized, determining what counts as assimilation also runs the risk of essentialising identities and ‘engaging in the very stereotyping that the antidiscrimination paradigm is meant to retire’<sup>13</sup>. Individuals who deviate from group norms may be negatively labeled as ‘covering’, and their individual needs may also be ignored. For example, in addressing the assimilation demands that marriage equality might place on gay people, this might run the risk of accusing gay people who are married as merely ‘covering’ their queer identity.

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<sup>13</sup> *ibid* 782 and 933-938.

It is proposed that the relationship among discrimination law, essentialism and assimilationism can be summarized as follows. Through tackling stereotypes, which may be a manifestation of essentialist beliefs, discrimination law helps to achieve the inclusion of excluded groups into the workplace and society-at-large. However, the process of integration risks placing undue assimilation demands on these excluded groups, especially if the norms of the dominant groups are not challenged. Discrimination law, as shall be seen, also provides certain tools for excluded groups to challenge the assimilationist demands that have been placed on them. However, in addressing assimilation and preserving or celebrating group differences, there is a risk of essentialising all individuals within these excluded groups as sharing certain group characteristics. Such essentialism can be a deliberate strategy in an effort to articulate group demands and counter identity-blind assimilation<sup>14</sup>, but such essentialism can also undermine individual agency and ignore diverse individual needs.

A possible solution to this, Yoshino suggested, is that in tackling assimilation one should not focus on the covering performance of an individual rather than on the covering demands placed upon one's group. Contesting these covering demands, rather than people's covering performances, is an anti-stereotyping move<sup>15</sup>. The rest of this paper, to some extent, is an attempt to show how disability and transgender discrimination law can be oriented to focus on covering demands rather than covering performance, so as to 'exploit the space between the essentialism of stereotypical thinking and the aridity of identity-blindness' to address both assimilationism and essentialism of disabled people and transgender people<sup>16</sup>.

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<sup>14</sup> Gayatri Spivak, 'Subaltern Studies: Deconstructing Historiography' in Guha, Ranajit and Spivak (eds) *In Other Worlds: Essays in Cultural Politics* (OUP 1988) 197.

<sup>15</sup> Yoshino (2002) (n 2) 937.

<sup>16</sup> *ibid* 934.

To situate our discussion in context, the next two sections will articulate the relevance of essentialism and assimilationism to disability and explore how various elements of disability discrimination law can be used to perform anti-essentialist and anti-assimilationist functions.

### **III. Essentialism and Assimilationism in the Disability Context**

Yoshino began his inquiry into the nature of Covering in the context of sexual orientation, and then proceeded to apply his model to race and sex. However, there was virtually no discussion of disability in his article. While this might, of course, be because it would simply be impossible to cover everything in one article, it is also indicative of the wider assumptions that being disabled is not as performative an identity as being gay, transgender, black or even being a woman is. The UK Equality and Human Rights Commission's report in 2017 on 'Being Disabled in Britain', for example, while containing a section on 'participation and identity', only mentioned the word 'identity' once<sup>17</sup>.

Addressing anti-assimilation and anti-essentialism within the context of disability discrimination is important before applying the framework of disability discrimination law on other grounds to tackle anti-assimilation and anti-essentialist demands. There is a risk that, in attempting to theorize the anti-essentialist and anti-assimilationist elements of disability discrimination law, one might be appropriating concepts designed to perform, say, redistributive functions for disabled people and undermining the legitimacy of such concepts in doing so. This would be the case if, as many might assume, essentialism and assimilationism are simply not substantive concerns among disabled people, and as such anti-essentialism and anti-assimilation may not be important normative goals of disability discrimination law.

This chapter will argue against the above assumption. Indeed, discussions on disabled identities are not uncommon in the disability studies literature, and social

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<sup>17</sup> Equality and Human Rights Commission, *Being Disabled in Britain: A Journey Less Equal* (Equality and Human Rights Commission 2017) 117-137.

exclusion is not the only evil that the contemporary disability rights movement have articulated. It will briefly account the evolving concept of disability as an identity and a challenge to ‘normalcy’ from the traditional individual or medical model of disability to the social model of disability, and the more recent culturally affirmative approaches towards at least certain forms of disability. These developments accord with the characterization in the CRPD that disability is an ‘evolving concept’<sup>18</sup>. However, the formation of these identities may come with certain essentialism, which may possibly justified on the basis of strategic essentialism, but still requires attention.

### 1. Disabled identities in various ‘models’ of disability

A common imagination of disability is captured in what Mike Oliver called the ‘personal tragedy theory’: ‘disability is a personal tragedy where the person has a health or social problem that must be prevented, treated or cured’<sup>19</sup>. As with common responses to other tragedies such as natural disasters, disabled people are often objects of charity, or sources of inspiration when they courageously overcame their own conditions as a matter of individual effort. Disability is seen as a personal problem for which society-at-large has at best only a responsibility in preventing, treating or curing them through healthcare, or in caring for the weak and unfortunate through welfare. Disability is commonly viewed, in health terms, as a pathological issue, and in welfare terms, as a social problem; ‘to have a disability is to have something wrong

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<sup>18</sup> Preamble (e) to the CRPD .

<sup>19</sup> Michael Oliver, *The New Politics of Disablement* (Palgrave Macmillan 2012) 20.

with you’<sup>20</sup>. Such an imagination of disability is, according to Oliver, the ‘central thrust’ of what he called the ‘individual model’ of disability<sup>21</sup>.

Another way to describe the traditional approach towards disability is the ‘medical model’, which views disability as a result of some physiological impairment due to some damage or disease. The medical model of disability in turn emanates from the disease model used in medicine as well as in clinical psychology, under which practitioners find standardized measures to evaluate ‘conditions’ and devise appropriate ‘treatment’ or ‘cure’<sup>22</sup>.

A relatively sophisticated version of the medical model used by the UK Office of Population Censuses and Surveys in the late 1960s makes a threefold distinction between ‘impairment’ (lacking or having a defective limb, organ or mechanism of the body), ‘disability’ (loss or reduction of functional ability) and ‘handicap’ (disadvantage or restriction of activity caused by disability)<sup>23</sup>. The World Health Organization’s International Classification of Impairment, Disability and Handicap (‘**ICIDH**’) drew on this threefold concept, but expanded ‘impairment’ to include psychological impairments and refined the definition of ‘handicap’ to refer to a disadvantage as compared to a ‘normal’ individual. The core idea, however, remains to be a causal relationship among impairment, disability and handicap: that disability is caused by impairment, and handicap is caused by impairment or disability.

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<sup>20</sup> Michael Oliver, *Understanding Disability: From Theory to Practice* (1st edn, Palgrave Macmillan 1996) 30.

<sup>21</sup> Oliver (2012) (n 19) 20.

<sup>22</sup> A. Llewelyn and K. Hogan, 'The Use and Abuse of Models of Disability' (2000) 15 *Disability & Society* 157, 158-159.

<sup>23</sup> Amelia I. Harris, Elizabeth Cox and Christopher RW Smith, *Handicapped and Impaired in Great Britain* (UK Office of Population Censuses and Surveys 1971); Oliver (2012) (n 19) 17.

Oliver argued that the medical model is a manifestation of the ‘individual model’; indeed, medicalization is an important component of the latter. While medicine has contributed to improving the qualities of lives of disabled people, the criticism lies in society’s undue emphasis on clinical diagnosis and its acquired power to determine the form of life that disabled individuals should take<sup>24</sup>. In particular, the medicalization of disability is closely linked to the ideology of the ‘normalizing society’<sup>25</sup>, which requires people with impairments to strive to be as normal as possible to adapt to the prevailing norms of the society without questioning what constitutes ‘normal’ – that of an ‘able-bodied/minded’ person. Oliver further argued that underlying this conception of an ‘able-bodied/minded’ person is that of individualism under industrial capitalism, in which people who could not be an independent and economically productive member of society are excluded from society, and even segregated into institutions. The norms that Oliver critique, therefore, ultimately are the capitalist norms of political economy. This is sometimes referred to as the ‘materialist’ or ‘political economy’ approach towards disability.

The social model of disability arose as an alternative to the individual or medical model among disability activists in the UK and was crystallised in the publication in 1976 of the *Fundamental Principles of Disability* by the Union of the Physically Impaired Against Segregation (‘UPIAS’), a disabled persons’ advocacy group in the UK<sup>26</sup>. The *Fundamental Principles* stated clearly that ‘it is society which disables physically impaired people’, distinguishing between the impairment and the social situation of disability, and recognizing disability as ‘a particular form of social

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<sup>24</sup> *ibid* 83-85.

<sup>25</sup> *ibid* 88.

<sup>26</sup> *ibid* 83-84; See also Colin Barnes, 'Understanding the Social Model of Disability: Past, Present and Future' in Nick Watson, Alan Roulstone and Carol Thomas (eds), *Routledge Handbook of Disability Studies* (Routledge 2012) 12.

oppression'<sup>27</sup>. The problems that disabled people face, such as poverty, result from social exclusion due to various ways in which society is organized for able-bodied people, such as working conditions. A clear example, raised in the document itself, is that people wearing glasses are generally not more disadvantaged than those who are not visually impaired as such, since society has adapted to their needs. The situation of the deaf or blind, or those using wheelchairs, are thus a result of society not having adapted to their needs. The publication of these principles 'turned the understanding of disability completely on its own head', and Oliver subsequently coined the term 'social model of disability' to elaborate on the underlying ideas for disability<sup>28</sup>.

The social model of disability has been highly influential. In particular, the World Health Organization responded to the social model by switching to a 'biopsychosocial model', an integration of the biomedical and the social model, upon replacing the ICIDH with the International Classification of Functioning, Disability and Health ('ICF') in 2002<sup>29</sup>. The ICF recognizes that disability is the result of an 'interaction' between health conditions and contextual factors, and aims at providing a 'universal classification' of human functioning as opposed to one based on individual pathology. The CRPD also adopted a similar conception of disability. Having recognized that disability is an 'evolving concept', the CRPD states that disability 'results from the interaction between persons with impairments and

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<sup>27</sup> Union of the Physically Impaired Against Segregation, *Fundamental Principles of Disability* (Union of the Physically Impaired Against Segregation 1976).

<sup>28</sup> Michael Oliver, *Understanding Disability: From Theory to Practice* (2nd edn, Palgrave Macmillan 2009) 43.

<sup>29</sup> TB Üstün and others, 'The International Classification of Functioning, Disability and Health: a new tool for understanding disability and health' (2003) 25 *Disability and Rehabilitation* 565.

attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others<sup>30</sup>.

However, the social model, or at least various versions of it, has also been criticized as a denial of the real impact of impairments on disability, although the criticisms come from different perspectives<sup>31</sup>.

In particular, Shakespeare and Watson agree that social oppression is indeed at play, but also argue that the disabling effects of impairments, such as pain and suffering, have not been taken into account in the social model<sup>32</sup>. They argue that an ‘embodied ontology’ approach, which Shakespeare more recently developed into a ‘critical realist’ approach, would present a more adequate social theory of disability<sup>33</sup>. In essence, the critical realist approach to disability sees the binary between ‘disabled’ and ‘abled’ in both the medical and the social model as unhelpful, and seeks to acknowledge disability as a complex reality and to accept impairment as negative but ubiquitous and varying in degrees. Indeed, if everyone is impaired in some ways, one would need to ask the question of why some impairments are remedied and accepted and others are not, which would problematize the binary between ‘abled’ and ‘disabled’. It would also mean that efforts focused on preventing or curing impairments should not be criticized, as they might be under the social model. Rallying disabled people under a group identity and fighting for anti-discrimination policies for disabled people as a group, as a policy prescription under the social model,

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<sup>30</sup> Preamble (e) to the CRPD.

<sup>31</sup> Carol Thomas, 'How is disability understood? An examination of sociological approaches' (2004) 19 *Disability & Society* 569.

<sup>32</sup> Tom Shakespeare and Nick Watson, 'The social model of disability: an outdated ideology?' in Sharon Barnartt and Barbara Altman (eds), *Exploring Theories and Expanding Methodologies: Where are we and where we need to go* (Emerald Publishing 2001) 9.

<sup>33</sup> Tom Shakespeare, *Disability Rights and Wrongs Revisited* (2nd edn, Routledge 2014) 72-91.

would not solve all the problems that disabled people face; instead, the focus should be on redistribution to meet the varying needs of the whole population.

Oliver's defence against this kind of criticism has been that the social model is not a theory of disability, but a 'practical guide to action'. One might characterize the social model as a reaction to the still-prevalent thinking about disability, which stigmatizes disabled people with a negative and medicalized lens. The social model hence directs attention to how society might construct the disadvantages that disabled people face, and rallies disabled people to collectivize to challenge the oppression that disabled people as a group faces.

Unfortunately, as Llewellyn and Hogan argued, the word 'model' can be and have been abused to refer to something more like 'theoretical systems' intended to account for the whole of the phenomena of disability, whereas models should really only be used as a tool to aid understanding of different aspects of disability<sup>34</sup>. What Llewellyn and Hogan said would support Oliver's characterization of the social model as a 'practical guide to action' for advocates to combat the overarching medicalization of disabled people, to understand the aspects of disability related to social oppression and to take action to eliminate such oppression.

As a 'practical guide to action', the social model calls for recognizing the reality of disabled people as a social group and mobilizing disabled people to demand for the social changes needed to eliminate oppression. In order to do so, it is necessary to build a collective identity around being 'disabled'. Emphasis on the collective identity and collective action for social change is thus a key part of the social model<sup>35</sup>.

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<sup>34</sup> Llewellyn and Hogan (2000) (n 22).

<sup>35</sup> Oliver (2012) (n 19) 45.

Hence, disability as an identity is politicized under the social model as a means to fight against disability as a form of oppression.

However, criticisms have also been made towards this mode of creating social change through a group identity lens. Shakespeare, for example, cited Helen Leggett in arguing that disabled identity activism reinforces the dichotomy between ‘disabled’ and ‘non-disabled’ people: ‘in order to participate in their own management, disabled people have to participate as disabled’<sup>36</sup>. However, Shakespeare observed that a majority of disabled people does not subscribe to the social model or a unified disability identity<sup>37</sup>. One of the reasons, he suggested, is the heterogeneity of disabled people’s experiences – unlike racial groups, there is no ‘unifying culture, language or set of experiences’. The basis of the disability identity is instead found in ‘shared resistance to oppression’, similar to that of feminists. Shakespeare was also concerned that the separation of the disability identity from the underlying impairment leads to the disability identity becoming ‘voluntaristic and difficult to define or police’.

Moreover, Shakespeare was concerned that any resort to identity politics built upon victimhood can be ‘as negative as the medical model’:

‘Whereas the [medical model] sees disabled people as victims of their flawed bodies or brains, the [social model] sees disabled people as prisoners of an oppressive and excluding society. In both versions, the agency of disabled people is denied and the scope for positive engagement with either impairment or society is diminished.’<sup>38</sup>

He evaluated more positively certain ‘affirmation approaches’ to disability identity. Citing John Swain and Sally French, Shakespeare noted that an affirmation

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<sup>36</sup> Shakespeare (2014) (n 34) 103; Helen Leggett, 'Stars are not born: an interpretive approach to the politics of disability' (1988) 3 *Disability, Handicap & Society* 263, 271.

<sup>37</sup> Shakespeare (2014) (n 34) 92-110.

<sup>38</sup> *ibid* 104.

approach to disability ‘rejects the discourses of either tragedy or oppression’, but instead affirms a ‘positive identity of being impaired’ and ‘actively repudiat[es] the dominant value of normality’. It focuses on the benefits of being impaired in, for example, being able to escape role restrictions and social expectations<sup>39</sup>. Examples of such affirmation politics that Shakespeare mentioned include people on the autistic spectrum who identify as ‘neuro-diverse’ as well as self-advocacy movements by people with learning difficulties. Another example that he had not mentioned would be the notion of ‘Deaf gain’<sup>40</sup>, which will be discussed further below. Shakespeare appreciated that these affirmation accounts ‘re-balance away from the emphasis on victimhood or incapacity’, and they ensure balance in representations of the lives of disabled people and their families.

Nevertheless, in line with his critical realist approach mentioned above, Shakespeare questioned the extent to which one’s disability could be seen as positively valued for many disabled people<sup>41</sup>, and remained doubtful about any mobilization of group-identities. He was attracted more towards ‘post-identity politics’ and ultimately he saw the goal of disability politics as:

‘... to make impairment and disability irrelevant wherever possible, not to seek out and celebrate a separatist notion of disability pride based on an ethnic conception of disability identity.’<sup>42</sup>

Whether post-identity politics is better for disability politics or not is not a claim that this thesis can evaluate. However, the anti-assimilation and anti-essentialist

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<sup>39</sup> *ibid* 107; John Swain and Sally French, 'Towards an affirmation model of disability' (2000) 15 *Disability & Society* 569.

