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Structural discrimination as a barrier to the socio-economic inclusion of migrants: Deepening the impact of human rights law

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Abstract

Most of the barriers migrants face in achieving socio-economic inclusion are the product of lack of adaptation of the institutions in the host community to migrants' particularities and needs, often reflecting a scenario of structural discrimination. Yet, migrants' predicament is rarely ever framed as such, and complaints of discrimination against migrants tend to be dismissed under the assumption that non-nationals can be treated differently from nationals. In this article, I argue that the notion of structural discrimination can and should be used more actively in contexts of migration, and that it leads to a more effective protection of migrants' rights in the application of positive human rights obligations. I explore the concept of structural discrimination and the reasons why discussions on migrants' rights hesitate to engage with it. I then examine how different international human rights bodies have interpreted states' positive obligations of non-discrimination in eliminating barriers to the enjoyment of socioeconomic services and opportunities. Finally, I show that reference to structural discrimination can play a role in heightening the scrutiny of review bodies towards these obligations and help tackle barriers to migrants' socio-economic inclusion.

Keywords

Structural discrimination, human rights, economic, social and cultural rights, socio-economic inclusion, migration

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Introduction

Over the years, states have increasingly vowed to take a more active role in the inclusion of migrants within host societies. This intent has been voiced in various international instruments[1] which, though not legally binding,[2] express states' commitment to various actions aimed at improving migrants' full participation in the daily life of the communities in which they live—such participation is, after all, the defining element of social inclusion.[3] Most of these actions concern migrants' access to various kinds of services, such as healthcare, education, social security, and banking, as well as to work opportunities more broadly, thereby denoting particular attention to the socio-economic components of inclusion. Importantly, these commitments are not limited to formally granting migrants the possibility of accessing socio-economic services and opportunities,[4] but also encompass the adoption of measures to facilitate access to and enjoyment of these services and opportunities.

The significance of this latter set of measures should not be understated: even among migrants legally allowed to access services and work under the same conditions as nationals, migrants' actual capacity of enjoying these entitlements tends to be lower.[5] The reasons for that are varied and have been explored in different studies, ranging from overtly xenophobic and racist attitudes by service providers and employers to language barriers,[6] lack of information and assistance in navigating unfamiliar frameworks and practices in the host state,[7] and the imposition of requirements—documents, tests, and qualifications—that migrants are unlikely to fulfil.[8] Essentially, these barriers relate to a generalized lack of accommodation of migrants' needs and particularities by and within institutions that are necessary for full participation in social life. This scenario, in turn,

1. Notably: UNGA, Global Compact for Safe, Orderly and Regular Migration (19 December 2018) UN Doc A/RES/73/195 para 32 (GCM); EU, 'Action plan on Integration and Inclusion 2021-2027' (24 November 2020) COM(2020) 758 final; OAS, 'Declaration for the Protection and Integration of Migrant and Refugee Children in the Americas' (23 June 2023) AG/DEC. 111 (LIII-O/23) para 6; IGAD and EAC, 'Ministerial Declaration on Durable Solutions for Refugees in the East and Horn of Africa' (16 June 2023) 6.
2. On the relevance of such political commitments, see Tim Höflinger, 'Non-binding and therefore irrelevant? The Global Compact for Migration' (2020) 75(4) IJ 662.
3. This derives from an *a contrario* reading of the definition of social exclusion: Arjan de Haan, '"Social Exclusion": An Alternative Concept for the Study of Deprivation?' (1998) 29 IDS bulletin 10; Anver Saloojee, 'Social Inclusion, Anti-Racism and Democratic Citizenship' (Laidlaw Foundation 2003) Working Paper Series Perspectives on Social Inclusion 9–10.
4. Although this formal access is paramount, including through the provision of documentation to migrants. See Michelle Foster, 'Objective 4: Provide all migrants with proof of legal identity, proper identification and documentation' in Vincent Chetail (ed.), *The Global Compact for Safe, Orderly and Regular Migration: A Commentary* (OUP 2025) (forthcoming).
5. For instance, regarding financial services and employment opportunities. See Anoosheh Rostamkalaei and Allan Riding, 'Immigrants, Financial Knowledge, and Financial Behavior' (2020) 54 JCA 951; Diego Chaves-González, Jordi Amaral and María Jesús Mora, 'Socioeconomic Integration of Venezuelan Migrants and Refugees: The Cases of Brazil, Chile, Colombia, Ecuador, and Peru' (MPI 2021) Report 15–18.
6. Rostamkalaei and Riding (n 5) 969–970.
7. Laura B Nellums and others, 'The Lived Experiences of Access to Healthcare for People Seeking and Refused Asylum' (Equality and Human Rights Commission 2018) Research report 122.
8. Lesleyanne Hawthorne, 'The Question of Discrimination: Skilled Migrants' Access to Australian Employment' (1997) 35 Int Migr, 399–402.

adversely affects migrants' capacity of enjoying a myriad of human rights—health, education, work, social security, an adequate standard of living, and, depending on the circumstances, even the rights to life and to be free from inhuman and degrading treatment.

The adoption measures to eliminate barriers to migrants' inclusion could be seen as something required under states' human rights obligations, especially those flowing from the principle of non-discrimination. After all, full participation in a community largely depends on ensuring that different social groups are able to enjoy their human rights under similar standards. Yet, while non-discrimination indeed has been highlighted as a key element of promoting inclusion,[9] in practice this obligation has played a rather modest role in this context.[10] The fact that the principle of non-discrimination does not prohibit all kinds of differential treatment, but only those deemed unreasonable, without objective justification, or disproportionate, coupled with the traditional view that states may apply distinctions in their treatment of nationals and non-nationals,[11] leads to points of uncertainty regarding the extent to which states may allow migrants to be treated differently in the enjoyment of their rights. This uncertainty is even greater in contexts involving access to socio-economic entitlements, as states are deemed to have considerable discretion in deciding how to allocate resources for the provision and those entitlements, and thus which groups should have access to or priority in enjoying them. Furthermore, international human rights bodies (IHRBs)[12] have been hesitant to clarify the scope and content of states' positive obligations on non-discrimination in concrete scenarios of state inaction in correcting de facto inequalities of treatment. The convergence of these factors leads to a situation where the potential of the principle of non-discrimination in ensuring the socio-economic inclusion of migrants is not achieved and questions about how—or even whether—to promote such inclusion are treated as matters about which states have a wide margin of discretion to decide.

As such, this article explores how the principle of non-discrimination can be interpreted and applied to more effectively combat practical barriers to migrants' socio-economic inclusion. I argue that the notion of structural discrimination can be helpful in this regard, justifying the application of a stricter scrutiny over the lawfulness of states' omission in eliminating obstacles to migrants' enjoyment of socio-economic services and opportunities while ensuring states a margin of discretion on these issues. A stricter scrutiny mean that less deference will be accorded to states when assessing the reasonableness of their justifications. Instead, the review body should inquire about the biases that may have informed the state's conduct, including its prioritization of resources,

9. GCM (n 1) para 32(c), (e), (i); EU (n 1); OAS (n 1) para 6(b).

10. Jean-Baptiste Farcy, 'Equality in Immigration Law: An Impossible Quest?' (2020) 20 HRLR 725. On the role of the principle of non-discrimination in promoting socio-economic equality more broadly, see Tilmann Altwicker, 'Social justice and the judicial interpretation of international equal protection law' (2022) 35 LJIL 221.

11. As expressed, for instance, in Anthony Aust, *Handbook of International Law* (CUP 2005) 184–185; Sir Robert Jennings QC and Arthur Watts KCMG QC, *Oppenheim's International Law*, vol 1: Peace (9th edn, OUP 2008) 931–932.

