

## BOOK REVIEW

IYIOLA SOLANKE, *DISCRIMINATION AS STIGMA: A THEORY OF ANTI-DISCRIMINATION LAW* (HART PUBLISHING 2017)

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Several recent campaigns, from Black Lives Matter to the #MeToo movement, have drawn attention to a social phenomenon that deeply shapes discrimination, violence and inequality: stigmatisation. Fed by stereotypes, the process of stigmatisation ascribes a degrading mark – a stigma – to members of certain social groups based on characteristics such as, among others, race and gender. When a stigma is imposed upon individuals or groups based on categorical differences, hierarchical beliefs are formed in relation to these differences. These beliefs trigger negative cognitive and behavioural responses from other members of society. Stigmatisation thereby constitutes social hierarchies, creating and legitimising discrimination, inequality and violence. Anti-racist, feminist and other social justice movements stress the role of stigmatisation in the (re)production of discrimination. For instance, discussions following the 2017 #MeToo campaign on social networks have brought to light the mechanics of stereotyping and stigmatisation at work in gender-based harassment, a legally prohibited form of discrimination.<sup>1</sup> Investigating the causal link between stigmatisation and discrimination is

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<sup>1</sup> See Article 2(c) and (d) of Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23 and Article 2(c) and (d) of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L 373/37. Another example is the Black Lives Matter movement's denunciation of racial stigmatisation, *inter alia* in the form of widespread stereotyping of young Black men as criminals, and its consequences in terms of police violence, racial profiling and discrimination. See eg, 'Black Lives Matter, What We Believe' available at <<https://blacklivesmatter.com/about/what-we-believe/>> accessed on 20 February 2018.

also the agenda set by Solanke in her perspective-shifting and timely book *Discrimination as Stigma: A Theory of Anti-Discrimination Law*.

By shifting the focus to stigmatisation, the book sheds a new light on discrimination theory. While the analysis proposed by the author centres on the essential question of defining the categories protected by non-discrimination law, its implications also allow revisiting other essential debates. Recurrent criticism stresses the inadequacy of non-discrimination law, denouncing its individualistic and adversarial focus and its inability to tackle intersectionality and ensure substantive equality. In this context, Solanke's book opens new avenues for reflection and pathways for future reform.<sup>2</sup> My review first introduces the main argument and structure of the book (section I). I then focus on three ways in which Solanke's contribution opens new spaces for theoretical thinking and legal reform. In section II of the review, I consider how the book displaces the focus from the symptoms to the root causes of discrimination through an innovative methodological approach integrating social science research into the legal analysis. In section III, I highlight the originality of the demonstration, which transcends the dichotomy between individual and structural inequality through a multi-level analysis of the (re)production of discrimination through stigmatisation. Finally, in section IV, my review shows how the proposed theory promotes non-discrimination law as a transformative equality project.

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<sup>2</sup> See eg, Sandra Fredman, *Discrimination Law* (Oxford University Press 2011); Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 International Journal of Constitutional Law 712; Alan D Freeman, 'Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine' (1978) 62 Minnesota Law Review 1049; Suzanne Goldberg, 'Discrimination by Comparison' (2011) 120 Yale Law Journal 728; Catharine A MacKinnon, 'Substantive Equality: a Perspective' (2011) 96 Minnesota Law Review 1; Aileen McColgan, *Discrimination, Equality and the Law* (Hart 2014); Christopher McCrudden, 'International and European Norms Regarding National Legal Remedies for Racial Inequality' in Sandra Fredman (ed), *Discrimination and Human Rights: The Case of Racism* (Oxford University Press 2001); Dagmar Schiek, 'Organising EU Equality Law Around the Nodes of "Race", Gender and Disability' in Anna Lawson and Dagmar Schiek (eds), *EU Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination* (Ashgate Publishing 2011); Alexander Somek, *Engineering Equality. An Essay on European Anti-Discrimination Law* (Oxford University Press 2011).