<sup>40</sup> H-Dirksen L. Bauman and Joseph J. Murray, 'Deaf Gain: An Introduction' in H-Dirksen L. Bauman and Joseph J. Murray (eds), *Deaf Gain: Raising the Stakes for Human Diversity* (University of Minnesota Press 2014) i, xv.

<sup>41</sup> A point also made in Colin Barnes and Geoff Mercer, 'Disability Culture: Assimilation or Inclusion?' in Gary L. Albrecht, Katherine D. Seelman and Michael Bury (eds), *Handbook of Disability Studies* (SAGE Publications 2001) 515.

<sup>42</sup> Shakespeare (2014) (n 34) 110.

demands surrounding the identities of at least some of those falling under the disability discrimination law framework are hopefully becoming more apparent. To better understand these observations and debates about disabled identities, one might benefit from a more concrete case study.

## 2. Case Study: Anti-assimilation and Anti-essentialism in Deaf advocacy

This section draws on Deafhood advocacy as a main example of anti-assimilation concerns in the context of disability and the anti-essentialist tensions that it might bring, though there are other examples such as the neurodiversity movement. It should be noted that these movements often reject the label of ‘disability’, and the Deaf movement in particular prefer to be recognized as a linguistic and cultural minority rather than a disabled group. However, these groups still often fall within the framework of disability discrimination law. The needs and concerns of Deaf people, therefore, should still be relevant to the argument of this thesis on discrimination law.

Deaf activism is a sophisticated form of anti-assimilation identity activism in that it has articulated not only the oppression of Deaf people in a society that treats hearing as the norm, but also the existence of a Deaf culture, community and language. The rich history and culture of Deaf people have spawned an area of studies on its own known as Deaf Studies<sup>43</sup>.

Particularly interesting for the purpose of this thesis is how the Deaf identity has more recently been constructed around concepts such as ‘Deafhood’. British Deaf activist and academic Paddy Ladd first coined the term ‘Deafhood’ in the early 1990s, and worldwide dissemination of the concept came with the publication of Ladd’s

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<sup>43</sup> For example, see Genie Gertz and Patrick Boudreault (eds), *The SAGE Deaf Studies Encyclopedia* (SAGE Publications 2016).

book, *Understanding Deaf Culture: In Search of Deafhood*, in 2002<sup>44</sup>. Deafhood followed a similar trajectory to the social model in rejecting a medical model, but it goes further than the social model in embracing a cultural model or, in the terminology used earlier, even a *somewhat* performative model of identity:

‘Deafhood is not, however, a ‘static’ medical condition like ‘deafness’. Instead, it represents a process – the struggle by each Deaf child, Deaf family and Deaf adult to explain to themselves and each other their own existence in the world... Deaf people are engaged in a daily praxis, a continuing internal and external dialogue. This dialogue not only acknowledges that existence as a Deaf person is actually a process of *becoming* and maintaining ‘Deaf’, but also reflects different interpretations of Deafhood, of what being a Deaf person in a Deaf community might mean.’ (Emphasis in original)<sup>45</sup>

Similar to Oliver’s characterization of the medical model in relation to disability, Ladd characterized the medical model of deafness as an individualistic model (‘each born Deaf person is a helpless isolated hearing-impaired individual’) and one that attempts to ‘restore’, or in the terminology used earlier in this thesis to assimilate, hearing-impaired person into the hearing norm<sup>46</sup>.

However, Ladd also rejected the social model for Deaf people. The social model, Ladd argued, includes Deaf people only by reason of their physical hearing impairment, and legislation arising out of the social model (such as discrimination laws) was often more suitable to needs arising out of individual hearing impairments<sup>47</sup>. Interestingly, as opposed to Shakespeare’s critique that the social model is too wide and the boundaries are difficult to police, Ladd’s critique appears to be that the social model is too narrow in its reliance on impairments to define the ‘disabled’ identity.

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<sup>44</sup> Paddy Ladd, *Understanding Deaf Culture: In Search of Deafhood* (Multilingual Matters, 2003); Annelies Kusters and Maartje De Meulder, 'Understanding Deafhood: In Search of its Meanings' (2013) 158 *American Annals of the Deaf* 428.

<sup>45</sup> Ladd (2003) (n 45) 3.

<sup>46</sup> *ibid* 163-164.

<sup>47</sup> *ibid* 15-17.

While the social model tended to characterize disability issues as access issues, the Deaf discourse was more about preserving its own culture and community<sup>48</sup>. For example, whereas the disability movement pushes for education of disabled children in mainstream schools, the Deaf movement wishes to preserve schools for Deaf children to equip them with the cultural and linguistic capabilities to play an active part in the Deaf community. Moreover, whereas people with disabilities, as Shakespeare also observed, ‘appear not to place a high priority on fraternizing with each other, other than under the aegis of political or artistic organization’, it was argued that Deaf people have always desired to associate with each other and even marrying each other. Ladd repeatedly emphasized that contrast between the ‘collectivist cultural value’ of the Deaf community and the ‘individualist values of Western cultures’<sup>49</sup>. Hence, he proposed that, instead of a social model, a ‘culturo-linguistic model’ would better capture the experiences of Deaf people, and that Deaf people are more comparable to other colonized or language minority groups than to other disabled people.

However, Deafhood appears to involve a considerable amount of essentialism about Deaf people and Deaf culture. Annelise Kusters and Maartje de Meulder, reflecting on their experiences of teaching Deafhood consciousness-raising courses, argued that Deafhood is an ‘open-ended concept with an essentialist core’<sup>50</sup>. They drew parallels between Deafhood and essentialist strands of feminism, the latter of which sometimes appeal to certain pure or original feminine properties such as being carers or having a womb<sup>51</sup>. Deafhood, on the other hand, suggests a more open-ended

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<sup>48</sup> *ibid* 166-169.

<sup>49</sup> *ibid* 167.

<sup>50</sup> Kusters and De Meulder (2013) (n 45).

<sup>51</sup> *ibid* 432.

concept but nevertheless implies an essentialist core, or in Ladd's terminology a 'seed', of being biologically deaf and using sign language.

While it was mentioned earlier that Ladd's conception of Deafhood is *somewhat* performative, it is important to note the ways in which Deafhood is not comparable to the concept of gender performativity popularized by Judith Butler and others, the latter of which influenced Yoshino's work on *Covering*<sup>52</sup>. Both Deafhood and gender performativity imply a process of 'becoming' – learning to become deaf or to become a certain gender. However, Deafhood suggests a direction of becoming Deaf (as opposed to deaf or even Hearing), while Butler's theory of gender performativity is anti-essentialist in the sense that it suggests an open-ended process of becoming that does not have to lead to an identity within the binary opposition of male and female<sup>53</sup>. In other words, gender performativity is an open-ended concept without a suggestion of a normative identity, whereas Deafhood more explicitly endorses a Deaf identity with an 'essentialist core'.

Hence, the essentialism in Deafhood raises questions as to the position of children of deaf adults ('CODAs'), hard of hearing people, and those deaf people who do not (yet) use sign language in the concept. Moreover, Kusters and de Meulder observed among the participants in their courses on Deafhood that there is an attitude that matters such as using spoken language, cochlear implants or hearing aids and enjoying music are 'taboos' within the Deaf community<sup>54</sup>. That not all deaf people could access the Deaf culture, for various reasons including the lack of Deaf culture awareness or differences in individual circumstances, is further demonstrated in the

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<sup>52</sup> Yoshino (2002) (n 2) 865-875; Judith Butler, *Gender Trouble: Feminism and Subversion of Identity* (2<sup>nd</sup> ed, Routledge 1999). Although popularized by Butler, the idea of gender performativity could be traced back to Candace West and Don H Zimmerman, 'Doing Gender' (1987) 1 *Gender & Society* 125.

<sup>53</sup> Kusters and De Meulder (2013) (n 45).

<sup>54</sup> *ibid* 435-436.

different uses of the term 'Deaf people' (with an uppercase 'D') to refer to those who identify as members of the Deaf community and regard themselves as culturally Deaf and the term 'deaf people' (with a lowercase 'd') to refer to those who do not sign and regard themselves as having a hearing impairment<sup>55</sup>.

Again, similar to Oliver's reaction to some of the criticisms of the social model, the concern about essentialism may simply be strategically less important than the need to combat the still-prevalent medical model around deafness and to assert the cultural identity around Deafhood. Ladd himself recognized the essentialism that is inherent in the concept of Deafhood, but explicitly justified it on the grounds of strategic essentialism, which originated from the works of postcolonial scholar Gayatri Spivak<sup>56</sup>. Criticisms of essentialism, Ladd argued, is 'unfortunate for groups like Deaf communities who are still struggling to conceptualise their post-colonial identity in the first place'<sup>57</sup>. More recently, he also recommended further cultural and sociological research about Deaf people in order to advance beyond strategic essentialism<sup>58</sup>. However, it is questionable whether such research is capable of eliminating essentialism. Indeed, it might not be necessary to think that essentialism is a 'weakness' that must be eliminated rather than an inherent part of the tension between anti-assimilation and anti-essentialism in identity politics. However, just as one cannot ignore the assimilationist pressures that identity-blindness might bring upon the Deaf community and its anti-assimilation efforts, one also cannot ignore the essentialist pressures that anti-assimilation efforts might bring upon individuals.

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<sup>55</sup> See e.g. Jemina Napier, 'The D/deaf-H/hearing Debate' (2002) 2 *Sign Language Studies* 141.

<sup>56</sup> Gayatri C Spivak, *The Spivak Reader* (Routledge 1996) 217.

<sup>57</sup> Ladd (2003) (n 45) 217.

<sup>58</sup> Paddy Ladd, 'Deafhood' in Genie Gertz and Patrick Boudreault (eds), *The SAGE Deaf Studies Encyclopedia* (SAGE Publications, 2016) 287.

The question is therefore how one could ensure that the law could respond to the needs and concerns of Deaf people as a cultural community, while not ignoring the needs and concerns of D/deaf individuals whether or not they subscribe to the Deaf identity. Kusters and de Meulder interpreted Ladd's concept of Deafhood as suggesting that matters like hearing aids or cochlear implants should be respected as 'individual choices' and that 'the focus of activism should be on *oppressive systems* rather than on these individual choices'<sup>59</sup>. The European Union of the Deaf, for example, reflects this focus by opposing the 'pressures on parents' to have their deaf children undergo cochlear implant<sup>60</sup>. This would be similar to Yoshino's suggestion to focus on covering demands rather than covering performances.

One might respond to this case study of Deafhood by arguing that it is merely an exception within disability activism, and that other disabled people do not share similar concerns of anti-assimilation or anti-essentialism surrounding their identities. Indeed, Ladd himself recognized that Deaf people have long thought that they are 'either not part of the disabled movement or a radically different group within it'<sup>61</sup>.

Whether Deafhood is an exception to in disability activism or representative of larger shifts within disability movement to recognize disabilities as cultural identities is not a question that can be conclusively answered here. Nevertheless, there have been suggestions that works surrounding the D/deaf identity may be a 'beginning to open up a theoretical space that enriches both Deaf and disability studies' by reflecting on the diverse social and cultural circumstances of both D/deaf and disabled

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<sup>59</sup> Kusters and De Meulder (2013) (n 45) 436.

<sup>60</sup> European Union of the Deaf, 'Position Paper: Cochlear Implant' (May 2013) <<http://www.eud.eu/about-us/eud-position-paper/cochlear-implant-position-paper/>> (Last accessed 26 Aug 2017).

<sup>61</sup> Ladd (2003) (n 45) 166.

people<sup>62</sup>. Moreover, it is important to note that anti-assimilation and anti-essentialist sentiment is not exclusive to Deaf identities.

Neurodiversity movements, already mentioned above, seem to have similar tensions between anti-assimilation and anti-essentialism strands. Neurodiversity is a relatively recent movement claiming that autism (among other neurological differences) is a natural human variation, and demanding for recognition and acceptance of the rights and values of neurodiverse people<sup>63</sup>. The neurodiversity movement offers an 'autism-as-difference' counter-narrative to the orthodox 'autism-as-disorder' model, the latter of which is similar to the medical model of disability in seeing that people with autism as having 'something wrong' with them<sup>64</sup>.

The politics of neurodiversity is an identity politics with comparable claims to those of Deafhood. Neurodiverse people is defined as a 'biopolitical category' advocating for the rights of and ending discrimination against people who are different from the 'neurotypical' population. The movement claims that neurodiversity is a valuable contribution to human diversity, and celebrates pride in an autistic culture and identity<sup>65</sup>. As Dana Lee Baker noted in the US context, public policy officials have been moved to respond to the neurodiversity movement by

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<sup>62</sup> Jackie Leach Scully, 'Deaf Identities in Disability Studies: With Us or Without Us?' in Nick Watson, Alan Roulstone and Carol Thomas (eds), *Routledge Handbook of Disability Studies* (Routledge 2012) 109.

<sup>63</sup> Pier Jaarsma and Stellan Welin, 'Autism as a Natural Human Variation: Reflections on the Claims of the Neurodiversity Movement' (2012) 20 *Health Care Analysis* 20.

<sup>64</sup> Katherine Runswick-Cole, 'Us' and 'them': the limits and possibilities of a 'politics of neurodiversity' in neoliberal times' (2014) 29 *Disability & Society* 1117.

<sup>65</sup> *ibid* 1120-1122.

administering programs that consider both when the disability becomes an ‘element of identity’ and when inclusion into general public activities is restricted<sup>66</sup>.

The rise of neurodiversity movements has not gone unnoticed in the Deaf studies literature. James Tabery, for example, recognized that there are two options that the Deaf community could respond to this expansion of the ‘anti-essentialist’ (in the sense of countering essentialism under the medical model) movement: either the Deaf community could welcome these additions to the ranks of the previously abnormalized, or they could make a case of why Deaf people deserve to be treated differently from the neurodiverse or the neurologically diverse. Recommending the first option, he argued that drawing essentialist lines between the Deaf and the neurodiverse or neurologically diverse would not only be inconsistent with the antiessentialist roots of Deaf activism, but would also undermine the assault against the dominance of the ‘normalcy’ paradigm<sup>67</sup>. Hence, Deaf people may be fighting a greater common battle with other forms of ‘disabilities’ against the essentialism under the medical model and the assimilation into the ‘normalcy’ paradigm.

Nevertheless, concerns of essentialism also come into play in the ‘neurodiverse’ movement. Neurodiverse advocates, for example, can be critical of medical interventions that seek to ‘normalize’ autistic people, leading to conflicts between neurodiverse advocates and parents of children with autism<sup>68</sup>. This conflict may not best represent the essentialist concern, since there is an added element of concern about the agency of the autistic child and the issue of parents deciding on

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<sup>66</sup> Dana Lee Baker, 'Neurodiversity, neurological disability and the public sector: notes on the autistic spectrum' (2006) 21 *Disability & Society* 15, 17.

<sup>67</sup> James Tabery, 'Identifying the ‘Able’ in a Vari-able World' in H-Dirksen L. Bauman and Joseph J. Murray (eds), *Deaf Gain: Raising the Stakes for Human Diversity* (University of Minnesota Press, 2014) 23, 33-34.

<sup>68</sup> Runswick-Cole (2014) (n 65) 1122.

behalf of their children. However, the act of defining which kind of medical treatments are ‘acceptable’ and which ones are not could have essentialist impacts on autistic people’s own choices as well. The homogenous construction of ‘neurodiverse people’ as opposed to the binary opposite of ‘neurotypical people’<sup>69</sup> may not be able to take into account the various circumstances of autistic people.

### 3. Summary

It would be helpful to extract various strands of information from the brief overview of some of the literature on identities under the social model of disability and approaches such as Deafhood, and weave them together using the anti-essentialism and anti-assimilationism framework of this thesis.

One can characterize the rejection of the medical model as partly driven by a combination of both anti-essentialism and anti-assimilationism concerns. As Oliver’s comments on the effects of medicalization on disabled people show, the medical model essentializes disabled people as objects of medical care and welfare while downplaying the moral and political agency of disabled people as rights-bearing citizens. This leads to discrimination against disabled people that is motivated by a prejudicial and paternalistic attitude that prefers disabled people to stay in the realms of healthcare and welfare instead of in the workplace or society-at-large.

The major concern of the social model was the exclusion of disabled people due to the way society is structured, but even in Oliver’s work one may discern an anti-assimilationist sentiment. This lies in his critique of the role of medicalization in upholding the ideology of the ‘normalcy’, in which the norm is that of an independent

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<sup>69</sup> *ibid* 1126.

and economically productive member of the capitalist economy. In rallying disabled people under a group identity to fight against oppression, one would think that Oliver would be concerned not only to fight against the essentialism arising from the medical model that excludes disabled people from society, but also to resist assimilation of disabled people into individualist and capitalist norms that is embedded in the wider 'individual' model.