12. This term is used to encompass both United Nations treaty bodies and regional human rights mechanisms, namely the African Court and Commission on Human and Peoples' Rights, the European Court of Human Rights, and the Inter-American Court and Commission on Human Rights.

and the potential effects this conduct has had in maintaining or heightening a situation of marginalization against the group at stake.

The analysis is structured as follows. The first section discusses the concept of structural discrimination and its application to groups of migrants. I show that states' sovereign powers over migration control create a natural expectation that non-nationals are to be treated differently from nationals, normalizing this distinction and making it less likely that IHRBs and other review bodies (such as domestic courts or other bodies responsible for assessing the lawfulness of state conduct) frame this situation as a structural problem. Nevertheless, the general lack of adequacy of social institutions to migrants' needs, putting them at a reiterated disadvantage in the enjoyment of their rights, can give rise to situations of structural discrimination that ought to be recognized as such.

The second section then provides an overview of how different IHRBs, in their practice of dealing with individual complaints in judicial or quasi-judicial frameworks, have interpreted states' positive obligations of non-discrimination in eliminating barriers to the enjoyment of socio-economic services and opportunities—such as work and housing—by different groups, and whether the potential existence of structural discrimination has impacted their conclusions. An exhaustive assessment of IHRBs' decisions focused on other aspects of non-discrimination, such as negative obligations and access to civil and political rights, are outside of the scope of this review, even if they may pertain to migrants. This section will consider decisions from IHRBs that have rendered decisions about positive non-discrimination obligations in relation to socio-economic services and opportunities to date, namely the African Commission on Human and Peoples' Rights (ACommHPR), the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR), the Human Rights Committee (HRC), and the Committee on the Elimination of Racial Discrimination (CERD).

Following that, the third section discusses the role the concept of structural discrimination can play in heightening the scrutiny of review bodies in assessing justifications for state omissions in tackling barriers to migrants' socio-economic inclusion. This section also sets out the structure that assessments of states' human rights obligations in these contexts should follow, encompassing a clear analysis of the relevant criteria and standards applicable to both positive obligations and non-discrimination duties under human rights law. The article concludes that further comprehension and development of this approach can lead to more effective tools to combat barriers to migrants' socio-economic inclusion.

Structural discrimination against migrants: conspicuously invisible

In legal literature, manifestations of discrimination are frequently presented through binaries.[13] In this sense, discrimination may be formal or substantive, direct or indirect.

[13.] Daniel Moeckli, 'Equality and non-discrimination' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International human rights law* (3rd edn, OUP 2018) 149–151, 155–157; Olivier de Schutter, *International Human Rights Law: Cases, Materials, Commentary* (CUP 2011) 625–626.

Such binaries are not, however, watertight divisions. In practice, these various forms of discrimination interact and intertwine to create and maintain structures of power where groups with certain characteristics are kept in a position of privilege. In these cases, tackling individual instances of discrimination is not enough to subvert these structures;[14] those in a position of privilege are still put forward as the image of what a person able to fully participate in social life should look and behave like—as the 'ideal', or even 'normal'. Individuals who deviate from this standard are required to adapt to reach a position similar to the privileged majority's, instead of having their own positions and differences valued.

This scenario reflects a situation of structural, or systemic, discrimination, that is, '[w]hen the rules of a society's major institutions reliably produce disproportionately disadvantageous outcomes for the members of certain salient social groups and the production of such outcomes is unjust'.[15] While structural discrimination relies most prominently on substantive indirect discrimination,[16] it is also supplemented by instances of formal and direct discrimination, manifesting in different degrees and different spheres of social life with the effect of keeping minority groups in a position of subordination.[17] A definition that helpfully describes this intertwinement was put forward by the United Nations (UN) High Commissioner for Human Rights in the context of racism, framing structural discrimination as:

> the operation of a complex, interrelated system of laws, policies, practices and attitudes in State institutions, the private sector and societal structures that, combined, result in direct or indirect, intentional or unintentional, de jure or de facto discrimination, distinction, exclusion, restriction or preference on the basis of [prohibited grounds of discrimination].[18]

Structural discrimination manifests in a myriad of ways, many of them relating to daily patterns of behaviour that may seem harmless at first but are founded on unconscious biases that reinforce senses of 'otherness' and inferiority upon and towards minority groups.[19] These patterns may relate to private acts or the functioning of

14. Schutter (n 13) 655.
15. Andrew Altman, 'Discrimination' in Edward N Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Stanford University 2020) <https://plato.stanford.edu/archives/win2020/entries/discrimination/> accessed 12 February 2024.
16. See CESCR, 'General Comment No. 20: Non-discrimination in economic, social and cultural rights' (2 July 2009) UN Doc E/C.12/GC/20, para 12 (CESCR GC20).
17. Fred L Pincus, 'From Individual to Structural Discrimination', *Race and Ethnic Conflict: Contending Views on Prejudice, Discrimination, and Ethnoviolence* (Routledge 1994) 122.
18. UN Human Rights Council, 'Promotion and Protection of the Human Rights and Fundamental Freedoms of Africans and of People of African Descent against Excessive Use of Force and Other Human Rights Violations by Law Enforcement Officers' (OHCHR 2021) Report of the UN High Commissioner for Human Rights, UN Doc A/HRC/47/53, para 9.
19. These patterns often constitute microaggressions, as explained by: Derald Wing Sue, 'Microaggressions, Marginality, and Oppression: An Introduction' in Derald Wing Sue (ed.), *Microaggressions and marginality: manifestation, dynamics, and impact* (Wiley 2010) 3–5; Mira Chandhok Skadegård and Christian Horst, 'Between a Rock and a Hard Place: A Study of Everyday Racism, Racial Discrimination, and Racial Microaggressions in Contemporary Denmark' (2021) 27 Soc Ident 92.

public institutions in a way that ignores or reinforces disadvantages towards certain groups.[20] Since this kind of behaviour is often unconscious, it may be difficult to identify. However, its consequences are made visible through the series of barriers that marginalized groups encounter in trying to access different kinds of services and opportunities, such as: the imposition of conditions for access that are disproportionately burdensome to or even impossible for some groups to fulfil, such as minimum income criteria;[21] poor dissemination of services, transport, or information in areas occupied predominantly by marginalized groups;[22] difficulties in establishing clear communication with providers of services and opportunities;[23] and the presence stigma affecting how welcomingly these groups are treated when trying to access services and opportunities.[24]

There is no shortage of studies showing that migrants frequently face these kinds of barriers.[25] After all, the institutions that make up a community—hospitals, schools, banks, supermarkets, government offices—are built around the idea of who the 'average person' that will make use of those institutions is, and migrants rarely ever factor into this consideration. The position of migrants may be even more precarious than that of national marginalized groups, given that migrants may not have a meaningful support network in the host country or be familiar with the language or certain practices, rendering it more difficult to seek help. The IACtHR, albeit falling short of referring to structural discrimination, acknowledged this power imbalance to the disadvantage of migrants in its advisory opinion on undocumented migrants.[26]