## **I. THE PROPOSITION: RETHINKING DISCRIMINATION AS STIGMA**

Building on the widely shared understanding that not all types of discrimination are wrong, the book's point of departure is the question of when discrimination should be made unlawful. That is, what distinctions should be illegal and what categories should be protected by non-discrimination law? The author's ambition is twofold: to propose a 'unifying principle' providing a systemic foundation for discrimination theory, and to offer a 'new', 'clearer' 'rationale' supporting the crafting of non-discrimination law.<sup>3</sup> The concept of stigma, well-known to sociologists and psychologists, serves as a starting line and analytical thread for the inquiry. While the book's scope is quite extensive, the author's central claim is that stigma should illuminate the distributional mechanics of non-discrimination rights. Her argument is that stigma, by demeaning the equal moral worth and social status of certain social groups, generates and maintains widespread and enduring discrimination against their members. Stigmatisation should thus be targeted as the root cause of discrimination. To render the concept of stigma operational, the author designs an analytical framework revolving around what she calls the 'anti-stigma principle'. Through providing a better understanding of why and how discrimination happens, the 'anti-stigma principle' aims to guide the delineation of the socially salient groups that ought to be protected by non-discrimination law in a systemic, flexible and inclusive manner.<sup>4</sup>

The book is divided into two main parts: theory-building and application. The first part is dedicated to the construction of the 'anti-stigma principle', which takes its inspiration from the social model of disability. Stigmatisation, Solanke argues, shapes our perceptions, actions, and modes of organisation in an all-encompassing and multi-level fashion.<sup>5</sup> Rooted in cultural narratives, widely shared symbolic representations, beliefs and social imagery, all of which circulate rapidly through discourses and other media, stigma spreads insidiously as part of what we call 'common sense' at a personal, interpersonal,

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<sup>3</sup> Iyiola Solanke, *Discrimination as Stigma: A Theory of Anti-Discrimination Law* (Hart Publishing 2017), 56, 62-63, 84, 102, 159 and 213.

<sup>4</sup> *Ibid*, 84-102.

<sup>5</sup> *Ibid*.

institutional, but also structural and social level.<sup>6</sup> Rapid transmission, notably through mediatisation, education and everyday trusted social interactions, makes stigma invisible and thus dangerous and highly difficult to eradicate. The 'anti-stigma principle' thus innovatively proposes to replace the current anti-discrimination system by an 'ecological' model that, by analogy to environmental approaches, displaces the focus from 'individual attributes and behavioural deficits' to the social context of production of discrimination through 'social meanings and discourses'.<sup>7</sup>

The author's argumentation unfolds over eight chapters. The first one meticulously defines stigma and its modes of dissemination through socialisation processes drawing on Goffman's influential work and its later elaborations.<sup>8</sup> The second chapter briefly reviews the historical origins of the non-discrimination principle from political philosophy to international law, subsequently turning to a critical discussion of the criteria of immutability and dignity that circumscribe its protectorate. Discarding these criteria because of their vagueness and ambiguousness, the author undertakes to define a different rationale — theoretically sounder and less open to arbitrary manipulations — to delimit the protective scope of non-discrimination law.<sup>9</sup> The third chapter studies how the concept of stigma has so far informed case law in six — in majority common law — jurisdictions. Chapter four, concluding the theoretical section of the book, refines the construction of the 'anti-stigma principle' that is tested in practice in the second part of the book by unwinding a creative analogy between non-discrimination law and public health to illustrate the multi-level impact of stigmatisation, and notably its structural effects.<sup>10</sup> By comparing discrimination to a virus, the author highlights the important role of the social environment in its mechanics of propagation.

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<sup>6</sup> Solanke (n 3) 92, 99.

<sup>7</sup> Ibid, 27, 102.

<sup>8</sup> Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Penguin 1963).

<sup>9</sup> Solanke (n 3) 49-60.

<sup>10</sup> These are Australia, England and Wales, Canada, the European Union, South Africa and the European Court of Human Rights, although Croatia, the Czech Republic, Hungary, India, Ireland, New Zealand, Russia, Sweden and the United States are also used as examples.

The second part of the book starts with chapter five in which the author continues the virus analogy and calls for the 'mainstream[ing] [of] social responsibility', as an addition to sanctioning individual responsibility.<sup>11</sup> Drawing lessons from public responses to epidemics, Solanke makes a solid argument in favour of more systematic and preventive anti-discrimination public action. While chapter six explains the ability of the 'anti-stigma principle' to tackle the complexity of intersectional discrimination, the last two chapters apply the principle to two current debates. Chapter seven elaborates a ten-step 'anti-stigma' test to answer the question of which stigmas should be combatted under non-discrimination law.<sup>12</sup> The test, made up of ten questions about the nature, durability and effects of stigmas, is then implemented to the issue of fattism to demonstrate that body size should constitute a protected ground under non-discrimination law. Chapter eight provides a contrasted response with regard to physical appearance applying the same test.