Anti-essentialist and anti-assimilationist concerns are even more obvious in movements such as Deafhood and neurodiversity. In rejecting deafness or autism as a disability and preferring to see them as a form of diversity, the Deafhood and the neurodiverse movement not only reject the stigma that medical discourse place on Deaf and autistic people (hence anti-essentialist) but also reject the need to 'cure' and 'restore' Deaf or neurodiverse people to the hearing or neurotypical norms (hence anti-assimilationist). In these movements, Deaf and neurodiverse identities are not simply united by shared resistance to oppression as in the 'disabled' identity under the social model, but also affirmed as positive contributions to human diversity.

Rejection of the medical model, therefore, has come with a mobilization of disabled identities whether under the social model or under the affirmation approaches. Moreover, the idea of disability politics being a challenge to the ideology of 'normalcy' has emerged among at least some sectors of disabled people.

Some of Shakespeare's criticisms towards Oliver's social model can be understood in terms of concerns around the essentializing effects that the 'disabled' identity under the social model can have on disabled people. This would be apparent, for example, in Shakespeare's observations about people's reluctance to be defined by the 'disabled' identity, difficulties in policing essentialized boundaries of the

‘disabled’ identity, and difficulties in articulating the pain and suffering arising from one’s impairments under the social model. The needs of disabled people arising from their impairments are not adequately addressed, and might even be brushed aside, in the social model.

However, according to Oliver, the social model has always been more about strategy than theory; it is a ‘practical guide to action’ instead of an ‘all-encompassing framework within which everything that happens to disabled people could be understood or explained’<sup>70</sup>. Hence, he was less concerned about the social model not taking into account the realities of impairments than the fact that the emphasis on impairments had been ‘a strategy that was impotent in protecting disabled people’ and the fact that differences among disabled people are being used to slash services for disabled people<sup>71</sup>. His strategic thinking might lead one to interpret that the social model was implicitly deploying a form of ‘strategic essentialism’ in order to recognize and address the realities of oppression that disabled people face in common, somewhat similar to the role of strategic essentialism in Ladd’s work on Deafhood. Nevertheless, in order for ‘strategic essentialism’ to be ‘strategic’, one must be conscious and remain critical of the effects of essentialism<sup>72</sup>. Some balance must be struck when strategic essentialism leads to a tension with other concerns.

The relationship between essentialism and assimilationism in the context of disability may therefore be summarized as follows. Essentialism and assimilationism works hand in hand under the medical model to disadvantage disabled people. The mobilization of group identities such as being ‘disabled’ can be understood both as

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<sup>70</sup> Michael Oliver, 'The social model: thirty years on' (2013) 28 *Disability & Society* 1024.

<sup>71</sup> *ibid* 1026.

<sup>72</sup> Spivak (1996) (n 57).

anti-essentialist efforts to reject the effects of medicalization and as anti-assimilation efforts to challenge ableist norms (whether such norms are social, political or cultural in origin). However, any mobilization of group identities risks bringing about some kind of essentialism, such as those that Shakespeare was critical of, which risks ignoring individual concerns and needs in the name of collective advocacy.

It should be emphasized that the above discussion does not advocate for the replacement of the social model. Rather, it was to make a more modest point: to recognize that disability may have an element as a performative identity, not simply a identity united by shared resistance to oppression under the social model or an underlying biological impairment under the medical model. One of the key takeaways from Shakespeare and other critics of the social model is that disability is a complex phenomenon that cannot be reduced to ‘models’. Indeed, social model advocates have also never sought to use the social model to explain everything about disability and that the social model was intended to be a ‘practical guide to action’.

Recognizing that disability may at least sometimes a cultural identity does not go against the social model; instead, the recognition of disability as a cultural identity, and problems of essentialism and assimilationism surrounding it, could be a useful complement to the aim of the social model in countering oppression of disabled people. In her influential essay on Five Faces of Oppression, Iris Marion Young listed ‘cultural imperialism’ as one of the forms of oppression alongside exploitation, marginalization, powerlessness and violence<sup>73</sup>. The brief overview of the literature above shows that cultural assimilationism is indeed part of the oppression that at least some disabled or Deaf people has to confront, but another important insight from

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<sup>73</sup> Iris Marion Young, *Justice and the Politics of Difference* (2011 edn, Princeton University Press, 2011) 39-65.

some of the authors above is that the construction of group identities to fight oppression can be essentialist as well. It may be the case that, as Oliver or Ladd might argue, it is not the right strategic timing yet to prioritize anti-essentialist concerns at a time when disabled or Deaf identities are still struggling to be formulated, but individual choices and rights remain worthy of respect. This is especially the case when some of the reasons that some disabled or deaf people do not subscribe to these identities may well have arisen from the very oppression of these identities.

Such tension between anti-assimilation and anti-essentialism efforts is not uncommon in other identity politics such as sexuality and gender politics. These connections have not been lost on a number of authors, some of which have explicitly drawn parallels between disability politics and queer politics. Mark Sherry, for example, identified that both disability studies and queer theory contain strands that oppose the hegemony of the ‘normal’, seek to denaturalize the ‘normal’ categories, and problematize binary categories of abled/disabled and heterosexual/homosexual. However, Sherry argued that disability studies should take on one of the great insights of queer theory from Eve Sedgwick, who argued that there are intractable minoritising and universalizing impulses – the need for rights and recognition in common with other citizens and the need to assert and address its own particular and unique needs – within all kinds of identity politics<sup>74</sup>. A number of other theorists have also advanced positions similar to strategic essentialism in embracing the tension between identity politics and anti-essentialism<sup>75</sup>.

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<sup>74</sup> Mark Sherry, 'Overlaps and Contradictions between Queer Theory and Disability Studies' (2004) 19 *Disability & Society* 769, 778-779; Eve K Sedgwick, *Epistemology of the Closet* (University of California Press 1990).

<sup>75</sup> Lara Karaian, 'The Troubled Relationship of Feminist and Queer Legal Theory to Strategic Essentialism: Theory/Praxis, Queer Porn, and Canadian Anti-Discrimination Law' in Martha Albertson

Discrimination law should embrace and respond to this tension between anti-assimilationist identity politics and anti-essentialism. This is partly because discrimination law itself can be complicit in reinforcing undue assimilation, as Yoshino had argued. Yet, the law in acknowledging identity categories might entrench, and eventually essentialize, discipline and normalize these categories, which could create other forms of exclusion. Carl Stychin, a Canadian queer legal theorist, therefore argued for a re-examination of equality law through the lens of ‘postmodern identity politics’: one that understands the malleable and socially constructed nature of identities, expresses identities defined in terms of difference, but accepts the strategic use of essentialism to advance legal protections<sup>76</sup>.

The next chapter will continue to make the argument on how this tension can be adequately captured, and how different needs can be adequately addressed, within the framework of disability discrimination law. The proposed direction, as mentioned by various writers above, is to focus on the oppressive demands placed upon disabled or Deaf people to assimilate into the abled or hearing norms, while accommodating individual choices to not be disciplined by essentialized group identities. The precise point of balance will be highly contextual and often difficult to identify, but it is important for discrimination law to recognize that this balance is needed. Indeed, as will be seen in the next chapter, disability discrimination law as it has evolved today already has a framework with several tools that is capable of recognizing this balance.

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Fineman, Jack E. Jackson and Adam P. Romero (eds), *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Routledge 2016) 375, 378-381.

<sup>76</sup> Carl Stychin, *Law's Desire: Sexuality and the Limits of Justice* (Routledge 1995) 102-116.

## **IV. Anti-essentialism and Anti-Assimilationism in Disability Discrimination Law**

Having discussed how concerns of anti-essentialism and anti-assimilationism may be relevant to the context of disabled identities, this chapter will argue that disability discrimination law has developed tools that are capable of reflecting anti-essentialist and anti-assimilationist concerns surrounding disabled identities. This would involve both the questions of defining ‘disability’ and ‘discrimination’.

On the first question, adding to the discussion in the previous chapter about different models of disability, it will be argued there is a shift towards less essentialist definitions of ‘disability’ in disability discrimination law and further evolution is possible to reflect the identity and community dimensions of disability.

On the second question, this chapter will discuss how various constructs such as group-based indirect discrimination claims, non-comparative discrimination claims, and duties of reasonable accommodation may be various tools to address anti-essentialist and anti-assimilationist concerns.

### **1. Non-essentialist grounds of discrimination**

The impact of the social model on disability discrimination law is most obvious in the way in which ‘disability’ is defined in these laws. As mentioned above, the CRPD defined ‘disability’ with reference to the distinction between impairment and disability and recognized that disability ‘results from the interaction between

persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others<sup>77</sup>.

The evolution of the definition of ‘disability’ under the CRPD can be demonstrated with successive cases in the CJEU. In *Chacón Navas*, before the CRPD entered into force, the Grand Chamber of the CJEU considered whether being dismissed from work on the ground of sickness could constitute disability discrimination under the Directive 2000/78 on equal treatment<sup>78</sup>. Ruling that sickness is not a disability, the CJEU held that ‘disability’ should be understood as ‘a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life’<sup>79</sup>. As Sarah Fraser-Butlin noted, *Chacón Navas* reflected a strongly medical or individual model, of which the focus was ‘firmly on the limitation from an impairment’ and ‘determined by the disabled person, rather than the barriers in society’<sup>80</sup>.

However, after the EU ratified the CRPD in 2010, the CJEU modified its approach towards defining disability. In *HK Danmark*, the CJEU again considered the question of whether a sickness could constitute disability under Directive 2000/78, and answered in the affirmative this time<sup>81</sup>. The Court stressed that Directive 2000/78

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<sup>77</sup> Preamble (e) to the CRPD.

<sup>78</sup> C-13/05, *Chacón Navas v Eurest Colectividades SA* [2006] ECR I-6467; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

<sup>79</sup> *Chacón Navas* (n 79) [43].

<sup>80</sup> Sarah Fraser-Butlin, ‘The UN Convention on the Right of Persons with Disabilities: Does the Equality Act 2010 Measure up to UK International Commitments?’ (2011) 40 ILJ 428, 433: Also see Lisa Waddington ‘Case C-13/05, *Chacón Navas v Eurest Colectividades SA*, judgment of the Grand Chamber of 11 July 2006’ (2007) 44 CML Rev 487.

<sup>81</sup> C-335/11 and C-337/11, *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Wege v Dansk Arbejdsgiverforening acting on behalf of Pro Display A/S* [2013] ECR 000.

must be interpreted in a manner consistent with the CRPD. Hence, so long as the sickness led to a limitation on a long-term basis, it would fall within the concept of ‘disability’ – the focus was thus on the impact of the sickness rather than its medical nature. Indeed, the Court stated clearly that the origin of the disability should be irrelevant. In ruling so, the CJEU was said to have ‘explicitly embraced’ the social model of disability reflected in the CRPD<sup>82</sup>.

The optimism surrounding *HK Danmark* may have wended down following subsequent cases of the CJEU, as Lisa Waddington described the Court as ‘clearly ‘talking the talk’ of the social-contextual model of disability found in the CRPD, but it is struggling to ‘walk the walk’ and apply that model in practice’<sup>83</sup>. She cited two cases since *HK Danmark* to demonstrate that the court in practice still placed an emphasis on the need for limitations resulting from impairments. In *Kaltoft*, for example, the Court was concerned with whether a person dismissed on the ground of his obesity could constitute disability discrimination<sup>84</sup>. While the Court reiterated broad statements from *HK Danmark*, the examples that the Court considered as to the situations in which obesity might constitute a disability all concerned limitations that are physical in nature and/or are directly caused by obesity, such as reduced mobility or medical conditions related to obesity. However, in failing to mention the relevance of socially created barriers arising from stigma or false assumptions about the ability of an obese person, even though they have been mentioned to the court in arguments, the Court was ‘struggling to recognize and apply [the social model] in practice’<sup>85</sup>.

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<sup>82</sup> Lisa Waddington, ‘*HK Danmark (Ring and Skouboe Werge)*: Interpreting EU Equality Law in Light of the UN Convention on the Rights of Persons with Disabilities’ (2013) 17 EADLR 1, 21.

<sup>83</sup> Lisa Waddington, ‘Saying all the right things and still getting it wrong’ (2015) 22(4) MJ 576, 591.

<sup>84</sup> C-354/13, *Fag og Arbejde (FOA), acting on behalf of Karsten Kaltoft v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund*, EU:C:2014:2463 (‘**Kaltoft**’).

<sup>85</sup> Waddington (2015) (n 84) 588.

The Canadian Supreme Court had also partially adopted the social model, even before the CRPD came into force. In *City of Montreal*, the court recommended a ‘multi-dimensional approach that includes a socio-political dimension’ towards the definition of ‘handicap’ in the Canadian Charter of Human Rights and Freedoms, which did not refer to ‘disability’ at that time<sup>86</sup>. A ‘handicap’ may thus be the result of ‘a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all these factors’. The emphasis should be on ‘obstacles to full participation in society rather than the condition or state of the individual’, and on the ‘effects of the distinction, exclusion or preference rather than the precise nature of the handicap’<sup>87</sup>.

Despite ‘talking the talk’ of the social model of disability, there also seems to be at times a problem with ‘walking the walk’ especially at the tribunal level in Canada. In *Hinze*, for example, the Ontario Human Rights Tribunal classified the case law on disability discrimination based on whether each medical condition has been considered a disability in each case<sup>88</sup>. Although there were other legitimate reasons for dismissing the case, the tribunal concluded partly from that classification exercise that the plaintiff’s illness did not meet the ‘de minimis, or minimal, threshold for having a disability’, indicating a focus on the medical nature of his condition rather than the social obstacles that he faced.

However, other tribunal cases made use of the notion of ‘discrimination by perception’ to implement the social model of disability. In *Rollick*, for example, the employee was dismissed after having taken temporary disability leave for a

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<sup>86</sup> *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City)* [2000] 1 SCR 665 (hereinafter ‘City of Montreal’) [72]-[84].

<sup>87</sup> *ibid* [81]-[82].

<sup>88</sup> *Hinze v Great Blue Heron Casino*, 2011 HRTO 93.

concussion arising from an accident at home<sup>89</sup>. The tribunal emphasized that the condition of the dismissed employee does not impact whether he was disabled for the purpose of discrimination law; instead, the ‘reality’ was that it was the employer’s perception that the employee might have functional limitations that led to the dismissal. Indeed, Lisa Waddington had also suggested that EU law could better implement the social model of disability by protecting those discriminated on the basis of assumed or perceived disability<sup>90</sup>.

Nevertheless, certainly rhetorically and arguably substantively, the trend towards shedding the medical or biological essentialism in the definition of ‘disability’ in disability discrimination law is observable. Protecting discrimination on the basis of not only actual but also perceived disability is also a way in which the social model can be or has been reflected in the issue of the ground of discrimination. A further question would be whether the law could evolve further to include that dimension of disability as a socio-cultural identity in the definition of ‘disability’.

Acknowledging the criticisms against the social model of disability for neglecting identity politics in disability, Theresia Degener argued that the ‘human rights model’ in the CRPD ‘acknowledges’ identity issues and offers room for ‘minority and cultural identification’ among disabled people<sup>91</sup>.

This acknowledgement is not obvious from the reference to the social model of disability in the Preamble and has been limited to a few groups in the text itself, most notably Deaf people. Art 30 CRPD, for example, provides that States must

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<sup>89</sup> *Rollick v 1526597 Ontario Inc*, 2014 HRTO 337; Also see *Hill v Spectrum Telecom Group Ltd*, 2012 HRTO 133.

<sup>90</sup> Waddington (2015) (n 84) 589.

<sup>91</sup> Theresia Degener, ‘A Human Rights Model of Disability’ in Peter Blanck and Eilionóir Flynn (eds), *Routledge Handbook of Disability Law and Human Rights* (Routledge 2017) 31, 41-45.

recognize and support disabled people's 'specific cultural and linguistic identity, including sign languages and deaf culture'<sup>92</sup>. Another specific reference was on the right to education in Art 24, which promoted 'inclusive education' for disabled people but required states to ensure appropriate education for deaf, blind and deaf-blind people and facilitate learning of Braille and sign language<sup>93</sup>. Furthermore, facilitation of sign language learning was specifically linked to the 'promotion of the linguistic identity of the deaf community'. These two articles, however, are the only ones that mentioned 'identity' in the text of the CRPD.

Nevertheless, given that the CRPD referred to disability as an 'evolving concept' and already recognized that some disabled people have 'specific cultural and linguistic identity', there is a basis for the definition of 'disability' in discrimination laws to further evolve to include cultural dimensions.

To what extent would or should such an evolution directly translate into substantive differences in the legal definition of 'disability' in disability discrimination law itself, however, is unclear. As seen in the previous chapter, cultural disabled identities such as being Deaf still have an 'essentialist core'. Some Deaf studies writers refer to audiological deafness as only among certain other criteria for determining membership in the Deaf community, so that there could indeed be hearing members of the Deaf community (such as sign language interpreters), but Ladd's understanding of Deafhood would perhaps assign them to a peripheral position of the community<sup>94</sup>. Asking courts to prioritize one's cultural identification over one's audiological status may not exactly reflect what the Deaf community demands.

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<sup>92</sup> Art 30(c) CRPD.