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20. As explored regarding structural racism in Shreya Atrey, 'Structural Racism and Race Discrimination' (2021) 74 Curr Leg Prob 1.
21. For these and other examples in the case of racial discrimination, see: Robert B Hill, 'Economic Forces, Structural Discrimination and Black Family Instability' (1989) 17 RBPE 5, 9.
22. Renee Y Hsia and Stefany Zagorov, 'Structural Discrimination in Emergency Care: How a Sick System Affects Us All' (2022) 3 Med. 98.
23. This may occur due to lack of cultural sensitivity, as reported in Marianne Hedlund and Anne Moe, 'Redefining Relations among Minority Users and Social Workers' (2010) 13 Eur J Soc Work 183, 190.
24. A common example arises in the context of medical care, when patients' experiences and complaints are downplayed as unimportant or ignored, leading to a poor and biased evaluation of their health condition. See notably Tara SH Beattie and others, 'Personal, Interpersonal and Structural Challenges to Accessing HIV Testing, Treatment and Care Services among Female Sex Workers, Men Who Have Sex with Men and Transgenders in Karnataka State, South India' (2012) 66 Suppl 2 JECH 42, 45.
25. To mention a few: ENNHRI, 'Migrants' Access to Economic and Social Rights: Good Practices and Challenges of National Human Rights Institutions' (2019) Report; Gustav Brauckmeyer, Verónica Medina and Shaaron Challco, 'Panorama Sobre El Acceso a Servicios Públicos Por Parte de La Población Refugiada y Migrante Venezolana: Un Análisis Sobre Los Servicios de Empleabilidad En Perú y Colombia' (Equilibrium CenDe & Friedrich Naumann Stiftung 2023) Report; Mingsheng Li and Jacqui Campbell, 'Accessing Employment: Challenges Faced by Non-Native English-Speaking Professional Migrants' (2009) 18 APMJ 371.
26. *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion, Ser A No. 18 (IACtHR, 17 September 2003).

According to the Court, migrants are frequently in a 'situation of vulnerability' that has ideological dimensions and is maintained by *de jure* and de facto inequalities.[27] The IACtHR further called attention to the existence of cultural prejudices that 'make it difficult for migrants to integrate into society and lead to their human rights being violated with impunity'.[28]

Despite this important acknowledgment, migrants' predicament is rarely framed as one of structural discrimination in international legal analysis. One could argue that this can be explained by the very logic of human rights law, which requires looking at individual cases to determine whether a violation has indeed occurred. Indeed, the existence of generalized patterns of xenophobic attitudes by the local population does not render the state immediately responsible for a violation through omission.[29] Rather, when examining the specific claim of violation, it may be found that the state acted reasonably in view of the particularities of the case, including the state's level of knowledge about the situation and of resources available to act. Put differently, not every manifestation of structural discrimination amounts to a human rights violation.[30]

However, as the next section discusses, some IHRBs have actually taken note of the existence of broader patterns of discrimination and exclusion towards certain groups when assessing individual claims of discrimination,[31] sometimes referring explicitly to the concept of structural or systemic discrimination. The presence of these patterns forms part of the context of the claim, and thus informs how different elements of the claim are analysed, notably the degree of deference accorded to states' justifications about their actions. Even so, claims involving migrants rarely ever inquire into whether such patterns of exclusion exist, and even more rarely take these patterns into account.[32] Rather than deriving from the individual character of the human rights claims framework, reticence in referring to structural discrimination against migrants is better explained by two factors.

First, the notoriously contentious relationship between migrants' human rights and state sovereignty. On the one hand, states' non-discrimination obligations

27. ibid para 112. Similarly, see Moritz Baumgärtel and Sarah Ganty, 'On the Basis of Migratory Vulnerability: Augmenting Article 14 of the European Convention on Human Rights in the Context of Migration' (2024) 20 Int J L Context 92.
28. ibid para 113.
29. Rory O'Connell, 'Cinderella comes to the Ball: Article 14 and the right to non-discrimination in the ECHR' (2009) 29(2) Leg Stud 221, 219–220.
30. A similar logic is presented by Atrey (n 20), regarding the distinction between racism and racial discrimination under United Kingdom domestic law.
31. *DH and others v the Czech Republic* (13 November 2007) ECtHR App No. 57325/00 paras 190–195; *Olivera Fuentes v Peru* (4 February 2023) IACtHR Ser C No. 484 paras 112–124.
32. As an example, the CERD, which regularly adresses issues of discrimination against migrants, has made 70 references to structural discrimination in its Concluding Observations from 1991 to 2003, and only 9 of those concerned migrants. This result was reached by searching for the term "structural discrimination" spread to a broad context in the NVivo software. 93 references were initially identified and I eliminated those references to the same context that had been doubly counted by the software, leading to the final count of 70 references.

extend to all persons under their jurisdiction. Nationality[33] and migratory status[34] have both been acknowledged as prohibited grounds of discrimination under human rights law. On the other, states' sovereign prerogative to control the admission of aliens into their territory remains a basic tenet of international law,[35] and human rights law itself admits that differential treatment that pursues a legitimate aim and is reasonable and objective in relation to said aim is lawful.[36] Traditionally, encouraging or discouraging certain kinds of migrants from settling into the country, reducing competition against nationals in labour and economic sectors,[37] and privileging nationals in the distribution of scarce resources have all been understood as legitimate reasons for granting migrants less favourable treatment in comparison to nationals in the enjoyment of services and opportunities.[38] Essentially, states are expected to be more attentive to the needs of their nationals than to those of migrants. Even with the continuous developments in human rights law, its norms continue to be interpreted according to this expectation, be it by state authorities or international bodies.

This position is voiced more explicitly by the ECtHR, which has indicated that states may be justified in distinguishing between nationals and non-nationals, or between different categories of non-nationals, when limiting access to 'resource-hungry public services'.[39] However, it is also implicit in other IHRBs: for instance, the CESCR has recommended that states allow asylum seekers access to the labour market within 1 year of their arrival,[40] but has not gone so far as to ask states to immediately grant asylum seekers full access to the labour market the way nationals are entitled to.

33. *Gaygusuz v Austria* App No. 17371/90 (ECtHR, 16 September 1996) para 42; CESCR GC20 (n 16) para 30.
34. CESCR, 'Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights' (13 March 2017) UN Doc E/C.12/2017/1 paras 5–6; HRC, 'Nell Toussaint v Canada' (24 July 2018) UN Doc CCPR/C/123/D/2348/2014, para 11.7; *Bah v the United Kingdom* App No. 56328/07 (ECtHR, 27 September 2011) paras 45–46; *Juridical Condition and Rights of Undocumented Migrants* (n 26) para 118.
35. *Juridical Condition and Rights of Undocumented Migrants* (n 26) para 119; *Abdulaziz, Cabales and Balkandali v the United Kingdom* App No. 9214/80, 9473/81, and 9474/81 (ECtHR, 28 May 1985) para 67.
36. Despite a few differences in the terminology adopted, international human rights bodies tend to refer to these standards when assessing discrimination-related claims. See, notably, HRC, 'General Comment No. 18: Non-discrimination' (10 November 1989) UN Doc HRI/GEN/1/Rev.1, para 13 (HRC GC18); CESCR GC20 (n 16) para 13; *Kenneth Good v Republic of Botswana* Communication No. 313/05 (ACommHPR, 26 May 2010) para 219; *IV v Bolivia (Preliminary objections, merits, reparations and costs)* Ser C No. 329 (IACtHR, 30 November 2016) paras 240–241; *Willis v the United Kingdom* App No. 36042/97 (ECtHR, 11 June 2002) ECtHR para 39.
37. This kind of measure is even expressly admitted under Article 2(3) of the ICESCR, regarding developing states' prerogative to limit the enjoyment of economic rights by non-nationals.
38. Jennings QC and Watts KCMG QC (n 11) 932.
39. *Bah v the United Kingdom* (n 35) para 49; *Ponomaryovi v Bulgaria* App No. 5335/05 (ECtHR, 21 June 2011) para 54.
40. CESCR, 'Concluding observations on the combined third to fifth periodic reports of Romania' (9 December 2014) UN Doc E/C.12/ROU/CO/3-5, para 14; CESCR, 'Concluding observations on the combined fourth and fifth reports of Bulgaria' (11 December 2012) UN Doc E/C.12/BGR/CO/4-5, para 9; CESCR, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: Slovakia' (8 June 2012) UN Doc E/C.12/SVK/CO/2, para 13.