## II. THE METHOD: LINKING ANTI-DISCRIMINATION LAW WITH SOCIAL SCIENCE RESEARCH

With this book, Solanke creates a distinct space for discussion in the context of a long and flourishing academic debate on the normative foundations and reform of non-discrimination law. The book's originality lies in its interdisciplinary anchor, at the crossroads of law, sociology and social psychology. While discrimination is often discussed in relation to political philosophy and social theory, this book, faithful to Solanke's socio-legal approach, proposes a practice-oriented discussion.<sup>13</sup> The study of stigma, stigmatisation and related phenomena such as implicit bias, stereotyping and prejudice is neither novel in sociology nor in law,<sup>14</sup> but Solanke inventively

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<sup>11</sup> Solanke (n 3) 213.

<sup>12</sup> Ibid, 162-163.

<sup>13</sup> See eg, Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press 2015); Fredman, 'Substantive Equality Revisited' (n 2); MacKinnon (n 2). See Iyiola Solanke, 'Putting Race and Gender Together: A New Approach to Intersectionality' (2009) 72 *Modern Law Review* 723 as an example of her use of 'social framework analysis'.

<sup>14</sup> Goffman's foundational sociological study was published in 1963 and as early as 1992, Larry Alexander's article already tackled some of the problems inherent to stigma and

integrates this knowledge in a single principle to re-think discrimination theory and law.

By consolidating her theory with social science research, Solanke fills certain gaps and convincingly responds to current controversies in legal debates about discrimination. Most prominently, by explaining discrimination through the ubiquitous presence of stigma, she embraces knowledge on the persistence of inequality and stratification built over the past two decades, from Tilly's durable inequality to Ridgeway's status beliefs theory.<sup>15</sup> Noticing the endurance of discrimination despite existing anti-discrimination laws, scholars have underscored the role played by hierarchical socio-cultural representations in sustaining discrimination. Solanke adopts this constructivist understanding and proposes to address the cultural narratives and hegemonic discourses that stabilise and convey stigma.

Applied to discrimination through the 'anti-stigma principle', Solanke's method of inquiry shares some features with what, in the US doctrinal debate, has been called the 'anti-subordination approach'.<sup>16</sup> Looking at discrimination through the lens of stigma makes hierarchies based on social divisions visible and invites to look at their historical context of formation and socio-political consequences in terms of subordination. It allows for a more systematic, inclusive and contextual delineation of the categories that should be protected by non-discrimination law, avoiding overreliance on definitions shaped by interest group mobilisations or criteria such as dignity and immutability that can prove problematic.<sup>17</sup> This approach also resolves

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bias in discrimination law. See Larry Alexander, 'What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies' (1992) 141 *University of Pennsylvania Law Review* 1.

<sup>15</sup> See Charles Tilly, *Durable Inequality* (University of California Press 1998) and Cecilia Ridgeway, 'Why Status Matters for Inequality' (2014) 79 *American Sociological Review* 1.

<sup>16</sup> See, for instance, Abigail Nurse, 'Anti-Subordination in the Equal Protection Clause: A Case Study' (2014) 89 *New York University Law Review* 293, 300.

<sup>17</sup> For a detailed discussion, see Solanke (n 2) 49-62.

further difficulties of non-discrimination law and doctrine, for instance accommodating the complexity of intersectional discrimination.<sup>18</sup>

Solanke's analytical endeavour is a welcome critique of the current non-discrimination legal apparatus and policies. At the same time, understanding 'stigma [a]s the source of all discrimination' also opens broader questions about the limits of law itself as an agent of social and cultural change.<sup>19</sup> Even though judicial decisions produce an authoritative discourse that can incrementally contribute to shifting cultural narratives, stigmatisation is part of our overarching cultural narratives and 'as [our] common sense, [stigmas] are unchallengeable', as Solanke herself recognises.<sup>20</sup>

Research shows that the velocity of the formation of status hierarchies causes a 'cultural lag' between non-discrimination corrective policies and the spread of stigmatisation.<sup>21</sup> By way of illustration, Harvard's 'Project Implicit' tests implicit bias in cognitive associations and finds that prejudice is pervasive, often unconscious, even when people are actively aware that the stereotypes they hold are unfounded and wrong.<sup>22</sup> In fact, according to Derrida and Cixous, language itself constitutes hierarchies.<sup>23</sup> Stigmatisation thus routinely transforms categories of distinction into grounds of inequality, which discursive hegemony processes then stabilise and perpetuate.<sup>24</sup> It follows that in the short run, non-discrimination law can only limitedly disrupt the deeply rooted cultural frames through which we construct social meaning. Hence, combatting the root causes of discrimination extends beyond the borders of a legal project.