<sup>93</sup> Art 24(3) CRPD.

<sup>94</sup> See e.g. Jemina Napier (2002) (n 56); Kusters and De Meulder (2013) (n 45).

Some simpler changes may be welcome in the legal discourse. English courts, for example, sometimes refer to Deaf people as ‘suffering from a hearing impairment’<sup>95</sup>, a phrase that reflects the medical model of disability and deafness, though it may well be the case that it was the deaf plaintiff’s own identification. The Deaf community has rejected phrases such as ‘hearing loss’ or ‘hearing impaired’ in favour of identification as ‘Deaf’ or ‘Hard of Hearing’<sup>96</sup>, and legal actors such as courts might well follow suit despite the legislation’s explicit reference to ‘impairments’ in its definition of ‘disability’. Some may decry this as ‘political correctness’, but if changes in language could encourage more positive perception and perhaps greater utilization of discrimination law among Deaf people, such ‘political correctness’ would be not only respectful but also useful.

Moreover, existing devices in discrimination laws, most notably the concepts of ‘discrimination by perception’ and ‘discrimination by association’, could be understood as incorporating cultural dimensions into the law. In relation to transgender discrimination, Alex Sharpe had written that discrimination by perception, by focusing not on actual identity but what is ‘seen’ and what is presented for ‘seeing’, could help re-orient discrimination law away from the essentialist substrate of identity and towards a focus on ‘the interplay between performance and gaze’<sup>97</sup>. More about this will be discussed in later chapters. For now, it suffices to say that a similar observation may be made in relation to disabled identities, such that ‘discrimination by perception’ could be understood as focusing on the essentialist or assimilationist

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<sup>95</sup> See e.g. *Mefful v Merton and Lambeth Citizens Advice Bureau* [2014] UKEAT 290.

<sup>96</sup> As jointly declared by the World Federation of the Deaf and the International Federation of the Hard of Hearing People on 2 July 1991 in Tokyo. Also see Co-operation Agreement between World Federation of the Deaf and the International Federation of the Hard of Hearing People (18 October 2013) <<https://wfdeaf.org/news/resources/international-federation-of-hard-of-hearing-people/>>

<sup>97</sup> Alex Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (Cavendish Publishing 2002) 159 and 160-163.

demands placed upon one's disabled identity rather than one's performance of that identity.

'Discrimination by association' may also be understood to reflect a community dimension of disabled identities<sup>98</sup>. Being a cultural construct, membership in a disabled community may not necessarily require an essentialist 'disabled' substrate in a person, especially in the relative peripheries of that community. For example, hearing members of the Deaf community, such as sign language interpreters and children of deaf adults (CODAs), may well be discriminated on the ground of their association with the Deaf community. By protecting hearing members of the Deaf community, discrimination by association can be taken to reflect an understanding of the Deaf community as one that is bound by an at least partially culturally constructed identity.

## 2. Group-based discrimination claims (indirect discrimination)

The most obvious reflection of disabilities as group identities may be the introduction of indirect discrimination into disability discrimination law. This is a relatively recent phenomenon in British discrimination law, in which indirect discrimination had not been available for disability discrimination until the Equality Act 2010. It has had a longer history in Australia, the case law of which will be referenced more extensively in this section.

Indirect discrimination is essentially a scrutiny of disparate impact. In the UK, the 'group-oriented' nature of indirect discrimination has been reinforced by the Supreme Court's judgment in *Essop*, which reiterated that it is unnecessary to prove

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<sup>98</sup> For example, see C-303/06, *Coleman v Attridge Law* [2008] ECR I-5603.

that the individual plaintiff suffered the disadvantage that the group suffered for the same reason that the group suffered the disadvantage<sup>99</sup>. It aims at removing hidden barriers that the group, of which the individual plaintiff is a member, face in participation in their socio-economic and public lives. As the court clarified,

‘... the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment - the [provision, criterion or practice] is applied indiscriminately to all - but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot.’<sup>100</sup>

The introduction of a group-oriented indirect discrimination claim to disability discrimination law has been said to be a welcome addition to help ‘challenge and break down systemic barriers’, to send a ‘symbolic message that disability discrimination is not entirely an individualized affair’ and that it ‘injects a degree of recognition of the group dimension of disability discrimination’<sup>101</sup>. Such group-oriented claims thus reflect the nature of disabled people as having group identities.

As Anna Lawson noted a few years ago, while indirect disability discrimination is either new or remains under-used in some jurisdictions, there have been interesting examples in Australia<sup>102</sup>.

One such example concerned the group demands of Deaf people in relation to the use of sign language. In *Hurst and Devlin v State of Queensland*, the Federal

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<sup>99</sup> For the group-oriented nature of indirect discrimination, also see Sandra Fredman, ‘Addressing disparate impact: Indirect discrimination and public sector equality duty’ (2014) 43 ILJ 349 at 353; Tarunabh Khaitan, ‘Indirect discrimination law: causation, explanation and coat-tailers’ (2016) 132 LQR 35 at 36-37.

<sup>100</sup> *Essop v Home Office* [2017] UKSC 27, [25]

<sup>101</sup> Anna Lawson, ‘Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated’ (2011) 40 ILJ 359, 376 and 379.

<sup>102</sup> *ibid* 376.

Court of Australia considered two Deaf students' complaint against the State of Queensland for providing education only in Signed English but not in Australian Sign Language ('Auslan', which is a native Australian sign language), which they claimed has negatively affected the quality of their education<sup>103</sup>. The major issue in the case was whether the requirement or condition that they accept an education and receive instruction in English without the assistance of an Auslan teacher or interpreter were indirectly discriminatory, in that this requirement or condition led to a detriment in their quality of education (compared to that of hearing students) and was not a reasonable requirement or condition.

The court heard extensive expert evidence from all parties regarding the use of Signed English and Auslan among Deaf communities, their use in education and the quality of education in each language. It was established, for example, that Signed English is not itself a language but a manual representation of English, whereas Auslan is a language with its own grammar and syntax. Much of the evidence was also related to the background policy debate: whether the 'Total Communication' policy of educating Deaf or Hard of Hearing students, under which teachers would 'speak and sign simultaneously in Signed English in order to facilitate the students' English language development through visual and auditory channels', should give way to a bilingual/bicultural policy that uses Auslan as the first language of Deaf students and English as their second language. The Total Communication policy facilitates Deaf people's communication and integration with hearing persons, but is also criticized for disempowering the Deaf and failing to recognize the Deaf as a

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<sup>103</sup> *Hurst and Devlin v State of Queensland* [2005] FCA 405.

linguistic and cultural minority<sup>104</sup>. In the language used in this thesis, the use of Auslan in education is an anti-assimilationist demand of Deaf people.

The court ruled that each student should be assessed individually to determine what method of communication would attain the best educational outcome, and that in some cases, such as those of the plaintiffs who are ‘profoundly deaf’, education in Auslan ought to be provided. It was therefore not reasonable for the State of Queensland not to provide the plaintiffs with an education in Auslan<sup>105</sup>. The ruling that each student’s needs should be individually assessed with a respect for needs for education in Auslan appeared to accord with the general notion of respecting individual choices over group-imposed demands, which in the previous chapter was mentioned as a preferred way to resolve the tensions between anti-assimilationist and anti-essentialist demands.

However, on closer examination, in deciding whether the Deaf plaintiffs has the ‘ability to comply’ with the requirement of being taught in Signed English instead of Auslan, the court focused on the degree of biological deafness and the ability to ‘cope’ and ‘participate’ in the classroom in an effective way, rather than the plaintiffs’ identification with the Deaf identity and their attendant cultural need to use Auslan<sup>106</sup>. Hence, whereas the court partly recognized the anti-assimilationist demands of Deaf people, they were given a low priority compared to effective participation in the hearing-norm environment. More importantly, the needs of Deaf students were essentialised with reference to their biological statuses of ‘deafness’ rather than their

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<sup>104</sup> *ibid* [653].

<sup>105</sup> *ibid* [728]-[803].

<sup>106</sup> *ibid* [804]-[822].

cultural identification. Admittedly, the balance was even more difficult to strike due to the presumed lack of agency of a D/deaf child.

Nevertheless, *Hurst and Devlin* demonstrated the potential of group-based claims such as indirect discrimination as a vehicle to make group-based anti-assimilationist demands<sup>107</sup>. Although the court emphasized the need for individual assessments, it did recognize that ‘profoundly deaf’ students as a group generally need education in Auslan<sup>108</sup> – hence a group-based solution was provided. However, even though the court did recognize that Deaf people are generally a cultural community, the way in which the group was conceived in the solution referred mainly to biological ‘deafness’ and reflected strong essentialism. Courts in dealing with indirect discrimination might be able to move further away from such essentialism by recognizing that the factors affecting a disabled person’s needs may not only be biological but also be cultural in nature, such as the extent to which a Deaf child wishes to be or is involved in the Deaf community.

This case may also put our theoretical discussion about the tension between anti-assimilationist and anti-essentialist demands in context. In the context of disabled and Deaf people, the general under-recognition of their anti-assimilationist demands may mean that it may be much more often to see biological or medical essentialism being used to defeat group-based anti-assimilationist demands, than to see group-based anti-assimilationist demands defeating individual anti-essentialist choice. This may remind us of Oliver’s argument that prioritizing anti-essentialist over anti-assimilationist concerns may be ‘unfortunate’ in timing for disabled people.

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<sup>107</sup> Also see Elizabeth Dickson, ‘Coping, Complying and Indirect Discrimination: *Hurst v State of Queensland*’ (2005-2006) 10(2) & 11(1) *Australia and New Zealand Journal of Law and Education* 103.

<sup>108</sup> *Hurst and Devlin* [2005] FCA 405, [769].

This is especially the case when courts have to decide what is best for disabled or Deaf children, who are often presumed to have no agency of their own, and in which it may be more likely that these courts would prefer the abled or hearing norms. In such cases, the balance will be even more difficult to strike, and there are more issues in such cases than can be dealt with in this thesis (such as how the law treats children generally). Nevertheless, it is argued that courts should at least be aware of potential assimilationist harms and address them adequately.

### 3. The Problem of Comparators and the Use of Non-comparative Claims

Another source of assimilationist and essentialist pressure in discrimination law is the use of comparators. Sandra Fredman, for example, argued that the need for comparisons in discrimination law has created ‘powerful conformist pressures’ to male, white or able-bodied norms, and the choice of ‘relevant’ comparators especially in the context of disability often involve difficult value judgments<sup>109</sup>.

For example, in the context of sex discrimination, the ‘male norm’ problem has been extensively written about. One example is in pregnancy cases in which there is simply no male comparator, or as courts later recognized, the comparator is that of an ‘ill male’. However, problems remain, for example, when complaints regarding paid maternity leaves are defeated due to comparisons with unpaid medical leaves<sup>110</sup>. By failing to question the norms that have been set by men who have dominated the workplace, such comparisons exert assimilationist pressures on women to modify their reproductive choices and family responsibilities in order to be equal with men.

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<sup>109</sup> Fredman (2011) (n 7) 10-12.

<sup>110</sup> *ibid* 168-171.

At the same time, the use of comparators may also be essentialist in the way in which courts choose the ‘relevant’ parts for comparison, a problem particularly apparent in disability discrimination. A common exposition of this problem refers to the hypothetical case of a blind person with a guide dog who was excluded from a restaurant under the restaurant owner’s general prohibition of dogs entering restaurants. The comparator can either be ‘other non-disabled persons with dogs’, which would only ignore the ‘blindness’ of the person, or ‘other non-disabled persons’, which would also take away the guide dog as a disability-related characteristic. This is also related to whether a medical model or a social model of disability is used – the first comparator would be more appropriate under the medical model, which approaches disability only as a matter of the impairment, whereas the second comparator would be more appropriate under the social model, which approaches disability as a matter of socially created barriers.

For some time, English courts had been relatively lax on the use of comparators in disability discrimination cases. In *Clark v Novacold*, Mummery LJ referred to the hypothetical case above and preferred the second comparator, which would avail the blind person of a direct discrimination (or ‘disparate impact’) claim<sup>111</sup>.

However, in *Lewisham v Malcolm*<sup>112</sup>, the majority in the House of Lords essentially preferred the first comparator instead. The difficulties that the majority identified was that direct discrimination provided no possibility for justification, and casting the net too wide in terms of comparators at the stage of identifying discrimination would overly intrude private defendant’s freedoms.

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<sup>111</sup> [1999] EWCA Civ 1091.

<sup>112</sup> [2008] UKHL 43.

Lady Hale, dissenting from the majority, preferred Mummery LJ's choice. She acknowledged that such a choice would be different from how comparators are used in other grounds, and that this might reduce the comparator test to one that would always be met, but such a difference is necessary to 'level the playing field' for disabled people<sup>113</sup>. It may be argued that Lady Hale's position implicitly endorsed the social model and was aimed at removing socially created barriers for disabled people.

In the context of culturally constructed identities, these problems with comparators would take on a cultural dimension too. Consider a hypothetical case in which a Deaf person complains a school of discriminatory treatment for not providing a sign language interpreter. The use of sign language may be a strong performative element of her identity as Deaf, but not all D/deaf persons have such a strong identification with sign language. Comparisons thus become fraught if another deaf person with a similar audiological status (i.e. levels of 'deafness') could access education in the school without a sign language interpreter. If the court disregards the Deaf person's cultural performative identification with the use of sign language, a comparison strictly on the basis of biological deafness could cause the her discrimination claim to fail. Such a comparison would be essentialist in relation to what constitutes being D/deaf and assimilationist on her Deaf identity.

Comparators may also cause problems in indirect discrimination (or 'disparate impact') claims. Indirect discrimination may still involve comparators – it would still have to be established that the group to which the plaintiff belong suffered a disparate impact as compared to a group without the protected characteristic. Focusing too much on this comparative aspect, however, would cause the disparate impact claim to

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<sup>113</sup> *ibid* [74].

lose its ability to challenge requirements that look neutral but work towards the disadvantage of certain groups<sup>114</sup>.

The danger of a disparate impact assessment that focuses too much on comparators can be demonstrated with an Australian case, *State of Queensland v Che Forest*, involving the use of assistance dogs<sup>115</sup>. In *Che Forest*, the plaintiff had a mental illness and sought to be accompanied by his assistance dog when accessing medical services provided by the State of Queensland. However, the State of Queensland denied the plaintiff's request on the basis of that his dog was not a guide dog or a hearing dog, which were allowed as a matter of course, and on a separate case-by-case assessment his assistance dog did not satisfy the respondent's standards of safety. On the indirect discrimination claim, the trial judge at the Federal Court of Australia was ready to note that a greater proportion of the comparator group, i.e. those without the plaintiff's disability who wished to seek access to the respondent's medical services, than the plaintiff's group would be able to comply with the requirement of not bringing dogs into the respondent's facilities. However, on appeal, the Full Federal Court reversed the trial judge's ruling on the indirect discrimination claim on the basis that the judge had no evidence to compare the proportion of the comparator group and the plaintiff's group who could comply with the said requirement.

Although the case seemed to have failed on an evidentiary rather than doctrinal issue, the point here is that the comparator requirement had placed a difficult evidential burden on the plaintiff. The problem lies in the fact that the indirect discrimination claim in *Che Forest* failed at the stage of comparison, without even

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<sup>114</sup> *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15 (n 122) [17].

<sup>115</sup> *The State of Queensland (Queensland Health) v Che Forest* [2008] FCAFC 96.

having to go into assessing whether the respondent's actions were justified or considering the plaintiff's substantial evidence that his assistance dog was indeed well-trained and safe<sup>116</sup>.

Furthermore, if the judge were to attempt to make such findings at the stage of comparison, defining the comparator group in relation to who should be considered to be 'without the plaintiff's disability' would cause difficulties. The court might define the plaintiff's group with a medical model focusing on the nature of the impairment (e.g. all those suffering from a similar mental illness), or under a social model focusing on a common socially created barrier (e.g. all those requiring the assistance of any service dogs). The latter would be more preferable, but then it would be a relatively lax use of comparators and one might argue that such use of comparators would simply be restating the facially neutral condition or requirement rather than performing any real analytical purpose. In such a case, one might wonder whether there should be avenues for the plaintiff to simply go around the comparator requirement in proving discrimination.

Indeed, non-comparative discrimination claims have been developed in disability discrimination laws. In the UK, the strict use of comparators in disability discrimination laid down by the majority decision in *Malcolm* was soon reversed with the introduction of separate claims for 'direct discrimination' and 'disability-related discrimination' for disability in the Equality Act 2010. 'Direct discrimination' still involves the use of comparators and, once established, cannot be justified. However, 'disability-related discrimination' focuses on whether the reason for the discriminator's action includes something 'arising from or in consequence of' the

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<sup>116</sup> Paul Harpur, 'The Convention on the Rights of Persons with Disabilities and Australian Anti-Discrimination Laws: What Happened to the Legal Protection for People Using Guide or Assistance Dogs' [2010] UTas Law Rev 3.

disability of the discriminated person, and allows the discriminator to justify her action on a proportionality test<sup>117</sup>. There is also a requirement in the latter claim that the alleged discriminator knew or would reasonably know of the discriminated person's disability<sup>118</sup>.