Different IHRBs have urged states to provide migrant children with the same educational opportunities as nationals,[41] but have not mentioned educational opportunities for adult migrants. Accordingly, as long as some minimum conditions are ensured, IHRBs have been hesitant to require states to eliminate other forms of differential treatment adversely affecting migrants.

There are, of course, cases in which this leeway is reduced; migrants with regular status usually have a stronger claim to accessing public services, especially if they have contributed to these services' funding.[42] Nevertheless, it is important to consider that states have broad powers to determine who may obtain such a status in the first place, making regular migration more accessible for persons holding certain characteristics and more difficult for others. What this ultimately means is that migration policies often serve as proxies[43] for distinctions based on other characteristics—notably race,[44] religion,[45] and disability[46]—for which the scrutiny regarding the existence of discrimination is usually higher.[47] Sovereignty is thus invoked to give a sense of legitimacy and reasonableness to distinctions made towards migrants or lack of accommodation to their particularities, overshadowing the perception of a more generalized pattern of discrimination, and thus its structural character.

Another reason why structural discrimination against migrants may not be so readily evident is that some groups of non-nationals may, in fact, receive quite a privileged treatment. This occurs not only when states make it easier for certain groups to legally immigrate to and settle in their territories but also—and most substantially—when migrant groups share characteristics that are valued by the host community. In these cases, the host community tends to adopt a more welcoming attitude towards these migrants, facilitating their access to goods, services, and opportunities—essentially, their participation in social life—regardless of their legal status.

41. CERD, 'Concluding observations on the combined seventeenth to nineteenth periodic reports of the Republic of Korea' (10 January 2019) UN Doc CERD/C/KOR/CO/17-19, paras 29–30; CMW and CRC, 'Joint general comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return' (16 November 2017) UN Doc CMW/C/GC/4, UN Doc CRC/C/GC/23, para 59.

42. Most notably, this was the case in *Gaygusuz v Austria* (n 33) paras 46–52. The limited reach of this judgment towards other categories of migrants was explored by Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015) 250–281. Baumgärtel and Ganty (n 28) 96–97 further unveil how the ECtHR seems to recognize stronger claims of non-discrimination regarding permanently settled migrants.

43. Thomas Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control' (2018) 20 Eur J Migr L 452, 467–468.

44. CERD, 'General Recommendation 30: Discrimination against Non-Citizens' (2004) UN Doc CERD/C/64/Misc11/rev3; E Tendayi Achiume, 'Migration as Decolonization' (2019) 71 SLR1509.

45. Antje Ellerman, 'Discrimination in migration and citizenship' (2020) 46(12) J Eth Migr Stud 2463, 2467–2468.

46. For instance, by denying visas to migrants with certain health conditions, as was the case in CRPD, 'Grainne Sherlock v. Ireland' (19 March 2021) UN Doc CRPD/C/24/D/20/2014.

47. These constitute suspect grounds of discrimination, as explained by Janneke Gerards, 'Discrimination Grounds' in Dagmar Schiek, Lisa Waddington and Mark Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart 2007) 35–36.

A recent example of this has been the mobilization of different communities around Europe since 2022 to welcome Ukrainians fleeing the conflict with Russia, whereas the arrival of persons in need of protection holding other nationalities has hardly been met with the same enthusiasm.[48] This creates a perception that there does not exist a systematic disadvantage against migrants, but simply that some migrant groups are better equipped than others to navigate the life in the host community. This kind of discourse, however, minimizes the role of the host community itself in facilitating or not participation in social life. Furthermore, it misleadingly uses examples of a favoured minority to deny the disadvantages suffered by a broader parcel of the marginalized group and to obscure the ways in which this favoured minority may also be adversely affected by structural discrimination, even in the absence of individual discrimination.[49]

As a result of these factors, discrimination against migrants is often acknowledged from a legal perspective only in instances of overt xenophobia or restrictive state policies against specific nationalities. It is seen as an episodic phenomenon—even if widespread—rather than as a structural one. Consequently, bodies assessing claims of discrimination often lose sight of the depth of the disadvantage suffered by migrants and how this disadvantage is systematically reproduced throughout structures necessary for participation in social life. Merely acknowledging that migrants' marginalization may come from a structural problem, however, does not in itself guarantee that the principle of non-discrimination will offer more effective protection to migrants. As the next section shows, even in cases where IHRBs have verified the existence of structural or similar patterns of discrimination in relation to other groups, the strictness of the review has not been uniform.

Structural discrimination before international human rights bodies: obscurities and inconsistencies

The practice of IHRBs is solid in affirming that the principle of non-discrimination also imposes positive obligations upon states. These include the duties to treat individuals differently inasmuch as this is necessary for them to fully enjoy their rights[50] and to

48. As discussed in the context of the United Kingdom by Samantha Sinclair, Mark Granberg and Towe Nilsson, 'Love Thy (Ukrainian) Neighbour: Willingness to Help Refugees Depends on Their Origin and Is Mediated by Perceptions of Similarity and Threat' [2023] Br J Soc Psychol 1. Even among Ukrainians, however, some groups, such as those Roma minorities, are still treated less favourably by host communities: Ivana Kottasová, '"You Are Not a Refugee." Roma Refugees Fleeing War in Ukraine Say They Are Suffering Discrimination and Prejudice' (*CNN*, 7 August 2022) <https://www.cnn.com/2022/08/07/europe/ukraine-roma-refugees-intl-cmd/index.html> accessed 28 March 2024.

49. On the effects of structural discrimination independently from individual discrimination, see Gilbert C Gee, 'A Multilevel Analysis of the Relationship Between Institutional and Individual Racial Discrimination and Health Status' (2008) 98 Am J Public Health S48, s54.

50. HRC GC18 (n 36) para 10; CESCR GC20 (n 16) para 9; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Communication No. 276/03 (ACommHPR, 25 November 2009) para 196; *Thlimmenos v Greece* App No. 34369/97 (ECtHR, 6 April 2000) para 44; *Juridical Condition and Rights of Undocumented Migrants* (n 27) para 104; CERD, 'LR et al v Slovakia' (7 March 2005) UN Doc CERD/C/66/D/31/2003, para 10.4; CRPD, 'HM v Sweden' (21 May 2012) UN Doc CRPD/C/7/D/3/2011, para 8.3.

prevent discriminatory conduct by private actors of which states knew or should have known about.[51] In principle, these duties can be interpreted as requiring states to pro-actively counter biases and intolerance and adapt social institutions so they are fully accessible to all groups, especially those whose situation of marginalization is so widespread that state authorities could not have failed to know about it.

At the same time, however, IHRBs admit that differential treatment generating some kind of disadvantage to certain groups is not unlawful when this occurs in favour of a legitimate aim and through means necessary and proportionate to achieve said aim. Furthermore, the scope of states' positive human rights obligations is constrained by a series of factors,[52] including (1) knowledge of the risk of harm or actual harm to human rights and (2) reasonableness, which dictates that these obligations cannot be interpreted in a way that imposes impossible or disproportionate burden upon states.[53] This means that the content of positive obligations must be shaped according to practical considerations, such as the resources realistically available to the state—be them financial, technological, or in terms of personnel—and the extent to which the state may make choices between competing social interests. An assessment of states' positive non-discrimination obligations should thus encompass an examination of each of these criteria and standards in a clear and reasoned manner, highlighting which elements of fact and law were taken into account in IHRBs' decisions.

