

Master of Laws: Advanced Studies in International Children's Rights



Leiden University

Faculty of Law 2020-2021

'You Fit the Description'

Tracing Labels: The nexus between the over criminalisation of black boys in schools and their over representation in the Criminal Justice System.

Thesis submitted by Carlota Soumah Fernández

to the final examination of the Advanced LLM in International Children's Rights.



Date: 09/07/2021

Location: Leiden, The Netherlands

Declaration Statement

I further hereby certify that this is an original work, that this thesis does not contain any materials from other sources unless these sources have been clearly identified in footnotes, and any and all quotations have been properly marked as such and full attribution made to the author('s) thereof.

I further authorise Leiden University, the Faculty of Law, the LL.M. Adv. Programme in International Children's Rights, its Programme Board and Director, and/or any authorised agents of the Institution, and persons named here in and above, to place my thesis in a library or other repository including but not limited to associated websites, for the use of the visitors to or personnel of said library or other repository. Access shall include but not be limited to hard copy or electronic media

Table of Contents

Acknowledgments	v
Table of Abbreviations	vi
Executive Summary	viii
Key Words	ix
Overview of Main Findings	x
1. Introduction	1
1.1. Research Question.....	2
1.2. Methodology	2
1.3. Limitations.....	4
2. International Legal Framework	5
2.1. The Right to Non-Discrimination	5
2.1.1. Background	5
2.1.2. Non-child specific International Legal instruments	8
2.1.3. Child-Specific International Legal Instrument - the CRC	9
2.1.4. Specific Conventions.....	13
2.1.5. Regional legal Instruments	15
2.1.6. Conclusion.....	17
2.2. The Right to Identity	17
2.2.1. Background	17
2.2.2. Non-child specific International Legal Instruments:	19
2.2.3. Child-Specific International Legal instrument: The CRC	20
2.2.4. Regional Legal instruments	22
2.2.5. Conclusion.....	24
3. UK Legal System	25
3.1. Legislation	26
3.1.1. The Human Rights Act 1998	26
3.1.2. The Equality Act 2010	26
3.1.3. Anti – Racial Discrimination Legislation	28
3.2. Police - Community Relations	29
3.3. Criminal Justice System (CJS)	30
3.3.1. Stop and Search	30
3.4. Conclusion	35
4. Schools	36
4.1. De Jure	36
4.1.1. Schools under the Equality Act	36
4.1.2. The Education Acts and Education and Inspections Act	36
4.2. De Facto	37
4.2.1. School Exclusions	38
4.2.2. Low Expectations	42
4.3. Duke’s Aldridge Academy, Tottenham London – Case Study	44
4.3.1. The school.....	44
4.3.2. CJS.....	45
4.3.3. Labelling	46
4.3.4. Staff	48
4.3.5. A Way Forward?	51
5. Conclusion and Recommendations	53

6. Bibliography	57
6.1. Books, articles and contributions to compilations	57
6.2. Case law	59
6.3. Documents of UN Committees	60
6.4. Legislation	61
6.4.1. International legislation	61
6.4.2. Regional legislation	61
6.4.3. United Kingdom legislation	61
6.5. Websites	62
6.6. National Reports and government publications	62
7. Appendices	64

Acknowledgments

I want to begin by thanking my brother **Alex**, who has defeated all stereotypes, even after being incorrectly labelled in the Criminal Justice System and in school his entire life. He is the inspiration behind this thesis.

I also want to thank my **parents**, for giving me the opportunity and motivating me to pursue my dreams, and all my **friends** for helping and supporting me through this process.

Finally, my deepest gratitude to all the **boys and the staff at Duke's Aldridge Academy**, and especially to my aunt **Delma**, without whom carrying out research for this thesis would not have been possible.

Table of Abbreviations

ACHPR	African Charter on Human and People's Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ACHR	American Convention on Human Rights
BAME	Black and Minority Ethnic
CRE	Commission for Racial Equality
CFR	Charter of Fundamental Rights
CJS	Criminal Justice System
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	Convention Rights of Child
EA	Education Act
EIA	Education and Inspections Act
ECHR	European Convention on Human Rights
ECtHR	European Court on Human Rights
EHRC	Equality and Human Rights Commission
GC	General Comment
HRA	Human Rights Act
IAtHR	Interamerican Court of human rights
ICPPED	International Convention for the Protection of All Persons from Enforced Disappearance
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political rights
PACE	Police and Criminal Evidence Act
CERD	The Committee on the Elimination of Racial Discrimination