The distinction between 'direct discrimination' and 'disability-related discrimination' addressed the problem that the majority in *Malcolm* identified with casting the net of 'direct discrimination' too wide without a possibility of justification, while allowing for the use of 'disability-related discrimination' to challenge socially created barriers on disabled people's access to opportunities or facilities. By allowing justification for disability-related discrimination, the focus of the inquiry would turn to the reasonableness of maintaining the barrier in question, rather than keeping off claims through a strict use of comparators. Recent decisions in the UK Employment Appeal Tribunal have confirmed the wide net that 'disability-related discrimination' casts – unlawful reasons for actions under this claim are not restricted to immediate physical and mental consequences of the disability on the disabled person, but encompass anything that is the result, effect or outcome of a disabled person's disability, such as different working patterns<sup>119</sup>.

Theoretically speaking, non-comparative discrimination claims focuses the wrong of discrimination on the presence of wrongful reasons for the discriminator's actions<sup>120</sup>. The use of comparators, in such an approach, should be merely a heuristic tool for identifying whether that kind of unlawful reasons for action were involved. The issue here is to identify what should constitute such unlawful reasons for actions.

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<sup>117</sup> Equality Act 2010, s 15.

<sup>118</sup> For the rationale for the knowledge requirement, see *Malcolm* [2008] UKHL 43, [86].

<sup>119</sup> *T-Systems Ltd v Lewis* [2015] UKEAT 42; *IPC Media Ltd v Millar* [2013] UKEAT 395.

<sup>120</sup> See e.g. John Gardner, 'On the Ground of Her Sex(uality)' (1994) 18 OJLS 167.

The ordinary, if not relatively narrow, understanding of discrimination is that it should be unlawful for the discriminator to rely on a prohibited ground of discrimination, such as a person's status as a disabled person, in acting against that person<sup>121</sup>. Baroness Hale's discussion and the subsequent legislative affirmation of 'disability-related discrimination' show that, depending on the object of discrimination law, the scope of unlawful reasons for actions can be widened.

Furthermore, having dispensed with the essentialist and assimilationist pressures in the use of comparators, there is also room for such non-comparative discrimination claims to prohibit not only those reasons for actions relating to the disabled person's impairment-related behavior, but also those reasons for actions relating to performative cultural identities in relation to one's disability. The focus on justification in could also orient the court to assess the reasonableness of the 'covering demands' placed on disabled people, rather than the 'covering performance' of disabled people and how they compare to abled people.

However, the focus on wrongful reasons for actions in non-comparative discrimination claims is not necessarily advantageous for all plaintiffs. The requirement to prove a discriminatory 'intent' had proven to be an obstacle for plaintiffs in the past, and the move away from such 'intent' requirements in discrimination law was a welcome development for plaintiffs<sup>122</sup>. The point here is therefore not to argue for a return to a sole focus on wrongful reasons for actions, but that making available comparative as well as non-comparative discrimination claims

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<sup>121</sup> *ibid* 183, where Gardner wrote, 'the wrongfulness of direct discrimination on a certain ground stems primarily from that ground's figuring in the operative premisses of the discriminator's reasoning.'

<sup>122</sup> Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) 69-73, 160-165; Fredman (2011) (n 7) 203-214.

would provide a greater toolbox for plaintiffs to challenge the oppressive demands placed on them.

#### 4. Reasonable Accommodation

Yet another limitation that discrimination law may sometimes have is that while it might be relatively easier to challenge the exclusion of protected groups from accessing existing facilities or opportunities, it may be more difficult to challenge the absence of appropriate facilities attending to the special needs of protected groups. The problem is more acute in comparative discrimination claims, where the treatment of disabled people must be compared to that of abled people in order to determine whether there was discrimination. Even under non-comparative discrimination claims, without a requirement of accommodation, the extent to which one might reasonably be expected to provide for the plaintiff's need might still be limited.

The lack of accommodation of disabled people's needs would put pressure on disabled people to, if possible, assimilate into the abled norms, and if not possible, be excluded from society. In relation to Deaf people, a complete lack of accommodation would, for example, require an 'Oralist' education of deaf people aimed at enabling them to communicate through spoken language and lip-reading. If successful, an Oralist education would give deaf people the same abilities to communicate as if they were hearing, and any discrimination between them would thus be treating like cases differently and violating formal equality. Oralist education, however, has been criticized not only for being ineffective especially for those who are born deaf, but

also for being a form of ‘linguistic colonialism’ of Deaf people due to its negative impact on the promotion and usage of sign language<sup>123</sup>.

In disability discrimination law, the pressure of assimilation brought by the formal equality paradigm is somewhat alleviated not only by the introduction of non-comparative discrimination claims as discussed above, but also by the recognition of duties of reasonable accommodation.

Duties of reasonable accommodation can be anticipatory or reactive, in that the defendant can be liable for not putting in place reasonable accommodative arrangements for certain disabled groups (anticipatory), or more commonly for not putting in place reasonable accommodative arrangements in response to the need of a certain disabled person (reactive)<sup>124</sup>. In the UK Equality Act 2010, the anticipatory duty would be akin to the public sector equality duty<sup>125</sup>, while the reactive duty would be akin to the duty of reasonable adjustment, and failure to comply with that duty would constitute discrimination against a disabled person<sup>126</sup>. Moreover, duties of reasonable accommodation do not only apply after a discrimination claim has been established. Under UK law, if a defendant’s practice or facility puts a disabled person at a ‘substantial disadvantage’ as compared to a non-disabled person, the defendant would have a duty to make reasonable adjustments and failure to comply with this duty would be enough to attract liability<sup>127</sup>.

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<sup>123</sup> Ladd (2003) (n 44) 178-183.

<sup>124</sup> Anna Lawson, *Disability and Equality Law in Britain: The Role of Reasonable Adjustment* (Hart Publishing 2009) 63-128.

<sup>125</sup> Equality Act 2010, s 149.

<sup>126</sup> *ibid* s 20-21.

<sup>127</sup> *ibid*.

It is sometimes argued that these provisions impose ‘positive’ duties on the defendant to make accommodation for the protected group, and the concept of ‘reasonable accommodation’ serves as a tool to limit the positive duty to a reasonable extent. Sometimes the concept of reasonableness is further modified to ‘reasonable accommodation *short of undue hardship*’ to indicate the importance of having realistic limits to such duties<sup>128</sup>.

For example, in *Eldridge*, the Supreme Court of Canada held that, for the purpose of discrimination law, there is no distinction between imposing unequal burdens or providing unequal benefits<sup>129</sup>. Equality can require positive steps to ensure that disadvantaged groups can equally benefit from services provided to the general public, though such positive duties are subject to the limits of reasonable accommodation. As such, the total denial of sign language interpretation in hospitals has an adverse impact on Deaf people and was manifestly unjustified, and thus constituted disability discrimination.

Such duties are sometimes understood as reflecting the stronger need for redistribution for disabled people, and ‘reasonable accommodation’ invokes the concept of reasonableness to limit the duty to which each individual is required to contribute to this redistributive scheme<sup>130</sup>. Due to their redistributive nature, these duties have been described as reflecting an ‘accommodation model’ that is focused on creating ‘special rights’ for disabled people, and contrasted to the ‘antidiscrimination model’ of non-disability discrimination laws that is focused on ensuring ‘equal rights’.

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<sup>128</sup> *Ontario Human Rights Commission v Simpson-Sears* [1985] 2 SCR 536.

<sup>129</sup> *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624.

<sup>130</sup> Samuel Issacharoff and Justin Nelson, ‘Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act’ (2001) 79 *North Carolina L Rev* 307; Also see Lawson (2009) (n 123) on the role of reasonable adjustments in achieving ‘substantive equality’.

Alternatively, the concept of ‘reasonable accommodation’ may be explained with reference to the need to balance the competing rights of the complainant and the employer<sup>131</sup>.

Many academics have disputed the suggestion that duties of reasonable accommodation reflect a special ‘accommodation model’ of disability discrimination law<sup>132</sup>. Moreover, it has been frequently observed that duties of reasonable accommodation were developed first in relation to religious discrimination in the United States, and in Canada such duties are applicable across all grounds<sup>133</sup>. Similar observations had led other commentator to argue similarly that reasonable accommodation is ‘part of a long-standing wider body of labour law’ in the context of European law<sup>134</sup>.

Some have also pointed out that the characterisation of reasonable accommodation as ‘positive’ duties is conceptually unstable. Tarunabh Khaitan argued that, conceptually speaking, duties of reasonable accommodation should be understood as a *remedy* for discrimination claims; reasonable accommodation is a ‘secondary right’ that one becomes entitled to upon the breach of the primary right to non-discrimination<sup>135</sup>. It is difficult, he argued, to imagine a situation where a failure to provide reasonable accommodation would not also amount to indirect discrimination. Duties of reasonable accommodation, however, have a different impact on the general norm: while indirect discrimination claims require an

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<sup>131</sup> *Simpson-Sears* (n 127).

<sup>132</sup> Christine Jolls, ‘Antidiscrimination and Accommodation’ (2001) 115 *Harvard L Rev* 642; MA Stein, ‘Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination’ (2004) 153 *University of Pennsylvania Law Review* 579; Lawson (2009) (n 123) 184-185.

<sup>133</sup> For example, see Khaitan (2015) (n 122) 76-79.

<sup>134</sup> Lisa Waddington and Aart Hendriks, ‘The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination’ (2002) 18 *IJCLLR* 403, 409-414.

<sup>135</sup> Khaitan (2015) (n 122) 76-79.

assessment of whether the general norm should reasonably be maintained or changed, duties of reasonable accommodation requires assessment of whether exceptions could be made to the general norms to accommodate the individual in question.

The individualistic impact of duties of reasonable accommodation has frequently been a source of criticism. Lisa Waddington and Aart Hendriks, for example, argued that a duty of reasonable accommodation, by focusing on the specific needs of the individual in question, ‘leaves unchallenged and unaffected the underlying discriminatory policy which resulted in the initial exclusion’; indeed, they argued, ‘accommodation is assimilationist’<sup>136</sup>.

While such criticisms would be forceful if indirect discrimination were to be deemed unnecessary because of the existence of duties of reasonable accommodation, the introduction of indirect discrimination claims to disability discrimination law may have addressed the concern about the lack of a group dimension in disability discrimination law.

Moreover, as Anna Lawson argued, such criticisms are more appropriate to *reactive* duties of reasonable accommodation than to *anticipatory* duties of reasonable accommodation, the latter of which is the most significant form of duties of reasonable accommodation in UK discrimination law<sup>137</sup>. She identified a number of differences between indirect discrimination claims and anticipatory duties of reasonable accommodation, at least in UK discrimination law. For example, in indirect discrimination claims, the scrutiny process is more an ‘after-thought’ focusing on the reasons for retain the challenged measure, whereas in anticipatory

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<sup>136</sup> Waddington (2002) (n 133) 414-416.

<sup>137</sup> Lawson (2009) (n 123) 168-172.

reasonable accommodation, the focus of the scrutiny is more ‘solution-oriented’ and places stronger emphasis on thinking creatively to avoid or reduce the discriminatory impact of the challenged measure. Also, the anticipatory nature of anticipatory duties of reasonable accommodation is advantageous because it often requires time and efforts to remove or reduce the disadvantageous effects of existing disabling barriers and there may be little that can be done if the duty-bearers wait until they actually encounter disabled persons.

More importantly for our purposes here, the emphasis on the needs and circumstances of an individual may be a source of strength. As Lawson argued, whereas indirect discrimination may dismantle structural barriers that disadvantage of group of disabled people, duties of reasonable accommodation may require the duty-bearer to go further than that and provide individualized solutions taking into account such factors as the nature of the service in question, the proximity of the relationship between the duty-bearer and the claimant, and the probable duration of the relationship between them<sup>138</sup>. This last argument should apply to both anticipatory and reactive duties of reasonable accommodation.

The relationship between reasonable accommodation and indirect discrimination has been a source of conceptual confusion<sup>139</sup>, but this debate does not directly concern this thesis.

As mentioned earlier, the focus of this thesis is to explore the potential of reasonable accommodation in achieving anti-essentialist and anti-assimilationist goals. The main argument here is that the presence of the duty of reasonable accommodation

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<sup>138</sup> *ibid.*

<sup>139</sup> See Khaitan (2015) (n 122) 77; Lawson (2009) (n 123) 182-185.

coupled with indirect discrimination claims reflects a dual concern for the group and the individual in disability discrimination law. In particular, the duty of reasonable accommodation may recognize the diversity of individual needs within groups, hence counteracting the essentialist risk in advancing group-based anti-assimilation claims.

For example, even without indirect discrimination claims, Deaf people might still be able to advance anti-assimilation demands through a duty of reasonable accommodation. Even though the duty is often regarded as individualistic in nature, where the demand of the individual in question is based on an anti-assimilation demand of the whole group, a successful claim for reasonable accommodation may still have an impact on the whole group. For example, a Deaf signing person may claim that the lack of sign language interpreters in public healthcare facilities presented her with a ‘significant disadvantage’ in accessing public healthcare services. This is in fact the demand of the plaintiff in *Eldridge* rephrased in the language of ‘significant disadvantage’ under the duty of reasonable adjustment in UK discrimination law<sup>140</sup>. A successful claim, though ostensibly directed towards the particular plaintiff, would likely result in the provision of sign language interpretation services to all Deaf people using public healthcare facilities so that the defendant could avoid future claims. Hence, where the nature of the demand underlying the reasonable accommodation claim is related to the group’s anti-assimilation demands, duties of reasonable accommodation could still be a (less direct) vehicle to advance such demands.

One potential benefit of advancing the claim through reasonable accommodation rather than indirect discrimination is that the former route does not

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<sup>140</sup> *Eldridge* (n 128) and text to n 126 above.

(or at least should not) involve strict comparisons. The qualifier ‘strict’ is necessary because what constitutes a ‘substantial disadvantage’ still have to be ascertained through some form of comparison with others accessing similar services. A strict comparator requirement similar to that in *Malcolm*, however, would render the duty of reasonable adjustment under the Equality Act 2010 ineffective and incompatible with the CRPD and European law<sup>141</sup>. Fortunately, the English Court of Appeal affirmed a lax comparator for the purpose of the duty of reasonable adjustment, such that one would only need to demonstrate substantial disadvantage as compared to non-disabled people<sup>142</sup>. As Rachel Crasnow and Sarah Fraser Butlin argued, the comparison should simply be for the purpose of identifying the barrier in question and the threshold should be low<sup>143</sup>. In this respect, the advantage of reasonable accommodation claims is similar to that of non-comparative discrimination claims.

Another potential issue with using reasonable accommodation to advance anti-assimilation demands is to what extent the ‘disadvantage’ would include such *cultural* disadvantages, in addition to socio-economic disadvantages. This could be important when, for example, the person subjected to the disadvantage is not biologically ‘profoundly deaf’ and may technically be able to use hearing aids instead of a sign language interpreter, but nonetheless identifies strongly with the Deaf identity and uses sign language as first language. Would such a person be subject to a ‘significant disadvantage’ if she is provided with hearing aids but not a sign language interpreter? Bearing in mind the assimilationist impact that may otherwise be incurred and one’s

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<sup>141</sup> Rachel Crasnow and Sarah Fraser Butlin, ‘Disabled compared to whom? An analysis of the current jurisprudence on the appropriate comparator under the UK Equality Act’s reasonable adjustment duty’ (2015) 15 Equal Rights Review 75.

<sup>142</sup> *Griffiths v Secretary of State for Work and Pensions* [2015] EWCA Civ 1265.

<sup>143</sup> Crasnow and Fraser Butlin (2015) (n 141) 85.

strong identification with being Deaf and sign language, a court should give weight to such cultural disadvantages in assessing reasonable accommodation claims.

Furthermore, if a low threshold for ‘substantial disadvantage’ is adopted, the inquiry for reasonable accommodation then turns to assessing the reasonableness of the measure in question. Instead of scrutinizing the extent to which the Deaf person ‘needs’ to use sign language, the reasonableness inquiry focuses on scrutinizing the factors that may hinder the duty-bearer from providing that accommodation measure. Relevant factors may include, for example, the availability and costs of sign language interpreters and the financial capacity of the healthcare providers. As such, the scrutiny could better achieve the goal of focusing on the reasonableness of the ‘covering demand’ rather than that of the individual’s ‘covering performance’.

Having argued that indirect discrimination and, perhaps to a lesser extent, reasonable accommodation can be used to advance anti-assimilationist goals, we may then turn to the potential of reasonable accommodation in addressing the essentialist risk of such anti-assimilationist efforts. It has been discussed in the previous chapter that, while articulating the assimilationist demands of a group, there may also be a risk of essentializing everyone sharing such group characteristics as having the same needs, hence ignoring the diversity of needs of each individual.