Despite these statements of principle, the practice of IHRBs in assessing claims of state omission in removing barriers to socio-economic inclusion is not entirely consistent or clear. This is so in two main aspects: first, the level of scrutiny exercised in assessing these claims; and second, the application of the relevant criteria and standards for determining states' obligations.

Level of scrutiny

Regarding the first aspect, IHRBs have not always been clear about how much leeway should be granted to states when dealing with issues of socio-economic inclusion. In principle, the HRC and the CERD have shown little deference to states' justifications in a claims concerning states' positive obligations to protect individuals against specific instances of discrimination affecting their work opportunities. This has been the case in claims involving dismissal on account of religious practices,[54] reduced opportunities for traineeships,[55] job positions passed over to a less qualified candidate,[56] and failure of the

51. CESCR GC20 (n 16) para 11; CEDAW, 'General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19' (26 July 2017) UN Doc CEDAW/C/GC/35, para 24(b). See also, more generally, HRC, 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 8.

52. Elisabeth Veronika Henn, *International Human Rights Law and Structural Discrimination: The Example of Violence against Women* (Springer 2019) ch 5; Vladislava Stoyanova, *Positive Obligations under the European Convention on Human Rights: Within and Beyond Boundaries* (OUP 2023).

53. See Stoyanova (n 52) ch 4.

54. HRC, 'FA v France' (16 July 2018) UN Doc CCPR/C/123/D/2662/2015.

55 CERD, 'Murat Er v Denmark' (8 August 2007) UN Doc CERD/C/71/D/40/2007.

56. CERD, 'VS v Slovakia' (4 December 2015) UN Doc CERD/C/88/D/56/2014.

state to investigate a claim of discrimination in the application process for a job position.[57] The HRC also exercised a particularly intense scrutiny in a case involving restrictions for an undocumented migrant to access public health care in Canada, rejecting the state's arguments about how these restrictions were justified by immigration control and emphasizing how the severity of the author's health condition turned the limitation incompatible with her right to life.[58] Nevertheless, in cases where risk to life was not at stake, the HRC was more deferent to states' policy choices in limiting access of socio-economic benefits to migrants. This was so in two communications concerning restrictions on the access of certain migrant families to social benefits in the Netherlands, in which the HRC did not inquire into the legitimate aim behind the measure nor whether the alternative financial aid was insufficient to maintain a minimum level of subsistence in the Netherlands.[59] Similarly, the CERD exercised less scrutiny over a complaint concerning a worker that had allegedly been discriminated against in his work opportunities in Switzerland because he held a temporary admission permit instead of a residence permit.[60] The CERD found that the author's difficulties resulted from his migratory status rather than from racial characteristics,[61] thus dismissing the communication without inquiring whether the legal restrictions and social stigma against temporary permit holders might be related to the ethnicities prevalent among the persons to which this permit is granted. It would thus seem that these two Committees are more hesitant to scrutinize states' conduct when considerations of immigration policy are at stake along with socio-economic issues.

A higher level of deference was also seen in the ACommHPR's only decision to date involving a claim of state omission in remedying social exclusion.[62] The applicants in the case argued that the people from Southern Cameroon suffered widespread discrimination in social, economic, and political spheres, including the purported denial of basic infrastructure and high levels of unemployment and illiteracy. Although these issues were raised under both the principle of non-discrimination and the right to development (Article 22 of the African Charter of Human and Peoples' Rights), the ACommHPR did not the address the non-discrimination argument.[63] Neither did the Commission inquire more deeply about the situation, instead stating that the fact that socio-economic

57. CERD, 'Grigore Zapescu v Moldova' (22 April 2021) UN Doc CERD/C/103/D/60/2016.
58. HRC, 'Nell Toussaint v Canada' (n 34) paras 11.6–11.8.
59. HRC, 'MSP-B v the Netherlands' (25 July 2018) UN Doc CCPR/C/123/D/2673/2015; HRC, 'Jamshed Hashemi and Maryam Hashemi v the Netherlands' (26 March 2019) UN Doc CCPR/C/125/D/2489/2014. See further in Vladislava Stoyanova, 'Objective 15: Provide access to basic services for migrants' in Vincent Chetail (ed.), *The Global Compact for Safe, Orderly and Regular Migration: A Commentary* (OUP 2025) (forthcoming).
60. CERD, 'AMM v Switzerland' (18 February 2014) UN Doc CERD/C/84/D/50/2012.
61. ibid paras 8.6–8.7.
62. *Kevin Mgwanga Gunme et al v Cameroon* Communication No. 266/03 (ACommHPR, 27 May 2009).
63. The obligation of non-discrimination was analysed only in relation to language discrimination in the registration of Southern Cameroonian businesses, as seen in ibid paras 100–108.

development had not reached all parts of Cameroon was insufficient to disclose a violation.[64]

The examined decisions of these three IHRBs did not refer to structural discrimination and did not take into account—at least explicitly—how broader patterns of marginalization against the group the alleged victims belonged to affected their enjoyment of rights or the level of harm resulting from the state's conduct. Conversely, the ECtHR has explicitly referred to the existence of a history of discrimination towards a group as justifying the exercise of a stricter scrutiny in discrimination claims brought by members of that group.[65] This has not, however, been done in every case concerning these kinds of marginalized groups.[66] More importantly, even where the ECtHR has indicated that it should exercise a strict scrutiny because the group in question was particularly disadvantaged, it has not always applied this standard.

In this vein, it is useful to compare the ECtHR's approach in two sets of cases concerning Roma minorities. The first set concerns two judgments relating to the trend of applying placement tests to determine special education needs of children, which had led to a disproportionate number of Roma children's being enrolled in special education programmes rather than mainstream ones.[67] Although the Court indicated that states usually had a wide margin of appreciation in matters concerning education, the history of disadvantaged suffered by the Roma and the need to give special consideration to their 'needs and their different lifestyle'[68] outweighed this margin.[69] Accordingly, the ECtHR minutely engaged with the evidence presented by the parties, including different reports on how these placement tests had been designed and applied and existing international standards for identifying mental disabilities, signalling a strict scrutiny. In the end, controversies regarding the adequacy of the tests and their suitability to evaluate Roma children led the ECtHR to find the existence of discrimination regarding the right to education (Article 2 of Protocol No. 1 to the European Convention on Human Rights (ECHR)).[70]

In the second set of cases, however, the intensity of the ECtHR's scrutiny was markedly lower. One case dealt with Slovenia's obligation to provide sufficient access to safe drinking water and sanitation in irregularly established but long-tolerated Roma settlements under Article 8 of the ECHR. The Court accepted the state's justifications that

64. ibid para 206.
65. *DH and others v the Czech Republic* App No. 57325/00 (ECtHR, 13 November 2007) para 182. In the same vein, *Horváth and Kiss v Hungary* App No. 11146/11 (ECtHR, 29 January 2013) paras 102, 115; *Hudorovič and others v Slovenia* App No. 24816/14 and 25140/14 (ECtHR, 10 March 2020) para 142.
66. Notably, the ECtHR has not done so regarding the Roma in: *RR and RD v Slovakia* App No. 20649/18 (ECtHR, 1 September 2020); *Eremiášová and Pechová v the Czech Republic*, App No. 23944/04 (ECtHR, 16 February 2012). And regarding LGBTQI + individuals in: *Stoyanova v Bulgaria* App No. 56070/18 (ECtHR, 14 September 2022).
67. *DH and others v the Czech Republic* (n 65); *Horváth and Kiss v Hungary* (n 65).
68. *DH and others v the Czech Republic* (n 65) para 181.
69. ibid 182; *Horváth and Kiss v Hungary* (n 65) paras 102, 115.
70. *DH and others v the Czech Republic* (n 65) paras 197–210; *Horváth and Kiss v Hungary* (n 65) paras 113–127.