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<sup>18</sup> This compares to the current 'single-axis approach' which requires choosing either/or protected grounds of discrimination for the sake of performing comparative tests of differential treatment. For a criticism of the comparator approach, see eg, Goldberg (n 2).

<sup>19</sup> Solanke (n 3) 208.

<sup>20</sup> *Ibid*, III.

<sup>21</sup> Ridgeway (n 15) 13.

<sup>22</sup> See <[www.projectimplicit.net/index.html](http://www.projectimplicit.net/index.html)> accessed on 23 April 2018.

<sup>23</sup> See eg, Jacques Derrida, *De la grammatologie* (Éditions de Minuit 1967) and Hélène Cixous, *Le rire de la Méduse et autres ironies* (1975) *L'Arc* 61.

<sup>24</sup> See Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (Verso 1985).

The author's proposition acknowledges the limits of the law through clarifying that combatting discrimination should become a social priority, like public health and 'well-being'.<sup>25</sup> The approach she proposes, rooted in public and, as the case may be, private education, professional training, prevention measures, policy-making, procedures, etc., could be called non-discrimination by design or non-discrimination mainstreaming.<sup>26</sup> Such a public policy would increase the effectivity of the anti-discrimination project while still leaving space for public authorities to establish the parameters of the balancing with other rights such as freedom and autonomy.<sup>27</sup>

As Solanke clarifies, 'not all stigma should be protected [and] being stigmatised per se is not enough to warrant protection under anti-discrimination law—thus additional factors would have to be considered to determine which stigmas warrant legal protection'.<sup>28</sup> The one-size-fits-all approach proposed by the 'anti-stigma principle' has the merit of offering a set of guidelines that is both contextual and standalone. On the one hand, the test proposed by the author strikes the balance between robustness and flexibility demanded by non-discrimination law. On the other, it is questionable whether such a one-size-fits-all approach appropriately covers the broad range of existing category-specific forms of discrimination in front of a phenomenon as complex and differentiated as stigmatisation.

The test unfolds as follows:

1. Is the 'mark' arbitrary or does it have some meaning in and of itself?
2. Is the mark used as a social label?
3. Does this label have a long history? How embedded is it in society?
4. Can the label be 'wished away'?
5. Is the label used to stereotype those possessing it?
6. Does the stereotype reduce the humanity of those who are its targets? Does it evoke a punitive response?
7. Do these targets have low social power and low interpersonal status?
8. Do

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<sup>25</sup> Solanke (n 3) 101.

<sup>26</sup> This is by analogy to the 'privacy by design' and 'gender mainstreaming' principles.

<sup>27</sup> One could think, for example, of the exceptions that current apply to religious institutions with regard to the prohibition to discrimination in employment matters. See eg, Article 4(2) of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

<sup>28</sup> Solanke (n 3) 161.



these targets suffer discrimination as a result? 9. Do the targets suffer exclusion? 10. Is their access to key resources blocked?<sup>29</sup>

Despite its comprehensiveness, the set of guidelines is not free from indeterminacy. The first question could lead to a wide range of interpretations. What would be, for example, the understanding of the arbitrariness criterion in the protection from discrimination based on age — both young and old — under the 'anti-stigma principle'?<sup>30</sup> Likewise, the author argues that the scope of the anti-stigma principle explicitly excludes more extensive legal protection — such as granted by French law against discrimination based on lifestyle or habits like smoking, thus raising questions of inclusiveness.<sup>31</sup> The concept of humanity contained in question 6 also suffers from uncertainty in the same form as pointed out by the author in relation to dignity. In addition, question 3 concerning the historical length and embeddedness of stigmas rests necessarily on comparative assessments and only limitedly determines the wrong nature of a label, especially given the non-linear history of stigmas.<sup>32</sup> It is therefore debatable whether the 'anti-stigma' test fully fulfils its purpose of eliminating arbitrariness and discretion in the delineation of protected categories. The test provides interesting clues and enables contextual flexibility but does not in itself determine thresholds

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<sup>29</sup> Solanke (n 2) 162-163.

<sup>30</sup> For example, in the case *Gosselin v. Québec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84 decided by the Canadian Supreme Court, while the majority found that a social assistance measure reserved for people under 30 was not unlawfully discriminatory, notably because it did not stereotype people based on their age in a demeaning way, Justice L'Heureux Dubé dissented by claiming that '[s]tereotypes are not needed to find a distinction discriminatory'.