Imagine a scenario in which a deaf person does not subscribe so strongly to the Deaf identity, and wishes to be integrated into ‘mainstream’ education in spoken language. To do so, she requires assistance, funded by the state if necessary, such as hearing aids and other classroom technologies in a ‘mainstream’ school. Yet the only options that the state provides are either education in sign language intended for Deaf people or education in spoken language intended for hearing people.

There are a number of ways in which this arrangement may be challenged, for example by arguing that such an arrangement amounts to segregated education and is therefore not equal, similar to challenges to racial segregation in education. However, the provision of separate education in sign language for Deaf people is indeed a demand of Deaf people, one that is recognized in the CRPD<sup>144</sup>. The provision of separate education in itself may not be necessarily discriminatory, and would be especially difficult to satisfy a comparative conception of discrimination. It may thus be easier to argue not that the requirement for deaf people to attend schools that teach in sign language is discriminatory, but that ‘mainstream’ schools should have the duty to provide reasonable accommodation such that a deaf person could attend those schools if they so choose.

Admittedly, a scenario like the one above may be difficult to find in reality, perhaps due to reasons such as the majority’s resistance to recognize the anti-assimilation demands of Deaf people in the first place. Moreover, as shown in decisions such as *Hurst and Devlin*, even in response to indirect discrimination claims, courts may already be inclined to adopt solutions that require individual assessments. Such an inclination, however, may be explained by the urge to avoid ‘revolutionary’ adoption of Deaf people’s anti-assimilationist demand<sup>145</sup>. This thesis, instead, argues for a more affirmative position towards Deaf people’s anti-assimilationist demands while recognizing a space for individual choices. The scenario above was aimed at demonstrating that, without reasonable accommodation, there may be a blind spot in the law in which group-based demands could not be balanced against individual needs. Reasonable accommodation ensures that, apart from group-based claims, the

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<sup>144</sup> Art 24, CRPD.

<sup>145</sup> *Hurst and Devlin* (n 104); text to n 104 to n 109 above.

individual also has room to articulate her needs if they are different from the group-based demands. As such, the individual is allowed room to resist being essentialized by her group membership.

At risk of repetition, it should be clarified that it is not the position of the author that anyone who advances a reasonable accommodation claim instead of a group-based indirect discrimination claim is someone who chooses to assimilate into the mainstream. As stated in the previous chapter, there are many reasons why, say, a deaf person might use hearing aids or cochlear implants to facilitate integration into the hearing society. The focus, at least that of the law, should be on addressing the oppressive demands that is placed on the D/deaf individual, rather than whether the acts of a person is essentially Deaf enough or not Deaf enough.

## 5. Summary

It has been argued in this chapter that disability discrimination law is capable of reflecting anti-essentialist and anti-assimilationist concerns surrounding disabled and Deaf identities. The move towards non-essentialist definitions of disability and the adoption of constructs such as discrimination by perception and discrimination by association may be understood as recognizing, or at least capable of recognizing, the culturally constructed aspects of disabled or Deaf identities. Relaxed uses of comparators and the development of non-comparative discrimination claims allow the law to shake off the essentialist and assimilationist pressures of comparators. Indirect discrimination claims, relatively common in other discrimination laws but relatively new or unused in disability discrimination law, recognize the group dimension of disability and are potent vehicles for advancing anti-assimilationist demands. Duties of reasonable accommodation not only provide another route for advancing group-

based demands but also allow room for individuals to articulate their own needs if they are different from the group's demands.

Moreover, the shift away from comparative discrimination towards non-comparative claims and reasonable accommodation claims allows greater focus on scrutinizing the reasonableness of the demands placed on the disabled or Deaf plaintiff, rather than that of the plaintiff's characteristics. This accords with the direction suggested in the previous chapter that the focus should be on contesting the oppressive demands rather than the oppressed individual's performance.

Having outlined the anti-essentialist and anti-assimilationist elements in disability discrimination law, to what extent can these elements be applied to other grounds of discrimination to tackle similar concerns? What lessons can be learnt? The next two chapters of this thesis will attempt to answer these questions using a different context: transgender discrimination.

## **V. Essentialism and Assimilationism in the Transgender Context**

Concepts of essentialism and assimilationism have been frequently invoked in gender politics, and have often been mobilized in debates about transgender issues. This chapter will focus on their relevance to one particular area, legal gender recognition, which has generated a substantial amount of case law and legislation around the world.

Legal gender recognition is used in this thesis to refer to the law's classification of a person's sex/gender for the purpose of gender-specific legal treatments (in many jurisdictions this would still include marriage)<sup>146</sup>. For example, how should official documents record the sex/gender of transgender people? Or should transgender women be able to access female bathrooms or gender-neutral bathrooms? On what criteria should the law recognise the gender of a person, and what would be the rights of that person in that gender?

Academics have critiqued the gender recognition jurisprudence as essentialist in relation to the notions of sex and gender and demands transgender people to assimilate into the dominant norms of gender, including assumptions about the binary and permanent nature of gender identity. However, anti-assimilationist attempts to break away from these norms, such as recognition of 'third gender' or fluid genders, also stand in tension with another kind of essentialism, one that risks re-inviting cultural stereotypes about transgender people as a group. The focus of this chapter will be in explaining the concerns of essentialism and assimilationism in the context of legal gender recognition.

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<sup>146</sup> This is slightly different from the definition given in some advocacy materials, where legal gender recognition refers to 'the official recognition of a person's gender identity', which is more affirmative of the law's role in recognizing the identity of transgender persons; see e.g. Richard Köhler and Julia Ehrt, *Legal Gender Recognition in Europe* (2nd ed, Transgender Europe 2016) 9.

## 1. Addressing Essentialism: from non-recognition to pathologised recognition

Legal gender recognition, broadly speaking, progresses from complete non-recognition of the possibility to change gender to employing some medicalized criteria on which some transgender people could have their gender identity recognised. In some jurisdictions, the law has now gone towards ‘self-determination’ – what activists call the ‘gold standard’<sup>147</sup> – and allows one to change legal gender without judicial or medical approval.

In the UK, for example, the law started from complete non-recognition of transgender people. In the famous decision of the England and Wales High Court in 1970, *Corbett v Corbett*, the court dealt with a man’s request for annulment of his marriage with a post-operative transsexual woman, April Ashley, on grounds that Ashley was not a woman and therefore the marriage was not between opposite sexes. Even though Ashley had ‘remarkably good’ female genitals and was ‘convincing’ in her presentation as a woman, the court refused to recognize Ashley as a woman. Justice Ormrod held that one’s sex should be determined according to one’s chromosomes, gonads and genitals at the time of birth, and no surgical intervention afterwards would make it possible for a person to change the legally recognized sex<sup>148</sup>. Although he restricted his observations to matrimonial laws, non-recognition was also the practice for government-issued identity documents, among other areas<sup>149</sup>. From the 1980s to the 1990s, plaintiffs from the UK brought several cases to the ECtHR to

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<sup>147</sup> Human Rights Watch, *World Report 2016: Rights in Transition* (2011) <<https://www.hrw.org/world-report/2016/rights-in-transition>> (last accessed 1 June 2017).

<sup>148</sup> *Corbett v Corbett (otherwise Ashley)* [1971] P 83.

<sup>149</sup> Sharpe (2002) (n 98) 43.

challenge, unsuccessfully, the government's refusal to amend their birth certificates to reflect their gender identity<sup>150</sup>.

It was in *Goodwin* in 2002 that the ECtHR conclusively allowed a small class of transgender people, namely post-operative transsexual persons, to be recognised in their preferred gender in the context of opposite-sex marriage<sup>151</sup>, which led to *Corbett* being overruled in UK courts<sup>152</sup>. It was accepted in *Goodwin* that 'transsexualism' is a medical condition for which there is 'nothing arbitrary or capricious', and that post-operative transsexual people have undergone 'as close to an assimilation as possible' and that recognition is the 'final and culminating step in the long and difficult process of transformation'<sup>153</sup>. It was held that the lack of recognition would force these people to 'live in an intermediate zone as not quite one gender or the other' and would be a violation of their right to respect for private life in Art 8 ECHR<sup>154</sup>. Since *Goodwin*, the ECtHR has established clear and consistent lines of case law under Art 8 ECHR affirming the right of post-operative transsexual persons to be legally recognized<sup>155</sup>, as well as the right of transsexual persons to access sex reassignment surgeries<sup>156</sup>.

On the surface, the progress from *Corbett* to *Goodwin* can be described as a gradual shedding of biological essentialism, replacing factors such as chromosomes with a person's psychological 'gender' and performance of that gender through surgically 'assimilating' with the opposite sex. However, a closer scrutiny would

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<sup>150</sup> *Rees v UK* (1986) Series A no 106; *Cossey v UK* (1990) Series A no 184; *Sheffield and Horsham v UK* [1998] ECHR 69.

<sup>151</sup> *Goodwin v UK* [2002] ECHR 588.

<sup>152</sup> *Bellinger v Bellinger* [2003] UKHL 21.

<sup>153</sup> *ibid* [78] and [81].

<sup>154</sup> *ibid* [90].

<sup>155</sup> *ibid*; *H v Finland* [2014] ECHR 787.

<sup>156</sup> E.g. *Van Kuck v Germany* [2003] ECHR 285; *L v Lithuania* [2007] ECHR 725; *Schlumpf v Switzerland* [2009] ECHR 36.

reveal that underlying this progress is a maintenance of a *culturally* essentialist belief in the binary of sexes and the permanence of sexual identity.

In *Corbett* the judge had to distinguish an earlier case, *SY v SY*, which concerned the annulment of marriage on another ground, namely the incapacity to consummate<sup>157</sup>. In *SY v SY*, the wife was born with a vaginal abnormality that made coitus impossible, and her husband requested annulment on grounds of incapacity to consummate. However, the wife was willing to undergo vaginal enlargement surgery to make penetration possible, and the court ruled that this would cure her of her capacity to consummate and dismissed the husband's request for annulment. This appeared to be inconsistent with Justice Ormrod's decision that artificially created vaginas are not to be considered real vaginas. In distinguishing *SY v SY*, Justice Ormrod argued that *SY* only concerned the capacity to consummate and the true sex of the wife was not in dispute. Franke argued that Justice Ormrod's apparent inconsistency here reflects Freud's observation that we are 'used to' being able to decide whether a person is a male or a female with absolute certainty and that we are reluctant to revise that initial attribution of gender<sup>158</sup>. In other words, what really justifies Justice Ormrod's opinions in *Corbett* was not a fact that sex is a biological construct, but the belief in certain socio-cultural norms about gender: that a person must, unchangeably, be either a man or a woman.

Whereas *Corbett* located the permanence of one's sex in the anatomy of a person at birth, *Goodwin* located it in the psychology of a person. In *Goodwin*, the court recognised that a person's psychological gender is relevant, but only because it is 'nothing arbitrary or capricious' and not in the 'intermediate zone' between male

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<sup>157</sup> *Corbett* (n 148) 105A-D; *SY v SY (otherwise W)* [1963] P 37.

<sup>158</sup> Franke (1995) (n 9) 48.

and female. As Yoshino argued in relation to US legal gender recognition cases, they preserve the notion that sex is a ‘prediscursive phenomenon’ by observing that the gender performances of a person are ‘evidence of an underlying gendered soul’<sup>159</sup>.

The evidential requirements in the law for that permanent gendered soul have gradually been lowered. In *Goodwin*, only a post-operative transsexual person, that is, one who has undergone a medical diagnosis as well as ‘sex reassignment’ surgeries, would be able to satisfy the requirements. Permanence of one’s psychological gender is guaranteed through medical assessment, and undergoing irreversible genital surgeries demonstrate the ‘manifest determination’<sup>160</sup> of transsexual plaintiffs to change their anatomical sex.

The surgery requirements, in particular, have attracted much criticism from the transgender community due to their impact on the right to bodily integrity. UK transgender rights groups successfully lobbied against a surgery requirement in the Gender Recognition Act 2004, which was ground-breaking at the time<sup>161</sup>. More jurisdictions followed, and international human rights authorities increasingly joined the call against surgery requirements<sup>162</sup>. In 2017, the ECtHR held in *Garçon and Nicot v France* that such requirements violate Art 8 ECHR, since they put at least

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<sup>159</sup> Yoshino (2002) (n 2) 923.

<sup>160</sup> *B v France* [1992] ECHR 40.

<sup>161</sup> Alex Sharpe, ‘Gender Recognition in the UK: A Great Leap Forward’ (2009) 18 *Social & Legal Studies* 241; For replies to Sharpe’s comment on the GRA 2004, see Sharon Cowan, ‘Looking Back (To)wards the Body: Medicalization and the GRA’ (2009) 18 *Social & Legal Studies* 247 and Ralph Sandland, ‘Running to a Stand Still’ (2009) 18 *Social & Legal Studies* 253.

<sup>162</sup> See e.g. Juan E Mendez, ‘Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment’ (UN Doc A/HRC/22/53, 1 February 2013); Office of the United Nations High Commissioner for Human Rights, ‘Discrimination and violence against individuals based on their sexual orientation and gender identity’ (UN Doc A/HRC/29/23, 4 May 2015).

some transgender people before an insoluble dilemma to choose between their physical integrity and recognition of their gender identity<sup>163</sup>.

However, the ECtHR in *Garçon and Nicot* also refused to rule against requirements that transgender people be diagnosed with ‘transsexualism’ or ‘gender dysphoria’, and even noted that this requirement is favourable to the ‘stability’ of sex changes in civil status. The UK Gender Recognition Act 2004 also retains the diagnosis requirement, along with requirements such as having lived for two years in the preferred gender (the so-called ‘real-life experience’ requirement). Even in jurisdictions that have adopted gender self-determination regimes, there appears to be an urge to impose administrative hurdles such as ‘cooling down periods’ to prevent transgender people from ‘regretting’ about their change in legal gender<sup>164</sup>.

So even though the evidential bar for proving one’s gender identity has fallen, the essentialist idea that there is a ‘true’ sex/gender in a person waiting to be discovered, whether in one’s biology or psychology, remains in the law<sup>165</sup>. As Ralph Sandland argued, while *Goodwin* recognized the possibility of movement between the categories, it did so through a conservative strategy. It did so through ‘an expansion of the boundaries of the proper, a redefinition of the necessary and sufficient properties of ‘woman’ and ‘man’’, and suppressing the ‘horror of ambiguous gender identity’<sup>166</sup>. In particular, the use of the medical discourse allowed the court to render intelligible and confirm the normality of transsexual people by naming the deviance of Others (i.e. those who transgress gender boundaries but are not medically

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<sup>163</sup> *Garçon et Nicot v France* [2017] ECHR 338.

<sup>164</sup> See e.g. Human Rights Watch, ‘Europe: Progress for Transgender Rights’ (24 June 2014) <<https://www.hrw.org/news/2014/06/24/europe-progress-transgender-rights>> accessed 1 June 2017.

<sup>165</sup> Alex Sharpe, ‘A Return to the ‘Truth’ of the Past’ (2009) 18(2) *Social and Legal Studies* 259.

<sup>166</sup> Ralph Sandland, ‘Crossing and Not Crossing: Gender, Sexuality and Melancholy in the European Court of Human Rights’ (2003) 11 *Feminist Legal Studies* 191, 201-202.

diagnosed as ‘really’ transsexual), and to limit rights to those who conformed<sup>167</sup>.

Pathologisation serves to assimilate transgender people as an intelligible exception to general social norms about the gender binary and the permanence of one’s sex/gender. Even without pathologisation, essentialism about transgender people as being ‘born in the wrong body’ helps to preserve such norms. In these cases, essentialism works hand in hand with assimilationism, in that the majority’s binary and permanent framework of sex/gender is minimally disturbed, while certain transgender people could be assimilated into society as an exception. While there is great value in such acceptance for many transgender people, it also excludes those who ‘cross’ gender differently, especially those who identify outside this binary.

## 2. Addressing Assimilation: breaking away from the binary

As some of the judicial statements above revealed, the idea that someone may be neither male nor female, or in the ‘intermediate zone’ between male and female, is seldom taken seriously at least in Western societies. In the words of an early court judgment in the US, such are ‘far-out theories’<sup>168</sup>. A common challenge raised towards the seemingly self-evident notion of the gender binary is that in many non-Western cultures there are three or even more genders. The hijra culture in South Asia is a particular example that has garnered attention, especially since the Indian Supreme Court recognised their demands in 2014.

In *NALSA*, the Indian Supreme Court considered the demands of transgender people, especially groups such as hijras that played significant roles in Indian history

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<sup>167</sup> *ibid* 203.

<sup>168</sup> *MT v JT*, 140 N.J.Super. 77, 355 A.2d 204.

and culture<sup>169</sup>. Hijras are a group of people who are assigned male at birth, but who identify in a range of identities other than men, and have a long tradition in South Asian cultures living in communities of their own. The court, having decided that hijras have suffered discrimination and violence in relation to non-recognition of their identities, granted the right to be recognized as a ‘third gender’.