the local authorities had acted reasonably quite readily, despite the difficulties still faced by the Roma. Notably, the ECtHR noted that a 'considerable part' of the Slovenian population did not have access to a public sewage system,[71] so that the lack of measures to improve the sanitation conditions in those settlements did not disclose a violation. No inquiries were made by the Court about whether the Roma or other minorities were overrepresented in these statistics. Nor did the ECtHR consider, for instance, that the Roma might face greater difficulties in accessing alternative sources of water due to various aspects of structural discrimination—such as prejudice from other communities, difficulty accessing transportation, less financial means available, and lower levels of schooling. The Court accepted that domestic law did not allow for irregular settlements to be connected to public water and sanitation services[72] without questioning whether it would have been unreasonable for the state to alter domestic provisions so the settlements could have been provided with quality water and sanitation services at a regular frequency independently from urban planning discussions—essentially, to ensure that domestic law does not prevent the basic needs of a portion of the population from being satisfied.[73]

This difference in the level of scrutiny applied may be explained by the fact that the first set of cases did not involve a duty to allocate resources towards the education of a marginalized group, but rather questioned how these resources were being applied. Strictly speaking, the ECtHR only required the states to stop placing Roma children in special schools through biased tests. Once that was done, the states still would have a wide margin to decide what kind of measures to take regarding the education of Roma children—whether to simply place them in mainstream education, design programmes targeted to Roma children's needs, or adopt other criteria for placement in special schools, for instance—and, thus, how to allocate their resources. This contrasts with the case against Slovenia, where the finding of a violation would have had direct and significant consequences on the allocation of resources for the provision of public services.

Indeed, a laxer scrutiny and failure to seriously consider the context of marginalization of Roma peoples was also present in a series of judgments rendered in 2001 concerning the prohibition to set up caravans in certain private property in the United Kingdom, which had made it exceedingly difficult for local Roma to maintain their traditional lifestyle.[74] The question of whether the state was required to allow the setting of caravans in a number of sites sufficient to accommodate the number of Roma in its territory—and, hence, whether not doing so was an unlawful omission—was briefly discussed in these cases, and the ECtHR concluded that 'such a far-

71. *Hudorovič and others v Slovenia* (n 65) para 157.
72. ibid 150.
73. This question was raised instead by the dissenting judges: *Hudorovič and others v Slovenia* (n 65) Partly dissenting Opinion of Judge Pavli, joined by Judge Kūris 12–15. See also Valeska David, 'The Court's first ruling on Roma's access to safe water and sanitation in Hudorovic et al v. Slovenia: Reasons for Hope and Worry' (*Strasbourg Observers*, 9 April 2020) <https://strasbourgobservers.com/2020/04/09/the-courts-first-ruling-on-romas-access-to-safe-water-and-sanitation-in-hudorovic-et-al-v-slovenia-reasons-for-hope-and-worry/> accessed 19 August 2024.
74. Notably: *Chapman v UK* App No. 27238/95 (ECtHR, 18 January 2001).

reaching positive obligation of general social policy' could not be imposed on states.[75] The fact that this lack of support for Roma settlements contributed to their marginalization was not discussed in the judgment, but only in a joint dissenting opinion of seven judges.[76]

This second set of judgments is, in fact, in line with the ECtHR's broader case-law on discrimination claims involving negative obligations. In these cases, the ECtHR has also accorded a high degree of deference to states' justifications and policy choices in establishing distinctions across different groups' level of enjoyment of socio-economic benefits and opportunities.[77] This has been the case particularly where migration policy is also involved.[78] Indeed, the ECtHR has been subjected to growing pressure from states, especially in the last decade, to be more deferential towards states' concerns,[79] especially in the area of migration. The stricter scrutiny in the first set of cases, in turn, can perhaps be explained by the heightened protection generally owed to children under international law and the ECtHR's understanding that the right to education has a 'special role' in a democratic society.[80] As such, it seems that factors other than the existence of a 'history of discrimination' against a group have greater influence on the intensity of the scrutiny exercised by the Court.

In contrast, the IACtHR has a consistent practice of: (a) inquiring into the existence of structural discrimination in cases before it;[81] and, if such discrimination exists, (b) applying a strict scrutiny over the claims, including those involving states' positive obligations to eliminate barriers to the access of socio-economic opportunities.[82] The case in which this is more evident concerned an explosion in a fireworks factory in a Brazilian town that left 60 workers dead and six injured.[83] Most of the factory's employees were Afro-descendent women from the town, where the majority of inhabitants lived in poverty, had low levels of formal education, and lacked access to basic sanitation.[84] The

75. ibid paras 98–99.
76. *Chapman v UK* (n 75) Joint dissenting opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Strážnická, Lorenzen, Fischbach and Casadevall para 4.
77. *Stec and others v the United Kingdom* App Nos 65731/01 and 65900/01 (ECtHR, 12 April 2006) para 52; *Garib v the Netherlands* App No. 43494/09 (ECtHR, 6 November 2017) paras 143–157.
78. *Bah v the United Kingdom* (n 34) paras 49–52; *Yeshtla v the Netherlands* App No. 37115/11 (ECtHR, 15 January 2019) paras 34–41.
79. See notably High Level Conference on the Future of the European Court of Human Rights, 'Brighton Declaration' (20 April 2012) para 11.
80. *Ponomaryovi v Bulgaria* (n 39) paras 55–58.
81. The Court to date has referred to the existence of structural discrimination against women, LGBTIQ + individuals, indigenous peoples, and economically disadvantaged people. See, respectively: *González et al ('Cotton Field') v Mexico* Ser C No. 205 (IACtHR, 16 November 2009) para 450; *Olivera Fuentes v Peru* Ser C No. 484 (IACtHR, 4 February 2023) para 89; *Caso de los Buzos Miskitos (Lemoth Morris y otros) vs Honduras* Ser C No. 432 (IACtHR, 31 August 2021) para 107 (*Buzos Miskitos*); *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and Their Families v Brazil* Ser C No. 407 (IACtHR, 15 July 2020) paras 187, 190, 197 (*Fireworks Factory*).
82. *Pavez Pavez v Chile* Ser C No. 449 (IACtHR, 4 February 2022); *Fireworks Factory* (n 81); *Buzos Miskitos* (n 81).
83 *Fireworks Factory* (n 81).
84. ibid paras 58–67.

presence of racial and gender prejudices made it unfeasible in practice for these women to find work outside of the fireworks factory, where they were subjected to informal and unsafe labour conditions.[85] Although the state had indicated various measures taken to improve the living conditions in that community, the IACtHR focused on the fact that there was no evidence that the victims' predicament had improved throughout the years, despite these measures.[86] The IACtHR therefore found the state responsible for having failed to reverse the situation of marginalization of the community and violating the prohibition of discrimination in connection with the right to work and the right to equal protection of the law (Articles 1(1), 26, and 24 of the American Convention on Human Rights).

It is important to acknowledge, however, that the IACtHR has not yet dealt with a contentious case involving discrimination against migrants in the socio-economic realm motivated by a state's immigration policies. Even though the IACtHR accorded the principle of non-discrimination great weight in its 2003 advisory opinion on the rights of undocumented migrants, including by affirming that undocumented migrants should benefit from the same labour protection as nationals,[87] the Court did not establish more precise standards against which to assess whether a state is duly observing its positive non-discrimination obligations. It remains to be seen what kind of scrutiny the IACtHR would apply to such a scenario.

In any event, the practice of the IACtHR and the ECtHR suggests that structural discrimination can be a useful concept to determine how intensely review bodies should scrutinize states' conduct, even if only the IACtHR has consistently applied such scrutiny.