<sup>31</sup> See Solanke (n 3) 36 and see the ground 'mœurs' in Article L1132-1, Code du Travail and the example provided by: Défenseur des Droits, *Lutte contre les Discriminations et Promotion de l'Égalité* (2018) available at <[www.defenseurdesdroits.fr/fr/institution/competences/lutte-contre-discriminations](http://www.defenseurdesdroits.fr/fr/institution/competences/lutte-contre-discriminations)> accessed 20 February 2018.

<sup>32</sup> As the book explains, the stereotypes associated to body size have oscillated from positive to negative throughout history, in a differentiated manner for men and women, and it is only with the beginning of World War II that thinness became an imperative. See Solanke (n 3) 168-169. When compared to sexism, the history of fattism is therefore relatively young.

above which the degree of social vulnerability caused by stigma should yield protection.<sup>33</sup>

Finally, the test entailed by the 'anti-stigma principle' also raises the question of operationalisation. In particular, the test's theoretical complexity might reduce its applicability. This concerns legislators and, in some cases, judges. In cases of open non-discrimination legislative clauses, with either a general unspecific non-discrimination principle or a non-exhaustive list of protected grounds, the test would in fact have to be operated by judges within doctrinal reasoning. Although ensuring robustness, the analytical granularity of the 'anti-stigma principle' would have to be put in the balance with the need for manoeuvrability, in addition to legal certainty.

### **III. THE ORIGINALITY: STIGMA AS A PATH TOWARDS COMBATING STRUCTURAL AND SOCIETAL DISCRIMINATION**

Owing to the structural implications of reconceptualising discrimination as stigma, Solanke's arguments extend the focus of non-discrimination law from the individual level to society as a whole. This change of perspective is illuminating, despite the difficulties of responding to society's responsibility through a predominantly individualistic and adversarial non-discrimination system. The book recognises the multi-level pervasiveness of discrimination as stigma. Comparing public action aimed to stem epidemic diseases with the concerted efforts that would be needed to stop discrimination, the virus analogy has the merit to expose the dissonance between the societal anchoring of discrimination and the individualistic response brought by non-discrimination law. The author makes clear that eliminating discrimination at the individual or institutional level is not enough. Beyond changing behaviours and institutional practices, society bears an active duty to remedy discrimination through, among others, policies of affirmative action, diversity representation, political empowerment and a substantive public-sector equality duty in fields and contexts as diverse as education, public health, public policy and the media.

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<sup>33</sup> By analogy, see Westen's analysis of the normative emptiness of the principle of equality: Peter Westen, 'The Empty Idea of Equality' (1982) 95(3) *Harvard Law Review* 537.

Solanke thereby interestingly reverses the paradigm: collective action against discrimination becomes the norm instead of the exception. Thanks to this shift of perspective, the book approaches the thorny question of individualism in non-discrimination law from a new angle. The anti-stigma approach can be read as a critique against a liberal understanding of non-discrimination law as limited to the pursuit of formal equality.<sup>34</sup> Solanke's approach resonates with the literature on substantive equality and echoes other scholars' long-lasting defence of collective and positive action.<sup>35</sup> As such, it demands an outcome-oriented and systemic fight against discriminatory practices and structures, not only through individual and corrective procedures, but also through a set of collective, preventive, public action measures, both of legal and political nature.

The 'anti-stigma principle' efficiently solves a second problem related to the preponderantly individualistic focus of current non-discrimination law, namely the predominant 'perpetrator perspective' that conceives of discrimination as 'actions' rather than 'conditions'.<sup>36</sup> Albeit negating some of the most important progress in the construction of non-discrimination law (e.g. the recognition of indirect discrimination), intent-based analyses of discrimination are lurking pitfalls for judicial reasoning.<sup>37</sup> Focusing instead on society's perpetuation of entire systems of discrimination through symbolic, material and physical violence, Solanke favours analyses centred on victims and effects, and counters the risk of intent-based analyses.<sup>38</sup> The stigma-based approach sends the important message that even if discrimination is unintentional, covert and even naturalised, it is not acceptable. Hence, the 'anti-stigma principle' empowers non-discrimination law to better confront

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<sup>34</sup> For a critique, see Somek (n 2).

<sup>35</sup> See eg, Fredman, 'Substantive Equality Revisited' (n 2); McCrudden (n 2); McColgan (n 2).

<sup>36</sup> Freeman (n 2) 1052-1053.

<sup>37</sup> See eg, Oddny Mjöll Arnadóttir, 'Non-Discrimination Under Article 14 ECHR: The Burden of Proof' (2007) 51 *Scandinavian Studies in Law* 26-29.