The Committee	The Committee on the Rights of the Child
VCLT	Vienna Convention on the law of Treaties
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
YJB	Youth Justice Board

Executive Summary

Following the wave of 'Black Lives Matter' protests that swept the world in the summer of 2020, it became clear that racism was not simply something that happens in the USA or a thing of the past. In the UK, the rallying cry that summer became 'The UK is not innocent.' In the UK, anti-racial discrimination legislation has been around since 1965, however, as this thesis will show, the issue does not lie with the lack of legislation but with the full implementation of measures and resources to adequately recognise and prohibit racial discrimination when it occurs.

The aim of this thesis is to (i) show how a state's obligation in relation to prohibiting racial discrimination and upholding boys right to identity goes beyond the enactment of legislation. It requires education for all sectors of society to challenge discriminatory attitudes, and the lack of appropriate measures allows for racial discrimination to take place. In this sense, the Committee's advice in relation to measures of implementation must be strengthened because states may not be fulfilling to their obligations in respect of engaging all sectors of society to adequately recognise and outlaw racial discrimination. (ii) To show how the UK has only fulfilled its obligation to enact legislation to outlaw discrimination under article 4 of the CRC. However, it has failed to allocate resources and educational measures to change racially biased attitudes. This has resulted in a disproportionate number of black boys encountering the CJS. (iii) To reconceptualise the notion that the disproportionate number of black boys being stopped by the police is an issue for the CJS; and the fact that black boys are disproportionately affected by school exclusions and low academic expectations as either being explained by in-school or out-of-school factors. Instead to apply the labelling theory to both and show that *same* negative labels created for black boys permeate *both* the CJS and schools.

Chapter one describes Tannenbaum's 'Labelling Theory' as the reason behind *both* the overcriminalisation of black boys in the CJS *and* their disproportionate subjection to school exclusions and low academic expectations. Through years of societal labelling of black men and boys as 'aggressive 'threatening' and 'misbehaved' society has created and perpetuated this stereotype and black boys have come to fit that description through no fault of their own. To investigate this, this chapter poses one main research question and four sub questions. It then lays down the methodology, which entailed both desk and empirical research at Duke's Aldridge Academy, in north London. Finally, it puts forward the limitations of having conducted empirical research into racial discrimination against black boys.

Chapter two aims to answer to first sub question and in doing so, analyses the international legal framework which seeks to protect children from discrimination and uphold their right to identity. It is divided into two sections. First, the right to non-discrimination and second, the right to identity. It seeks to analyse the meaning of both rights and identify the states obligations to uphold them. In doing so, it examines these rights under the three major human rights instruments and focuses the discussion regionally around Europe and the ECHR. Since the focus of this thesis is racial discrimination against boys, it also analyses the right to non-discrimination in relation to race as discussed under ICERD and notes that black children will be subjected to discrimination and awarded protection on account of being a boy *and* being black.

Chapter three examines the second sub question and discusses the UK's legal system. Although the UK is party to all the international legal instruments discussed in chapter two and has put in place national legislation to uphold human rights, black boys are still significantly discriminated against by the system. In light of this, the chapter first delves into a historical overview of the national anti-discrimination legislation in the UK. Second, it explains the history of poor police-community relations and third, it identifies an area of concern for black boys: the stop and search checks. Since black boys

are 1.7 times more likely to be stopped by the police than their white counterparts on account of looking suspicious, the remainder of the chapter examines the impact of the searches on black boys, with special focus on what this type of discrimination means for their sense of identity.

Chapter four answers the third and fourth research questions. It does so by investigating how, notwithstanding all the legislation in place to outlaw racial discrimination in schools, black boys continue to experience it. It puts forwards the main pieces of legislation that prohibit racial discrimination in schools. It then identifies two examples (i) the disproportionate number of school exclusions black boys are subjected to and (ii) low academic expectations, in order to demonstrate the reality of the situation in schools. Finally, it introduces a case study based on empirical research carried out at Duke's Aldridge Academy, where the reader can gauge the opinions of both students and staff about the over criminalisation of black boys, and, what role the school can or should be playing to mitigate the effect of school exclusions and low academic expectations.