Non-application of relevant standards under human rights law

While the IACtHR's stricter scrutiny over discrimination claims from marginalized groups offers an important subsidy towards the effective promotion of their socio-economic inclusion, the way this scrutiny has been applied also creates an important limit to this potential. This is because the IACtHR has not clearly engaged with the applicable criteria and standards under human rights law for determining states' positive non-discrimination obligations. As seen previously, these criteria and standards encompass: whether the identified differential treatment serves a legitimate aim; whether the differential treatment is necessary and proportionate; whether the state knew or should have known of the risk of harm to human rights; and whether the measures it took to prevent this harm were reasonable.

In the aforementioned judgment against Brazil, the state did not seek to justify the lawfulness of the differential treatment, but rather prove that it had sufficiently acted to

85. ibid paras 70–73.
86. ibid para 202.
87. *Juridical Condition and Rights of Undocumented Migrants* (n 26) paras 118–119, 133–135.

revert the community's predicament of social exclusion. In this sense, Brazil mentioned the adoption of measures such as policies on business and human rights, financial aid to the town's families, and progressive socio-economic development in the region.[88] Under the rationale of positive human rights obligations, endorsed by the IACtHR itself in other judgments,[89] the existence of a violation would have depended on whether these measures had been reasonable or not. Nonetheless, the IACtHR only stated that Brazil had 'failed to take any measure that could be assessed… as a way of addressing or seeking to reverse the situation of structural poverty and marginalization' at hand.[90] No reference to the standard of reasonableness was made, nor did the Court explain why the measures adopted were deemed insufficient. The IACtHR's pronouncement rather gives the incorrect impression that the state's obligation was one of result, and that the existence of structural discrimination in and of itself discloses a violation—which, as seen previously, is not the case.

This lack of clarity in applying the relevant criteria to assess discrimination claims is not exclusive to the IACtHR. The HRC, in several communications involving differential treatment in the access of certain group to socio-economic benefits, concluded that the state had not provided a reasonable and objective justification for the differential treatment, without explaining why the state's arguments were considered flawed.[91] Moreover, in the aforementioned cases where the HRC considered that restricting social benefits to certain migrant families in the Netherlands had been a lawful distinction, the Committee did not indicate the legitimate aim behind this distinction, nor did it engage in a clear proportionality analysis.[92]

This lack of clear engagement with the relevant criteria and standards for positive and non-discrimination obligations makes it difficult to follow the reasoning behind the IHRB's conclusions, thereby also creating confusion as to the applicability of this reasoning to other cases. This is especially so considering that each state will face different constraints based on their resources and priorities in terms of socio-economic policy. If review bodies do not clearly lay down what objectives are legitimate or not for states to pursue, what kinds of distinctions are proportionate or not, and what measures are reasonable or not to address social exclusion, the protection of human rights law towards marginalized groups becomes essentially casuistic and unpredictable.

88. *Empregados da Fábrica de Fogos de Santo Antônio de Jesus e seus Familiares vs Brasil* (March 2019) IACtHR Brazil's defense, paras 358–419 <https://www.corteidh.or.cr/docs/casos/fabrica_fuegos_br/4_contestacion.pdf> accessed 26 April 2024.

89. *Velásquez Rodriguez v Honduras (Merits)* Ser C No. 04 (IACtHR, 29 July 1988) para 174–175, 188; *Case of the Pueblo Bello Massacre v Colombia (Merits, Reparations and Costs)* Ser C No. 140 (IACtHR, 31 January 2006) para 123; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay (Merits, Reparations and Costs)* Ser C No. 146 (IACtHR, 29 March 2006) para 155.

90. *Fireworks Factory* (n 81) para 202.

91. Notably: HRC, 'Navya Sheriffdeen v Sri Lanka' (19 October 2021) UN Doc CCPR/C/133/D/2978/2017; HRC, 'X v Colombia' (30 March 2007) UN Doc CCPR/C/89/D/1361/2005; HRC, 'Edward Young v Australia' (6 August 2003) UN Doc CCPR/C/78/D/941/2000; HRC, 'Rehoboth Baster Community et al v Namibia' (25 July 2000) UN Doc CCPR/C/69/D/760/1997.

92. HRC, 'MSP-B v the Netherlands' (n 59); HRC, 'Jamshed Hashemi and Maryam Hashemi v the Netherlands' (n 59).

Unraveling the potential of structural discrimination analysis in human rights claims

The previous section identified an overall inauspicious scenario in how IHRBs apply the prohibition of discrimination to situations of state omissions in eliminating barriers to socio-economic inclusion. The lack of a consistent approach across and within IHRBs on how intensely to scrutinize such situations and the lack of clarity of some bodies in applying relevant standards of human rights law result in a situation where the disadvantages of groups facing structural discrimination are often not fully taken into consideration. Even when they are, the decision might offer little insight as to its reasoning. This picture is discouraging for the protection of marginalized groups overall, but even more so for migrants: none of the IHRBs examined has identified migrants as a group subject to structural discrimination or indicated attentiveness to the particular challenges they face in effectively enjoying socio-economic services and opportunities in the host country.[93] In fact, the ECtHR, the HRC, and the CERD have signalled greater deference to states when socio-economic inequality is a product of states' migratory policies.

One could argue that this deference is warranted: that states should be granted sufficient leeway to identify social needs and interests and dedicate their resources accordingly. Yet, it is also important to recognize the role that the majoritarian discourse in a society plays in dictating how states conduct the political appreciation of what their priorities are and what kinds of measures are reasonably expected of them under human rights law.[94] This discourse permeates different government levels and, if not acknowledged and addressed, leads to state policies and behaviours that either explicitly reproduce it or fail to provide the means to change current societal structures. Given the way structural discrimination operates, this phenomenon will be reproduced in state conduct, consciously or unconsciously, and continue to compromise marginalized groups' full and effective enjoyment of their human rights, unless directly challenged. This is all the more true in relation to migrants, given the rise of anti-migrant sentiment in many states in recent years. Naturally, not all migrants are affected by the anti-migrant discourse in the same way. Migrants coming from Global South countries or that have other characteristics that are devalued in the host society—including in relation to gender, race, ethnicity, religion, and disability status—are more likely to feel the effects of structural discrimination, and even among these effects will vary. Nevertheless, as seen in the first section, these variations do not erase the existence of structural discrimination and its impact upon certain migrant groups. Where this impact is identified, the scrutiny of review bodies, including IHRBs, is key to reverse this predicament.[95]

93. The previously mentioned statement of the IACtHR in *Juridical Condition and Rights of Undocumented Migrants* (n 26) paras 112–113, may count as an exception; however, since the IACtHR was dealing with advisory proceedings, no specific guidance on how this situation impacted the scope of states' obligations towards migrants was provided.

94. Henn (n 52) 133.

95. ibid; Paulo De Tarso Lugon Arantes, 'The Due Diligence Standard and the Prevention of Racism and Discrimination' (2021) 68 NILR 407, 417.