<sup>38</sup> Solanke uses the concept of 'structural stigma' developed in Bruce G Link and Jo C Phelan, 'Conceptualizing Stigma' (2001) 27 *Annual Review of Sociology* 363 (cited in Solanke (n 3)).

entrenched structures of marginalisation, oppression, exploitation and subordination in which individual discriminatory acts are anchored.<sup>39</sup>

After a robust demonstration, the author however intriguingly mitigates her own argument, claiming in her intermediate conclusions, that 'the anti-stigma principle does not necessarily change the tools of anti-discrimination law, but can change their prioritisation'.<sup>40</sup> This claim seems to stand in sharp contrast with the argued necessity to transform non-discrimination into a public well-being and equality project. While the author describes the 'anti-stigma principle' mainly as a tool to inform the crafting of non-discrimination legislation and action, re-thinking discrimination around the concept of stigma entails further-reaching implications. Hence, changing other features of the non-discrimination system would seem necessary to ensure coherence with the author's project to design an 'ecological' model of non-discrimination law.<sup>41</sup> Targeting equality and stigma within non-discrimination law therefore seems to call for a broader reform of the non-discrimination system, both in terms of rules and structure.

First, despite the author's reservations of using stigma to 'influence the determination of a finding of discrimination', the theory laid out could also have implications for judicial reasoning.<sup>42</sup> In particular, in legislation devoid of a closed list of protected grounds, it is incumbent upon judges to define the limits of the scope of protection. Thus, an 'anti-stigma principle' could certainly play a role in assessing whether a characteristic is protected or not.<sup>43</sup> Second, the adversarial nature of non-discrimination law primarily makes it a tool to seek liability and compensation for victims. How to then promote social change through non-discrimination law when 'there is no clear answer as to who is responsible for the creation and maintenance of stigma in society'?<sup>44</sup> Cases like the Court of Justice of the European Union's decisions *Feryn* or *ACCEPT*, which exclude the identification of individual victims as a

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<sup>39</sup> See Iris M Young, *Justice and the Politics and Difference* (Princeton University Press 1990) and Tilly (n 15).

<sup>40</sup> Solanke (n 3) 102.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*, 84.

<sup>43</sup> The Canadian Supreme Court doctrine for instance already uses stereotypes as an indicator of discrimination.

<sup>44</sup> Solanke (n 3) 110.

requirement for condemning direct discrimination in case of hostile and prejudicial public speech, offer lines of reflection.<sup>45</sup> Other possibilities such as class actions, *actio popularis*, collective claims or other group proceedings exist, but the tension between systemic responsibility and individual liability remains.

In addition, the analogy between public action against discrimination and public health models to eradicate epidemic diseases, albeit illuminating, highlights that the success of non-discrimination public action is tied to political consensus.<sup>46</sup> Combatting epidemics is of direct interest for the majority and is supported by a large societal consensus. There is no comparable consensus on fighting against discrimination, not least because privilege and oppression are partially naturalised or disguised as products of a meritocratic society.<sup>47</sup> Hence coming up with a public action programme in the absence of broad awareness and substantive social commitment is difficult, as evidenced by the controversies surrounding affirmative action. Considering the complexity of the challenge and the required degree of voluntary cooperation of the majority towards minorities' interests, efforts to free society from the discrimination 'virus' do not herald the most optimistic prognoses.<sup>48</sup> By way of illustration, a necessary non-discrimination measure would be to ban gender stigmatisation in the media, advertisement and education. However, policy-makers at the EU level exempted precisely these three vital sectors from the obligation to ensure gender equality.<sup>49</sup>

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<sup>45</sup> See Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn* NVEU:C:2008:397 and Case C-81/12 *Asociația Accept v Consiliul Național pentru Combaterea Discriminării* EU:C:2013:275.

<sup>46</sup> Solanke herself acknowledges the 'challenges in transferring [the] lessons [learnt from the public health modes of action] to tackling discrimination', notably because 'in society most people do not live with an active everyday fear of discrimination' and 'many in society do not agree'. See Solanke (n 3) 109-110.

<sup>47</sup> See for instance the discrepancy between our perception of socio-economic status as a product of meritocracy, and Bourdieu's theorisation of class habitus as deeply entrenched in individual perceptions and behaviours. See Pierre Bourdieu, *La Distinction : Critique Sociale du Jugement* (Les Éditions de Minuit 1979).

<sup>48</sup> Solanke (n 3) 97-101.

<sup>49</sup> Article 3(3) of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L 373/37.