The possibility of recognition as a third gender allowed hijras to maintain their own identity without being fully assimilated into the gender binary, but it would be inappropriate to equate transgender people with hijras and even less so to equate their demands for legal recognition, as media reports on the *NALSA* case not uncommonly did<sup>170</sup>. There are many transgender people who do not identify with the hijra tradition, and who demand recognition in their own preferred gender identities rather than the ‘third gender’.

The Indian Supreme Court, in referring to international documents such as the Yogyakarta Principles that recognize transgender rights, was well aware that transgender people are not limited to groups such as hijras<sup>171</sup>. Although much of the Indian court’s judgment referred to the situation of hijras, the court also explicitly recognized that discrimination and violence is faced not only by hijras but also non-hijra transgender people<sup>172</sup>. As such, in addition to granting ‘third gender’ recognition, the court also recognized the right of all transgender people to be recognized in the their self-identified ‘male’ or ‘female’ gender. However, such has not been the case in

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<sup>169</sup> *National Legal Services Authority v Union of India*, WP (Civil) No 604 of 2013 (15 April 2014).

<sup>170</sup> See e.g. BBC, ‘India court recognises transgender people as third gender’ *BBC* (London, 15 April 2014) <<http://www.bbc.co.uk/news/world-asia-india-27031180>> accessed 1 June 2017; Dhananjay Mahapatral, ‘Supreme Court recognises transgenders as ‘third gender’’ *Times of India* (Mumbai, 15 April 2014) <<http://timesofindia.indiatimes.com/india/Supreme-Court-recognizes-transgenders-as-third-gender/articleshow/33767900.cms>> accessed 1 June 2017.

<sup>171</sup> *NALSA* (n 169) [11].

<sup>172</sup> *ibid* [46].

other South Asian courts, which were much less affirmative of non-hijra transgender people and granted only ‘third gender’ recognition<sup>173</sup>.

Recognition of non-binary gender identities is also increasingly being litigated in Western jurisdictions. In *Norrie*, the High Court of Australia ruled that the law permits recognition outside of the ‘male’ and ‘female’ binary on birth certificates, for example as of ‘non specific’ gender<sup>174</sup>. The court unanimously declared that ‘not all human beings can be classified by sex as either male or female’, and expressly recognized that sexual ambiguities can exist and that it is possible that surgeries or other medical treatments would not eliminate such ambiguities<sup>175</sup>. In *TA v Ontario*, the Ontario Human Rights Tribunal appears to be dealing with the preliminary stages of a discrimination complaint of an applicant who was refused a fluid or non-specified (the applicant identified as ‘pan-gender’ and used the pronouns ‘they’, ‘them’ and ‘theirs’) sex designation on their driving license<sup>176</sup>.

Creating new legal categories of gender, whether of the ‘third gender’ or of ‘non-specified gender’, appears to be one strategy of some transgender people to resist assimilation into the gender binary. However, the risk in doing so is that it invites re-essentialization of these newly recognized identities, when courts deal with the boundaries of, say, ‘pangender’ categories. Moreover, it would clearly be inappropriate to essentialise all transgender people into these newly created legal categories, as many transgender people may not even subscribe to fluid gender identities.

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<sup>173</sup> See e.g. the decision of the Supreme Court of Nepal in *Sunil Babu Pant and Others v Nepal Government*, NJA Law Journal 2008.

<sup>174</sup> *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11.

<sup>175</sup> *ibid* [1], [30] and [36]-[40].

<sup>176</sup> *TA v Ontario*, 2016 HRTO 17.

Some might argue, therefore, that instead of creating more boxes for people to fit in, it might be better to remove such boxes altogether – as Paisley Currah observed, many trans activists are actively campaigning to ‘disestablish’ gender from state regulation<sup>177</sup>. This can occur, for example, by removing sex/gender designations on official documents, or by changing gender-specific treatment into gender-neutral ones, such as having gender-neutral bathrooms. In addition to allowing for the full spectrum of identities to be respected, gender neutrality also benefits those who are questioning or have fluid identities.

However, a project of disestablishing legal gender categories, while on one hand alleviates transgender people from having to deal with unnecessary and intrusive state involvement in their identity, also risks appealing to the gender-blind logic of neutrality. In particular, the logic of neutrality provides a condition in which the non-recognition and discrimination of transgender people is brushed aside rather than addressed. For example, the Hong Kong government recently indicated its willingness to provide gender-neutral bathrooms in public recreational facilities<sup>178</sup>, but at the same time it has been delaying in its review of gender recognition policies, which still require transgender people to undergo diagnosis and surgeries in order to have their gender identity recognized<sup>179</sup>. Here, the provision of gender-neutral facilities can be seen as a cop-out strategy, even though still useful to some transgender people, to

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<sup>177</sup> Paisley Currah, ‘Gender Pluralisms under the Transgender Umbrella’ in Paisley Currah, Richard M Juang & Shannon Price Minter (eds), *Transgender Rights* (University of Minnesota Press 2006) 24.

<sup>178</sup> Mingpao, ‘Equal Opportunities Commission: Leisure and Cultural Services Department planning gender-neutral toilets for the benefit of sexual minorities and families’ *Mingpao* (18 July 2016) <[https://news.mingpao.com/pns/dailynews/web\\_tc/article/20160719/s00002/1468864501701](https://news.mingpao.com/pns/dailynews/web_tc/article/20160719/s00002/1468864501701)> accessed 1 June 2017.

<sup>179</sup> Catherine Lai, ‘Transgender and intersex groups blast gov’t working group over consultation paper delay’ *Hong Kong Free Press* (13 January 2017) <<https://www.hongkongfp.com/2017/01/13/transgender-intersex-groups-blasts-govt-working-group-consultation-paper-delay/>> accessed 1 June 2017.

avoid the more difficult issues about gender recognition. Such skepticism can be extended towards more comprehensive efforts to ‘de-gender’ the law.

Hence we see how anti-assimilation efforts could stand in tension with anti-essentialism efforts. Efforts to break away from the gender binary, including through recognition of ‘third gender’ or fluid identities, risks undermining the hard-fought recognition that many transgender people do identify permanently as ‘men’ or ‘women’. But efforts to assimilate transgender people into the gender binary could leave essentialist ideas about the gender binary unchallenged and exclude those who do not subscribe to the gender binary. To push all transgender people into ‘third gender’ categories, or to describe fluid identities as not being ‘real’ identities, or to describe those with more permanent identities as merely ‘covering’ their fluidity, would all be wrong and would not accord with the lived experiences of respective groups of transgender people.

The discussion so far is not aimed at undermining the usefulness of each strategy for various transgender people, whether it be allowing movement between established legal categories of men and women, or creating new legal categories of gender, or disestablishing legal categories for gender altogether. The point, instead, is exactly that different transgender people have different needs that may or may not depend on their group identity. Both anti-essentialism and anti-assimilation are real demands of transgender people, and the law must find a way to deal with both.

### 3. Summary

This chapter focuses on concerns of essentialism and assimilationism surrounding one particular aspect of transgender rights, that of legal gender

recognition. The non-recognition of transgender people's preferred gender, epitomized in the *Corbett* decision, exerted strong pressure on transgender people not simply to assimilate but perhaps even to convert themselves into the cisgender norm – to 'cure' themselves of their transgenderism and become cisgender.

The law in a number of jurisdictions has since moved on to provide some kind of recognition, often based on surgical, diagnostic or some other kind of pathologized criteria, of transgender people. While this is nevertheless a valuable progress, it has been noted above that certain underlying essentialist beliefs remained: that a person must permanently, and unchangeably, be either a man or a woman. Such essentialism ensures that transgender people are assimilated as an intelligible exception to the largely undisrupted general norms of gender in society. In these cases, essentialism works hand in hand with assimilationism.

Anti-assimilationist attempts to break away from the binary, for example by creating non-binary gender categories such as the 'third gender', are not without their problems. Most relevant to this thesis is how the creation of new gender categories might risk re-inviting essentialism about these new categories. This would be most unfortunate if all transgender people, many of whom do indeed identify permanently within a binary gender, were pushed into these new gender categories. Disestablishing all legal gender classifications risks appealing to the logic of neutrality that may risk ignoring situations where gender-specific measures are necessary, if not only to counteract existing oppression on the basis of gender.

The law must therefore find a way to address the collusion and tension between essentialism and assimilationism. In doing so, as emphasized throughout this

thesis, the focus must be on tackling the essentialist and assimilationist demands placed upon transgender people rather than how they perform their gender.

It might be argued that the project of gender recognition is inherently a classificatory one, and thus is inherently essentialist. Moreover, as gender becomes formally irrelevant to most areas of law, especially with the passing of same-sex marriage in many Western jurisdictions, continued preoccupation with defining gender categories such as ‘male’ and ‘female’ for the purpose of distributing legal rights and responsibilities makes little sense.

Hence, one way out may be to look at the same matter with a different lens of transgender discrimination, and in doing so, take lessons from previous chapters on anti-essentialist and anti-assimilationist elements in disability discrimination law. The next chapter will discuss the obstacles and opportunities of transgender discrimination law in relation to anti-essentialism and anti-assimilationism.

## **VI. Anti-essentialism and Anti-assimilationism in Transgender Discrimination Law – Lessons from Disability Discrimination Law**

The idea that ‘gender discrimination’ might be less guilty of essentialism than ‘gender recognition’ appears to make instinctive sense. Instead of focusing on the characteristics of the transgender plaintiff and whether one fits the notion of ‘male’ or ‘female’, gender discrimination asks the court to focus on the specific act of discrimination that occurred. Hence, it appears to be fit the earlier stated goal of focusing on the covering demand placed on the excluded group instead of the covering performance of members of the group.

However, the extent to which the questions asked in ‘gender discrimination’ differ from those asked in ‘gender recognition’ depends on what conception of ‘discrimination’ is used. Indeed, Katherine Franke’s succinctly described the logic in which sex discrimination jurisprudence may fall back to essentialist questions of gender recognition as follows:

‘In setting forth the meaning of ‘discrimination because of his sex’ the court must first identify what kind of wrong Title VII was intended to remedy: ‘discrimination against women because of their status as females and discrimination against males because of their status as males.’ Then the court must clarify what it means by female and male, woman and man.’<sup>180</sup>

But a different conception of discrimination can yield a different observation. Alex Sharpe, for example, argued that Australian discrimination laws that prohibit ‘discrimination by perception’ has the potential of reflecting the reality that

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<sup>180</sup> Franke (1995) (n 9) 35.

discrimination is often not focused on the actual identity but on what is ‘seen’ and what is presented for ‘seeing’. Hence, the inclusion of discrimination by perception can be comprehended as approaching the issue not as identifying an essentialist substrate of identity but focusing on ‘the interplay between performance and gaze’<sup>181</sup>.

Nevertheless, the extent to which ‘discrimination by perception’ can shed the essentialist lens still depends on how the ground of discrimination (‘transgender’) is defined and how ‘discrimination’ is defined. This section will focus particularly on the latter: how different conceptions of ‘discrimination’ may or may not help orient our attention from the ‘covering performance’ of transgender people to the ‘covering demands’ placed on them. Lessons from the previous discussion on disability discrimination law will be considered, particularly on the role of comparators and the adoption of duties of reasonable accommodation.

#### 1. Limitations of comparative and formal conceptions of discrimination

In accordance with the maxim of ‘treating like cases alike’, the common comparator-driven approach towards discrimination would focus on whether a transgender person would be treated differently compared to a cisgender person in an analogous situation.

As discussed above in the context of disability discrimination, this comparative conception of discrimination is both essentialist and assimilationist. The quest for comparators is not straightforward, for analyzing whether a transgender man or woman is in an analogous situation to that of a cisgender man or woman could entail similarly essentialist conclusions of the ‘true’ differences between transgender

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<sup>181</sup> Sharpe (2002) (n 98) 159, 160-163.

and cisgender and those between man and woman. Moreover, the situation of cisgender people is often held to be the norm against which the situation of transgender people is compared.

In *Croft v Royal Mail*, the English court dismissed a direct discrimination claim in which a pre-operative male-to-female transsexual person challenged her employer's refusal to allow her to use female toilet facilities<sup>182</sup>. The court ruled that the plaintiff had not reached the stage at which the law recognizes her as a 'woman' militated against her claim, essentially deferring the question of discrimination to one of recognition. When compared to the situation of cisgender persons, the plaintiff did not suffer a differential treatment, for 'the toilet facilities are accepted to be adequate; it is the label they are given which is claimed to be unacceptable'<sup>183</sup>. In other words, the court saw no differential treatment in requiring a transgender person who identifies as a woman to use facilities designated for men. For a cisgender person, the toilet facilities are of course equally 'adequate'. However, from the perspective of the transgender plaintiff, there is, at the very least, an expressive harm to her gender identity every time she is denied the chance to use the toilet for her gender.

The problem of there being no real choice is further highlighted when there are no unisex facilities available, for example, when dealing with the placement of transgender prisoners in gender-specific correctional institutions. In *Green v Secretary for Justice*, the transgender prisoner who identifies as a woman was placed in a male institution, and the court in dismissing her challenge even described her as

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<sup>182</sup> [2003] EWCA Civ 1045.

<sup>183</sup> *ibid* [51].

having a number of ‘privileges’ since she had a choice of her prison clothing not available to other male prisoners<sup>184</sup>. The cisgender norm was held un-interrogated.

Problems with comparator analyses also exist in the ECtHR when dealing with the right to equality and non-discrimination under Art 14 ECHR, which often reflects a formal conception of equality of treatment<sup>185</sup>. In *H v Finland*, the ECtHR dealt with a requirement in Finnish law that transgender persons be divorced before gaining legal recognition of their preferred gender identity. The Grand Chamber rejected the claim relating to non-discrimination under Art 14 ECHR on the basis that the alleged comparators, namely non-transgender persons and unmarried transgender persons, were not ‘sufficiently similar’, and therefore no differential treatment was established<sup>186</sup>.

The court’s judgment can be contrasted to the analysis in the dissenting opinion of Judges Sajo, Keller and Lemmens. The dissenting judges, first, found that there was a ‘differential treatment between transsexual and cis-sexual persons’, in that there is no situation in which a legally married cisgender heterosexual couple would be required to choose between maintaining their civil status and obtaining identity cards reflecting the gender with which they identify<sup>187</sup>. Secondly, the dissenting judges found that the court’s judgment failed to differentiate between transsexual and homosexual persons in equating the claim of a transsexual person to remain married with that of a homosexual person to marry<sup>188</sup>.

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<sup>184</sup> [2013] EWCA Civ 3491 (Admin), [69].

<sup>185</sup> See e.g. Rory O’Connell, ‘The Cinderella Comes to Ball: Art 14 ECHR’ (2009) 29(2) LS 211.

<sup>186</sup> *H v Finland* (n 155) [112].

<sup>187</sup> Dissenting opinion of Judges Sajo, Keller and Lemmens in *H v Finland*, [19].

<sup>188</sup> *ibid* [20].

So whereas the Grand Chamber viewed the situation of cisgender people as the norm and equated the same treatment of cisgender and transgender people as their ‘equal’ treatment, the dissenting judges looked at the issue from the perspective of the transgender plaintiff who was forced to make the said choice. Although this case did not deal with misrecognition situations like *Croft* and *Green*, it highlighted the difficulties with comparators in formal equality analysis.

Group-based indirect discrimination claims, as discussed above, are more promising on the anti-assimilation front. For example, the Indian Supreme Court in the *NALSA* case relied largely on a reasoning that recognizes the discriminatory effect that non-recognition has on hijra and other transgender people, and granted third gender recognition intended to respect the cultural practices of hijra people.

However, the problem of essentialism can again arise because, in order to assess a claim for disparate impact, it might be necessary for courts to situate the plaintiff in a ‘group’ that suffers particular disadvantage, and courts might be driven to find more ‘stable’ or ‘authentic’ boundaries to define such groups. For example, the Ontario Human Rights Tribunal in *Hogan* in finding that transsexual people is a ‘discrete and insular group’ emphasized the authority of the medical diagnosis for ‘transsexualism’, common difficulties faced while transsexual people were ‘transitioning’, and that being transsexual is ‘not a lifestyle choice’<sup>189</sup>. Although this case did not concern defining groups for the purpose of disparate impact claims in particular, it shows the essentialist tendencies that a court might fall into in attempting to define transgender people as a ‘group’.

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<sup>189</sup> *Hogan v Ontario*, 2006 HRTO 32 [398]-[410].

Moreover, courts may again focus too much on analysing whether the comparator group is in an analogous situation to the plaintiff's group<sup>190</sup>. For example, if we apply the comparative disparate impact claim to the facts of *Croft*, a court could be overly invested in the question of deciding whether pre-operative transsexual women, the group to which the plaintiff belonged, is in an analogous situation with cisgender women or post-operative transsexual women, before deciding whether pre-operative transsexual women suffer a disproportionate impact as compared to these other groups. These kinds of comparisons could revert to the kind of essentialist comparisons in comparative disparate treatment analysis, and the problem could be exacerbated if other groups of transgender people who are less established in the jurisprudence, such as those who are non-binary or gender-fluid, make their claims.