An initial step to ensure the effectiveness of this protection draws from the IACtHR's practice: inquiring into the existence of structural discrimination in each case involving discrimination claims. This should be done as a matter of fact rather than law, before considering whether the differential treatment may be legally justified—since, as previously mentioned, the existence of structural discrimination does not necessarily amount to a violation of the principle of non-discrimination under human rights law. The IACtHR, for instance, has usually associated the existence of structural discrimination with factors such as the persistence of high rates of poverty among the group's members,[96] limited access to formal labour markets, social security, education, and health care,[97] and manifestations of prejudice against members of the group in the mass media.[98] These and other manifestations of prejudice and intolerance are commonly identified towards migrants across different societies. This is not to say that any restriction upon migrants' access to public services in comparison to nationals necessarily confirms the existence of structural discrimination; however, the broader consequences of these restrictions upon migrants' living conditions and participation in social life should be examined. If these restrictions are found to lead to a situation of marginalization that migrants cannot realistically escape from, then the presence of structural discrimination should be considered. In this sense, the IACtHR has also stressed that the lack of consensus in some states regarding the extent of a minority' rights is not a justification to 'reproduce and perpetuate the historical and structural discrimination that these groups or persons have suffered'.[99]

If structural discrimination is identified as affecting a given migrant group, a strict level of scrutiny should be exercised over the claims, regardless of the kinds of policies and interests they touch upon. This approach is warranted especially because, as previously developed, structural discrimination commonly manifests under the guise of socio-economic priorities and public order concerns. This heightened scrutiny ought to apply to all stages of the assessment of the claim. In the scenario discussed herein, concerning positive non-discrimination obligations, four main stages are at stake: whether positive obligations are triggered, meaning whether the state knew or should have known of the need to act to eliminate barriers to individuals' or groups' enjoyment of socio-economic services and opportunities; if so, whether the state's conduct was reasonable in light of the circumstances of the case or whether it should have done more to tackle these barriers; if the state's conduct is found to be lacking, whether the state has acted according to a legitimate aim; and, even if this legitimate aim exists, whether the state's conduct is necessary and the result is proportionate to the aim sought. It is important that each of

96. *Maya Kaqchikel Indigenous Peoples of Sumpango v Guatemala* Ser C No. 457 (IACtHR, 27 July 2022) para 139 (*Maya Kaqchikel*); *Hacienda Brasil Verde Workers v Brazil* Ser C No. 318 (IACtHR, 20 October 2016) para 339 (*Hacienda Brasil*).
97. *Maya Kaqchikel* (n 96) para 139; *Buzos Miskitos* (n 82) para 104; *Fireworks Factory* (n 81) paras 188–189; *Hacienda Verde Workers v Brazil* (n 96) para 339.
98. *Maya Kaqchikel* (n 96) para 139.
99. *Atala Riffo and Daughters v Chile* Ser C No. 239 (IACtHR, 24 February 2012) para 92.

these stages be clearly laid out in order to avoid the deficiencies pointed out in the IACtHR's practice and ensure that the review body's reasoning can be easily followed.

In exercising a strict scrutiny over these claims, review bodies should not shy away from inquiring into the basis for the justifications presented by the state: what factors motivated the state's conduct; what resources are available and how they have been allocated; the impacts of the state's choices on the general population and on migrants in particular; what other courses of action might have been available to the state; whether there exists relevant quantitative data and what does it say. By engaging more in depth with these justifications, review bodies can then have a comprehensive view of their effects on the situation of marginalized migrants and provide a more substantiated assessment of the lawfulness of the state's conduct.

It is important to note that the exercise of a strict scrutiny does not imply that every situation of structural inequality towards migrants entails a human rights violation, but rather that review bodies should not accept states' justifications at face value without further inquiry. This is especially important for states that defend absence of accommodation for some of migrants' needs, such as lack of cultural sensitivity or language training among service providers, under the argument that migrants should make efforts to 'integrate' into the host society. Arguments of 'integration' frequently assume assimilationist connotations and fail to consider that different barriers to the enjoyment of rights and accommodation needs exist even within the national population, and do not subtract from states' obligation to render human rights protection effective.[100] Assumptions about what the 'normal' practice or the 'values' of the host society are, as if society were a monolithic bloc and not an ever-changing network of different individuals, should also be questioned.[101]

Nor does a strict scrutiny nullify states' discretion in resource allocation, though it does constrain this discretion; once it is found that a state did not adequately address the needs of migrants in the socio-economic sphere without a valid justification, even if the review body offers some direction as to how remedy the situation, it should still be up to the state to decide which specific steps to take, where to reallocate resources from if needed, which partnerships to seek. Put differently, a strict scrutiny in identifying the problem does not imply dictating the solution. This is an important balance to strive for, avoiding a situation where, in making the protection from discrimination effective, impossible or unreasonable burdens are imposed on states.

Conclusion

Despite the far-reaching protection offered by the principle of non-discrimination, international human rights frameworks still grapple with securing this protection against

100. See generally Alexandra Xanthaki, 'Against Integration, for Human Rights' (2016) 20(6) IJHR 815.

101. This kind of criticism has been made notably in: Willem Schinkel, *Imagined Societies: A Critique of Immigrant Integration in Western Europe* (CUP 2017) 35–43; Christian Joppke and Ewa Morawska, 'Integrating Immigrants in Liberal Nation-States: Policies and Practices' in Christian Joppke and Ewa Morawska (eds), *Toward Assimilation and Citizenship: Immigrants in Liberal Nation-States* (Palgrave Macmillan 2003) 3–4.

practical barriers to social inclusion. As seen in the practice of different IHRBs, the existence of structural discrimination affecting an individual or group's socio-economic inclusion is rarely ever acknowledged. This silence obscures the extent of the disadvantages faced by certain groups in accessing rights and opportunities in a given community. Moreover, even when these disadvantages are recognized, the level of scrutiny IHRBs applied over each case still varies greatly, and most IHRBs are not clear as to which factors impact the strictness of their assessment. Accordingly, the broader context of marginalization may be overlooked in favour of a narrower assessment that disregards profound and lasting impacts that barriers to accessing socio-economic services and opportunities have on these groups. IHRBs are particularly mindful of respecting states' discretion over certain policy areas. In this context, migrants face a particularly unfavourable predicament: IHRBs are less likely to recognize structural discrimination affecting migrants and more likely to defer to states when immigration policies touching on socio-economic issues are at stake. The result is that migrants at greater risk of socio-economic marginalization are also at greater risk of having their claims assessed through less protective lenses.

While the IACtHR emerges as an exception to these trends, its practice in the context of positive non-discrimination obligations still faces limitations. More importantly, the IACtHR has not been clear in its reasoning for rejecting states' justifications, not indicating why measures adopted by the state to fulfil its obligations were insufficient and not referring to applicable standards under human rights law in its assessment, such as the standard of reasonableness. This makes the decisions of the Court more difficult to replicate in other scenarios, and more likely to have their findings challenged. Moreover, the IACtHR has not yet pronounced on states' positive obligations of non-discrimination in the socio-economic realm in relation to migrants.

Despite those shortcomings, this practice offers insight on how to deepen the impact of human rights law in the promotion of migrants' socio-economic inclusion: acknowledging situations of structural discrimination against migrants and putting this phenomenon at the centre of discussions. This means that the situation of marginalization in which certain groups of migrants find themselves should be accorded weight greater than their status as non-nationals, or than potential irregularities about their stay in the host country, when assessing whether they have been victims of discrimination. Any justifications states present for their conduct, be them the protection of other social interests or lack of resources, cannot be analysed in dissociation from this broader context. Once situations of structural discrimination are identified, they should be assessed under a strict scrutiny. This scrutiny means that review bodies should inquire into states' justifications and seek more detailed evidence about the impact of the alleged discriminatory conduct on the lives of members of the migrant group, the aims the state has sought to achieve through its conduct, the steps the state has taken to remedy any omissions, and the effectiveness of such measures. All of these factors are to be analysed by clear and explicit reference to applicable criteria and standards under human rights law, laying down the bases for the review body's conclusions. By adopting this approach, migrants' socio-economic inclusion can become less of a policy issue that states may choose or not to pursue and more of a necessary measure to uphold migrants' human rights.

Author's note

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