#### IV. THE IMPLICATIONS: TRANSFORMATIVE EQUALITY AND THE QUESTION OF MALDISTRIBUTION

The very first line of the book – '[t]his book is about the use of anti-discrimination law to pursue equality' – makes clear that equality is considered the normative bedrock of non-discrimination law.<sup>50</sup> However, the author explicitly claims that her theory does not explore the question of the normative purpose behind non-discrimination law.<sup>51</sup> In view of the diversity of normative commitments carried by other discrimination law projects, ranging from autonomy to dignity and substantive equality, it would have been insightful to read more about the author's vision of equality.<sup>52</sup> Despite this grey area, the book appears to promote a deeply 'transformative' understanding of equality.<sup>53</sup> The author's view of tackling systemic discrimination can be understood in terms of achieving social change through accommodating diversity and eliminating oppressive categorical hierarchies.<sup>54</sup> Combatting discrimination as stigmatisation implies 'modify[ing] [...] social and cultural patterns of conduct [...] with a view to achieving the elimination of prejudices and customary and all other practices

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<sup>50</sup> Solanke (n 3) 21.

<sup>51</sup> Ibid, 22: 'while [others] see[k] to clarify the purpose of discrimination law, my goal is to clarify the mechanics of that law'; 'it is not an inquiry into why some forms of discrimination are seen to be so bad that they require legal regulation'.

<sup>52</sup> See eg, Khaitan (n 13); Fredman, 'Substantive Equality Revisited' (n 2); MacKinnon (n 2).

<sup>53</sup> The idea of transformative equality originates from the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). See CEDAW General Recommendation 25 (2004) calling for 'a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns'. This understands stigma, stereotypes and prejudices as 'underlying causes of discrimination [and] inequality'. The idea of transformative equality has been theorised by Fredman in her four-dimensional substantive equality model as the accommodation of diversity through social and cultural transformation. Transformative equality therefore requires structural and cultural change to tackle systemic inequalities. See eg, Fredman, *Discrimination Law* (n 2) 25, 30-31, 98-99.

<sup>54</sup> Fredman, *Discrimination Law* (n 2), 98-99.

which are based on the idea of the inferiority or the superiority' of certain categories, a foundational goal of transformative equality.<sup>55</sup>

Unwinding the idea of 'transformative equality' then opens broader questions related to the link between non-discrimination law and the set task of 'pursu[ing] equality'.<sup>56</sup> Notably, (re)distributive questions and issues of material inequality arise, which are mainly absent from the analysis. Two interrogations unfold. First, does understanding discrimination as stigma allow tackling its socio-economic manifestations? Second, does a politics of recognition subsume the goal of addressing the root causes of discrimination?

Even though Solanke recognises the role of poverty in relation to obesity, it is not discussed as an autonomous protected ground. The book understands stigma as the exclusive mediator of discrimination. On the one hand, this account echoes sociological knowledge about the stigmatisation of material disadvantage.<sup>57</sup> In that sense, a non-discrimination law revolving around the concept of stigma could capture material inequalities through their correlated prejudices. On the other hand, the presence of a ban on class-based, economic or socio-economic discrimination in numerous European countries shows that a more direct, systematic, and maybe effective way to tackle material inequality is to explicitly acknowledge systemic discrimination based on material resources.<sup>58</sup>

This brings us to the second question, which relates to modes of anti-discrimination action. One of the book's aims is to tackle the root causes of discrimination rather than its symptoms, therefore it is important that a

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<sup>55</sup> Article 5(a) CEDAW on 'sex role stereotyping and prejudice'.

<sup>56</sup> Solanke (n 3) 21.

<sup>57</sup> Bourdieu has shown the links between class habitus and stigmatisation. See Bourdieu (n 47).

<sup>58</sup> For instance, 'wealth/income' and 'social origin' are protected grounds in Belgium; 'social origin' and 'financial status' in Hungary; 'class', 'estate or property', and 'social standing' in Austria; 'social descent', 'wealth', and 'social class' in Cyprus; 'economic situation' and 'social condition' in Portugal; 'social standing' and 'economic situation' in Slovenia; the 'particular vulnerability resulting from a known or apparent economic situation' in France. These categories encompass both the material and the symbolic dimensions of class-based discrimination. In addition, a number of other countries prohibit discrimination based on 'social origin', 'social status', 'property', 'education', 'belonging to a disadvantaged group' and 'social condition'.