Furthermore, the remedies for group-based disparate impact claims may purport to benefit everyone in the group thought to share the same characteristic of the plaintiff, even though belonging to the same group does not necessarily mean they have the same needs. For example, a transgender woman who has not undergone surgeries may demand to use the female bathroom, but another transgender woman may be more comfortable using a gender-neutral bathroom instead. Assigning the same benefit to all transgender women, even if they appear to have the same characteristics, do not ensure that all of their needs are attended to.

The author is unable to find any notable judgment involving disparate impact claims by transgender people in English courts or the ECtHR to demonstrate this risk, but English courts have shown this kind of group-based essentialism in another way. Courts have come to think of gender recognition issues as separate from transgender

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<sup>190</sup> Khaitan (2016) (n 54 above).

discrimination issues, thus ruling against the claims of transgender people who do not fit the legal requirements of gender recognition on the basis that the issue has already been decided in the gender recognition jurisprudence. In *Croft*, for example, the English court held that the possibility of the transgender plaintiff to gain legal recognition ‘militates against’ her claim of discrimination in not being able to use female toilets before satisfying the requirements of the gender recognition law<sup>191</sup>. In other words, whereas cases such as *Goodwin v UK* and legislation such as the Gender Recognition Act 2004 might benefit a certain group of transgender people, the court in *Croft* equated this group-based remedy as the answer to all transgender discrimination claims. It essentialized the needs of transgender people as a group.

Hence, comparative conceptions of discrimination may not do better than ‘gender recognition’ in tackling assimilation or essentialism. If courts are able to focus less on comparisons, group-based indirect discrimination claims are more promising on tackling assimilation demands placed on transgender people, but they also run the risk of essentialising their demands.

Lessons, however, can be learnt from the discussion on disability discrimination law above. Two of them will be discussed: non-comparative conceptions of discrimination, and duties of reasonable accommodation. Indeed, both have received some degree of mention in the ECtHR’s limited transgender discrimination jurisprudence, and there are some Canadian cases that have applied these lessons to transgender discrimination.

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<sup>191</sup> *Croft* (n 182) [51].

## 2. Lesson 1: Non-comparative discrimination

The first lesson from disability discrimination law is the development of non-comparative discrimination claims. We have learnt in Chapter 3 that disability discrimination law has relaxed or even removed the use of comparators, for example in the development of ‘disability-related discrimination’ claims in the Equality Act 2010. The important lesson therein, it was argued, is that discrimination claims do not have to be comparator-driven. The focus can instead be on identifying unlawful reasons for the discriminator’s actions, and depending on the object of discrimination law, the scope of unlawful reasons for actions can be widened.

This point can be applied to disparate treatment claims in transgender discrimination law not only to avoid essentialist use of comparators but also to tackle reliance on essentialist stereotypes. The perpetuation of stereotypes against protected groups is a classic concern of discrimination law, one that even the ECtHR’s limited Art 14 jurisprudence on transgender people has touched upon. In *Van Kuck v Germany*, the ECtHR noted that the German court relied on ‘general assumptions as to male and female behaviour’ in rejecting the plaintiff’s access to sex reassignment surgery<sup>192</sup>. These assumptions relate to the German court’s evaluation of the plaintiff’s evidence as to her sexual identity and development, on which the German court decided that certain episodes of her life showed ‘male behaviour’ and was ‘genuinely male oriented’. The ECtHR further noted that where decisions were made based on general assumptions which introduce a differential treatment based on sex, problems could arise under Art 14, but it considered no further whether the conduct of the German courts did introduce such differential treatment.

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<sup>192</sup> *Van Kuck* (n 156).

Focusing on the reliance on stereotypes in the decision-making process of the discriminator can expose the essentialism behind the law. A particularly elaborate example can be found in one of the cases of the Ontario Human Rights Tribunal, *XY v Ontario*, which ruled against the requirement in an Ontario statute that one must undergo ‘transsexual surgery’ to change their sex-designation on their birth certificates<sup>193</sup>. This tribunal judgment was later endorsed in an Alberta court<sup>194</sup>.

In *XY v Ontario*, The plaintiff was an MtF transsexual person who had undergone surgeries to remove her testes and changed her sex designation, but nonetheless challenged the surgery requirement. The tribunal ruled that the surgery requirement is discriminatory for two reasons: first, that it constitutes distinct and disadvantageous treatment as well as impact on grounds of sex and/or disability; secondly, it perpetuates stereotypes about transgender persons. Moreover, the discriminatory requirement cannot be justified since there is no undue hardship in removing it.

It is important to note that the tribunal argued that the surgery requirement constitutes not just discriminatory impact, but also discriminatory treatment. Having found that the plaintiff suffered from a distinct and disadvantageous treatment under the surgery requirement, the tribunal went on to scrutinize the reasons for the law to impose the surgery requirement. The plaintiff alleged that the surgery requirement perpetrated the ‘stereotypical and outdated ideas’ about transgender people that are ‘not based on their actual characteristics and circumstances’, including the notion of ‘women trapped in male bodies’ and that they need to make their bodies ‘female’

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<sup>193</sup> *XY v Ontario (Government and Consumer Services)*, 2012 HRTO 726.

<sup>194</sup> *CF v Alberta (Vital Statistics)*, 2014 ABQB 237.

through surgery to be their experienced gender<sup>195</sup>.

However, the tribunal took the plaintiff's arguments about stereotypes even further in a way that is recognizant of performative conceptions of identity. It argued, in contradiction to the common judicial understanding of sex as a biological construct and gender as a psycho-social construct, that surgery does not change a person's sex in a 'genetic or biological sense' or in any 'real, objective way'; instead, it only changes how the law 'attributes a change of sex'<sup>196</sup>. It also recognized that, again in contradiction to the usual dichotomy of bodies as 'objective' and 'actual' and identity as 'subjective' and 'arbitrary', what is really arbitrary is the requirement that transgender people undergo surgery to alter their bodies for 'a benefit that does not necessarily have anything to do with the manner in which their bodies had been surgically altered'. The significance of surgeries is 'attributed' rather than actual, and is incognizant with the lived experiences of many trans people. The surgery requirement is thus not based on actual 'merits', but based on 'assumptions about [transgender people] and what they must do in order to 'be' their gender'. Such stereotypical notions include not only those about transgender people and surgeries (e.g. that transgender people can only 'be' their gender by having surgery), but also traditional gender stereotypes about man and woman (e.g. that a trans woman who has undergone surgery is more 'female' than one who has not)<sup>197</sup>.

The Ontario tribunal thus exposed the stereotypical ideas about sex and gender, and about the experiences of transgender people, that underlay the surgery requirement in the law. This allowed the tribunal to find that the surgery requirement

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<sup>195</sup> *XY* (n 195) [187].

<sup>196</sup> *ibid* [205]-[207].

<sup>197</sup> *ibid* [211]-[215].

was indeed imposed for a stereotypical, therefore discriminatory and wrongful, reason, without the need to find a comparator. In doing so, the tribunal was able to focus on the experience of transgender people rather than the perspective of cisgender people, hence avoiding the assimilative and essentialist impact of a cisgender comparator.

### 3. Lesson 2: Duties of reasonable accommodation

It was suggested above that an important characteristic of duties of reasonable accommodation is that they are focused on bringing about a solution that suits the needs of the individual plaintiff, instead of group-wide solutions that may not fit everyone's needs. In this way, the availability of duties of reasonable accommodation is capable of reducing risks of essentialism.

In order to do so, however, it would be important for courts to incorporate concerns for essentialist and assimilationist pressures when interpreting, for example, what constitutes placing a transgender person at a 'substantial disadvantage' for the purpose of the duty of reasonable adjustment in the Equality Act 2010. In particular, the cost to the transgender person's identity should be taken into account.

This may be demonstrated in the context of transgender people's access to bathrooms such as *Croft*, but changing the facts such that the transgender plaintiff demands to use a gender-neutral bathroom and there was no gender-neutral bathroom available in the workplace. Under a strictly comparative conception of discrimination, it might be difficult for her claim to succeed, since gender-neutral bathrooms are not available to either cisgender or transgender people.

However, the recognition of positive duties would mean that the employer might be required to take positive steps to ensure that everyone can access bathrooms

that are not contradictory to their gender identity, subject to the limit of reasonable accommodation. Not being able to access bathrooms appropriate to one's gender identity puts a transgender person at substantial disadvantage. However, such access could mean access to either male or female bathrooms for some transgender people, but access to gender-neutral bathrooms for other transgender people. Rather than focusing on essentializing comparisons of the situation among cisgender people and these different groups of transgender people, the duty of reasonable accommodation allows courts to focus instead on the reasonableness of the demand in question, such as whether it would cause undue hardship to the employer to have to change one of its bathrooms to a gender-neutral one. Moreover, in doing so, the court might consider third-party benefits of such a measure<sup>198</sup>, for example that such a gender-neutral bathroom may also be friendly to families and carers.

Another potential application is in cases of non-binary sex designations in official documentation, such as the facts of *TA v Ontario*, where a transgender person who identifies as pangender demands a 'fluid' or 'non-specified' sex designation on their driver's license<sup>199</sup>. One may argue that this does not involve positive duties since cisgender people are accorded a sex designation that accords with their gender identity whereas transgender people are not. The problem, however, is that with the advancement of cases such as *XY v Ontario*, transgender people who permanently identify as men or women are increasingly accorded the same treatment as cisgender people – the ability to be recognised as men or women in their drivers' license or other documentation. It could be argued that transgender people demanding a 'fluid'

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<sup>198</sup> Elizabeth F Emens, 'Integrating Accommodation' (2008) 156 UPenn L Rev 839.

<sup>199</sup> *TA v Ontario*, 2016 HRTO 17.

or ‘non-specified’ sex designation is asking for something more than what is already available to everyone.

However, the recognition of positive duties would mean that it is not enough to make available the binary sex designations to everyone. Driver’s license is a benefit for which many people use as identity documents, and to have a driver’s license that designates a sex inappropriate to the transgender person’s gender identity would put them at a substantial disadvantage. The inquiry then moves towards how the issuer of driver’s license could accommodate their needs. In doing so the court must consider the reasonableness of plaintiff’s individual demand, that is, having a ‘fluid’ or ‘non-specified’ sex designation. The result could well be that there is no particular hardship in allowing such designations.

Having outlined certain lessons that transgender discrimination law could take from the previous discussion on disability discrimination law, it is time to draw some tentative conclusions from all the above.

## **VII. Conclusion and Reflections**

We may now pull together the discussions in disability and transgender contexts and see what conclusions we may reach about the proposed relationship between essentialism, assimilationism and discrimination law and the proposed solution to addressing these concerns.

Let's recall what these proposals were. It was proposed in Chapter 2 that discrimination law discourages essentialist stereotypes that lead to the exclusion of certain groups from society, but that this process might place undue demands on these groups to assimilate into the dominant norms; yet in addressing such assimilationism the law must also be vigilant of the risk of re-inviting essentialist thinking in the name of celebrating group differences. It was also proposed that the general direction in addressing assimilationism and essentialism should focus on contesting the oppressive demands placed upon the excluded groups, rather than disciplining the performance of individuals within these groups.

This thesis then took on a slightly difficult route, by first establishing the relevance of anti-essentialism and anti-assimilationism in the context of disability discrimination and demonstrating the potential of disability discrimination law in tackling such concerns, and then applying it to a seemingly more obvious context of transgender discrimination. However, the author hopes that this has been a worthwhile journey. This structure ensures that various elements of disability discrimination law and their roles in tackling essentialism and assimilationism are considered, canvasses a sufficiently wide range of lessons to be applied to other contexts, and ensures that these lessons are properly understood in their original contexts before they are applied to other contexts.

Readers may still find the later parts of the thesis on transgender discrimination to be more convincing than the earlier parts on disability discrimination, for example because they do not find Chapter 3 convincing in establishing the relevance of essentialism and assimilationism in the disability context. In particular, given the under-recognition of anti-assimilationist demands of disabled or Deaf people, the need for counteracting the essentialist risk of anti-assimilationist efforts may be difficult to imagine, and the realization of such a need in the form of legal claims may be considered even more unrealistic.

Even so, Chapters 5 and 6 may still stand on its own as a demonstration of how transgender discrimination law can take lessons from disability discrimination law to perform anti-essentialist and anti-assimilationist functions. The risk, though, is that this might detract from the focus that elements such as reasonable accommodation, sometimes thought to be so unique to disability discrimination law, on their particular functions for disabled people. It is hoped that this risk has been alleviated by the preceding discussion that these functions are also relevant to disability discrimination, and disability discrimination law needs to be, and can be, understood to perform such functions alongside other functions.

If readers accept the arguments throughout, one may then consider further reflections on discrimination law more generally. First, doctrinally speaking, this thesis provides another reason for extending such elements as non-comparative discrimination claims and reasonable accommodation to tackle essentialism and assimilationism in other grounds of discrimination. Indeed, this is already the case in Canada, where non-comparative discrimination reasoning and duties of reasonable accommodation already apply regardless of the ground of discrimination.

Second, theoretically speaking, this thesis provides another reason for the common idea of disability discrimination law as an *exception to* discrimination law to give way to the idea that it is indeed an *ideal of* discrimination law. The framework of disability discrimination law, as well as its ‘unique’ elements such as reasonable accommodation, has often been justified on the basis of the observation that the usual formal, comparative model of discrimination law simply cannot realize much for disabled people. As Lady Hale observed in *Malcolm*, such a model will not achieve the object of disability discrimination law to ‘level the playing field’<sup>200</sup>.

The ‘playing field’ that many, including Lady Hale, might be primarily concerned for disabled people would perhaps be that of the distribution of opportunities or access to mainstream socio-economic institutions. However, this thesis focuses on a different but related ‘playing field’ – the ability to participate in the social, political and cultural conversations that shape one’s identity, to form one’s own communities and ultimately to have one’s differences valued rather than eliminated. This means realizing the *right* to be different, but importantly not the *responsibility* to be different, hence this thesis also demonstrated sensitivity towards individual choices by emphasizing the need to contest essentialist and assimilationist demands rather than one’s performance of their identity. It is hoped that some light has been shined at what disability discrimination law can teach us in achieving these goals, and how these lessons can be applied to other contexts such as transgender discrimination law.

Some readers might be disappointed that an important normative question has been left largely unanswered so far: is identity politics even desirable at all? This is an

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<sup>200</sup> *Malcolm* (n 113) [86] (Lady Hale).

important question because the whole idea of this thesis is to recognize anti-assimilationist and anti-essentialist demands in relation to performative identities and to explain how discrimination law would address such demands. But if understanding personal characteristics such as disability and gender as difference-generating identities – in other words, identity politics – creates more problems than it solves, why should discrimination law embrace it?

One of the risks of identity politics – its essentialising effects – has already been addressed. Theoretically, it has been suggested that concepts such as strategic essentialism may come to rescue. Legally, it has been argued that concepts such as reasonable accommodation are capable of counteracting such risks.

But this does not solve what is perhaps the more fundamental issue: identity politics may be undesirable in their effects on society by creating what Reva Siegel calls the ‘Balkanization’ of society – promoting and reinforcing the separation of society into competing or even mutually-resenting identity-based factions<sup>201</sup>. The path of identity politics towards realizing the ‘right to be different’ might impede rather than facilitate the achievement of the ‘ultimate goal’ of equality to ‘overcome old divisions and subordination’<sup>202</sup>. Once unleashed, identity politics may be a Pandora’s box. It may be difficult to assess when the strategic use of identity politics have completed its role, and even more difficult practically to curb people’s identification with their social groups once it has become a common practice. And the nastiest manifestation of identity politics may well be the kind of toxic nationalism that has plagued politics historically and contemporarily.

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<sup>201</sup> Reva B Siegel, ‘From colorblindness to antibalkanization: an emerging ground of decision in race equality cases’ (2010-2011) 120 Yale LJ 1278.

<sup>202</sup> *South African Police Service v Solidarity obo R M Barnard* [2014] ZACC 23 [93] (Cameron J, Froneman J and Majiedt AJ).

This thesis took on a less ambitious burden by recognizing the fact that anti-essentialist and anti-assimilationist demands have indeed been raised by various social movements that seek to eliminate oppression. And it explored how discrimination law could be oriented to perform anti-essentialist and anti-assimilationist functions, by taking lessons from disability discrimination law and showing that they can be applied, *inter alia*, to transgender discrimination law.

To the extent that there are normative assumptions in this thesis, it is that the right to equality must firmly encompass a ‘right to be different’, and that the social movements that have historically shaped the formation of discrimination law should continue to shape the evolution of the law to respond to their evolving demands. After all, the life of discrimination law is sustained by its utility to the oppressed in society, and the law is but one part of the political, social and cultural conversations that form the incredibly complex yet fundamental project of achieving a world in which we are all free and equal in dignity and rights.

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