Chapter five concludes by answering the research (sub)question(s) in order to who how black boys right to non-discrimination and identity are infringed by the UK's failure to allocate sufficient resources, training and education to all sectors of society regarding racial discrimination. It highlights that the Committee is also responsible for the state's failure to take on its responsibility due to the lack of issuing of advice regarding racial discrimination because of the non-existence of a GC in this area. It ends by providing a list of recommendations to the Committee the state and the school as to how to outlaw de facto and ameliorate the impact of racial discrimination and thereby uphold black boys' right to identity.

Key Words

Discrimination – Identity - Black – Boy – UN Convention on the Rights of the Child - CRC Committee
– Schools – Labelling – Criminal Justice System

Overview of Main Findings

The distinct starting point for this thesis is the application of the 'Labelling Theory' to the issues of overrepresentation of black boys in the CJS, their disproportionate subjection to school exclusions, and low academic expectations. As such, linking the theoretical approach and identified issues in an attempt to explain that the discrimination faced by black boys in the CJS and in schools stems from the same underlying structural and institutional problem. The central contribution of this thesis is to explain how black boy's subjection to racial discrimination simultaneously hinders their right to identity. Therefore, this thesis primarily finds that portraying how discrimination de facto manifests is of crucial importance to enable states to implement adequate measures to fully outlaw it, by educating and engaging all sectors of society.

Although states *should* be upholding black boys right to not be discriminated against and *should* protect them from unlawful interference with their right to identity, this is not the case. This thesis reiterates that to have legislation in place outlawing discrimination is not enough to make non-discrimination a reality.

Although the UK's legislation upholds black boys right to not be discriminated against and their right to identity, it has been unsuccessful in engaging all the sectors of society in safeguarding these two rights. This thesis showcases the prevalent disengagement between the implementation of these two rights, and advocates for adopting a holistic approach that takes into account the intersection of discrimination and identity, and the resulting heightened vulnerabilities of children. This is also manifested in the consistent overrepresentation of black boys at every stage of the youth justice system. Another way in which this is manifested is in the form of fear of reprisal by the police. Although boys are aware of their right to manifest their identity and to not be discriminated against on the basis of their race, it was found that they were unable to exercise their rights due to fear of reprisal by the police when displaying certain aspects of their identity such as wearing black clothing or plaiting their hair.

Therefore, the fact that boys are stopped because 'they look suspicious' alludes to the fact that the UK has not done enough to put in place educational measures to challenge discriminatory attitudes as required under the CRC. This thesis therefore calls for the adoption of a dedicated GC27 on Discrimination which could have the potential of providing a detailed explanation as to the intersectionality of discrimination faced by *black children* and reflecting the importance and impact of challenging individual bias and stereotypes.

Moreover, in school, the fear of displaying certain aspects of their identity – such as being in big groups, or their tone of voice could be misinterpreted as disrespectful and could result in exclusion. This thesis rejects the current explanation in academic discourse which predominantly concentrates on the binary of 'in and out-of-school factors' as explanations for this disparity. Instead, using the approach of the Labelling Theory, this thesis is able to bring together the overcriminalisation of black boys in schools - demonstrated by their subjection to disproportionate number of school exclusions and low academic expectations, with their disproportionate representation in the CJS.

In applying the Labelling Theory to this issue, this thesis is the first to investigate its impact on the boys at Duke's Aldridge Academy. The analysis developed in chapter 4.3 through conversations with students and staff at the school revealed the lived experience of black boys who encounter discrimination in the CJS and in schools daily. It finds that the responsibility to adequately implement measures that will truly prohibit discrimination, entail all sectors of society to be conscious of their own complicity within a system of privilege and hierarchies. Ultimately, this thesis identifies sites of

concern in the discrimination experienced by black boys and makes recommendations to the Committee, schools and the state to address the perpetuating cycle.

1. Introduction

In January 2021, the government of the United Kingdom released a report titled 'Ethnic disproportionality in remand and sentencing in the youth justice system.' The report concluded that black youth, especially boys, end up in the CJS more than any other demographic - with a disproportionality that cannot solely be explained by factors other than their race.¹ On top of this, the UK government's latest 'Ethnicity facts and figures' published in February 2021, showed that Black pupils experienced almost twice the average rate of short term exclusions in England.² Moreover, in the UK, the wave of 'Black Lives Matter' protests throughout the summer of 2020 emphasised the importance of acknowledging British racism. The British were not simply protesting in solidarity with American racism, but the British system reproduced similar patterns of racial discrimination in the UK. As such, the rallying cry that summer became: 'The UK is not innocent.'³