'reciprocal causal interdependence [exists] between cultural status beliefs about social groups and material inequalities between these groups'.<sup>59</sup> It appears that 'status beliefs develop quickly among people under conditions in which categorical difference is at least partially consolidated with material inequality'.<sup>60</sup> This consideration *de facto* makes the redress of socio-economic inequality a necessary condition to eradicate stigma-based discrimination in the long run.<sup>61</sup> While echoing the idea that stigmas are '*independent* dimensions of inequality that generate material [and other] disadvantage', Solanke seems to minimise the reciprocity of this relationship.<sup>62</sup> To give a concrete example, gender equality requires anti-discrimination measures to address both the cultural narratives and the social and economic structures organised around the bivalent category of gender.<sup>63</sup>

Conceiving all discrimination as stigma *de facto* leads to privileging politics of recognition, resting on the idea that stigma-based discrimination subsumes material inequality. Importantly, founding non-discrimination law on stigma should not aggravate what Fraser calls the 'widespread decoupling of the cultural politics of difference from the social politics of equality', at the risk of compromising the transformative reach of the equality project.<sup>64</sup> Instead,

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<sup>59</sup> Ridgeway (n 15) 4.

<sup>60</sup> Ibid, 3.

<sup>61</sup> See Tilly (n 15) and Ridgeway (n 15). Tilly understood exploitation, along with opportunity hoarding, as the two conditions for durable inequality. Based on his theory, Ridgeway explains how, primarily, 'inequality based purely on organizational control of resources and power is inherently unstable' and becomes consolidated and stabilised through the formation of essentialising and hierarchising status beliefs based on categorical differences between people (race, gender, etc.), which in turn become a partially independent variable of inequality.

<sup>62</sup> Ridgeway (n 15) 1.

<sup>63</sup> See Nancy Fraser, *Social Justice in the Age of Identity Politics: Redistribution, Recognition, Participation* (Wissenschaftszentrum Berlin für Sozialforschung, Berlin 1998).

<sup>64</sup> The anti-stigma approach seems closer to the US anti-stereotyping model than to the European model centred on social and economic rights (eg, securing an individual autonomy of choice vs. ensuring social and economic rights such as maternity leave). See eg, Julie Suk, 'From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe' (2012) 60 *American Journal of Comparative Law* 175 and Ruth Rubio-Marin, 'A New European Parity-Democracy Sex Equality Model and Why It Won't Fly in the United States' (2012) 60 *American Journal of Comparative Law* 199.



if the aim is to tackle the root causes of discrimination, equality should be regarded as a bivalent justice project that demands coordination between redistributive, as well as recognition-based remedies and public action.<sup>65</sup> Ultimately, this observation also poses the broader question of how big a role non-discrimination law can play in the fight against inequality.

## V. CONCLUSION

As my review shows, Solanke's book is both inspiring and thought-provoking. It can be highly recommended for two main reasons. First, it sheds a new light on current debates of discrimination theory and law. By bringing with force and creativity an argument well-known in sociology and social psychology into this field of law, it reinforces our understanding of, and stimulates reflection on, three crucial questions: What discrimination to combat? Whom should law protect? And how should law do it? The book thus offers a distinct perspective on this controversial discussion thanks to its interdisciplinary approach. Through an adroit analytical shift in the conceptualisation of the issue of discrimination, it proposes a concrete way to re-think non-discrimination law and policy, building on insights about the volatile and ubiquitous harm of stigmatisation. Solanke's demonstration — and this is the second major strength of this book — lies in the practical implications that it entails for law reform. Thinking about discrimination in terms of stigma could bring great added value to non-discrimination law and action, in terms of protected categories in legislation, public action and policy-making, but perhaps also in terms of judicial reasoning.

While the value of the 'anti-stigma principle' is thus not to be doubted, the risk might, however, lie in the search for a 'Holy Grail' in the form of a unique principle cementing the normative foundations of non-discrimination law.<sup>66</sup> Considering the 'anti-stigma principle' as the sole underpinning of non-discrimination law might promote both too narrow and too broad a rationale. Too narrow to directly tackle the material repertoires of discrimination that constitute the counterparts of stigma in the (re)productive dynamics of inequality. Too broad for the sake of law-making because combatting stigmatisation as the root cause of discrimination demands an extensive

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<sup>65</sup> See Fraser (n 61).

<sup>66</sup> See Khaitan (n 13) 6.

social, political and cultural reforming enterprise. Hence the reflection raises far-reaching questions beyond the scope of the book. The contribution should be praised for the daring, the originality and the clarity of its propositions. The new theory laid out brings up fascinating issues, sketching new pathways for future exploration in a context of increasing targeted attack against minority and diversity protection.