This thesis will argue that the 'Labelling Theory' could explain the overrepresentation of black children in the CJS, their subjection to low academic expectations and the disproportionate number of school exclusions. This is problematic because research has shown that youth are more likely to engage in deviance if adults identify them as deviant.⁴ In this respect, individuals develop a self-identity consistent with the perception of others.⁵ However, the issue is not the labelling itself but the effects of this labelling - once labelled aggressive, the individual is more likely to become embedded in deviant social groups or at risk of developing a deviant identity.⁶ For instance, the overrepresentation of black boys in the CJS may be attributed to being *labelled* as more aggressive than their white peers because they are *perceived* as more at risk of offending due to individual traits and attitudinal factors.⁷ This means that a black boy will be stopped and searched more frequently, irrespective of whether he has committed an offence warranting the stop, because he is black and a boy, bearing the perception of being aggressive. As a result, the consistent labelling of the black boy as aggressive will inadvertently lead to the black boy developing an 'aggressive' or 'criminal' identity. This identity may warrant future 'stop and search' checks that may result in arrest and conviction and unfortunately play a part in the disproportionate number of black youths in the CJS. It is therefore important to recognise that black boys commit no more crimes than other demographic, however, the rate of arrest and

¹ Youth Justice Board: *Ethnic disproportionality in remand and sentencing in the youth justice system Analysis of administrative data*, January 2021.

² <https://www.ethnicity-facts-figures.service.gov.uk/education-skills-and-training/absence-and-exclusions/pupil-exclusions/latest> (last visited 15/06/2021).

³ R. Joseph-Salisbury; L. Connelly and P. Wangari-Jones, 2020 at 3.

⁴ F. Tannenbaum, 1938.

⁵ J.M. Chavez and G.C. Rocheleau, 2017 at 67.

⁶ *Supra* at 67.

⁷ *Supra* at 68.

conviction becomes significantly higher because of their disproportionate subjection to 'stop and search' checks.

Similarly, the disproportionate number of black pupils experiencing exclusion from their school or subject to low academic expectations may also be explained through the Labelling Theory. If teachers assume that a *black* child has misbehaved, or is unable to perform a task, that child is more likely to develop a sense of self to match that description. For instance, if a child is constantly assumed to be causing disruptions, it is more likely that that child will cause a disruption in order to fit that label.

This thesis will apply the Labelling Theory to school exclusions, low academic expectations and the CJS because of the similarity between the 'deviant' labelling observed in each of these areas. When a black child becomes labelled by his surroundings, he may potentially become involved in crime; portray behaviour that may warrant an exclusion or fail to academically perform to his highest potential.

1.1. Research Question

It is against this backdrop that I formulate the following research questions and subsequent sub questions:

- *To what extent is the labelling of black boys in the CJS and in Schools an infringement on their right to non-discrimination and identity under the UNCRC and what should the Committee, states and schools be doing to challenge this?*

Accordingly, the following sub-questions will be answered:

- What are the rights to non-discrimination and identity, and what should states do to uphold them?
- How and why has black youth been criminalised by the UK's legal system?
- How do schools de facto discriminate against black boys notwithstanding legislation in place to outlaw it?
- What be learnt from the pupils and the staff at Duke's Aldridge Academy about discrimination?

The first chapter will proceed by elaborating on the research methodology. Chapter two will present the international legal framework. It will provide a detailed analysis of the right to non-discrimination and the right to identity to lay the foundations for the application of the research question. Chapter three will broadly address the UK's legislation and the history behind the country's strong anti-racial discrimination legislation. It will also contain two subsections (i) a brief historical overview with respect to the poor police-community relations in the country (ii) a discussion about the CJS with special focus on the discriminatory 'stop and search' checks that disproportionately affect black boys. Chapter four seeks to explore the lived reality of black boys in schools by first examining how schools are regulated under national legislation and second, by portraying how black boys' lived experience are in fact contrary to the standard anticipated in the international frameworks. Chapter five returns the reader's attention to the research question and sub questions in order to provide recommendations for the ameliorating of black boys' realities in the CJS and in schools.

1.2. Methodology

In approaching the main research question, both primary and secondary data collection was conducted in order to frame a contextualised socio-legal argument and develop solutions.

The primary data collection entailed, expert consultations, individual interviews and a focus group. Expert consultations were held on Zoom with David Gillborn⁸ in April 2021 and Karen Graham⁹ in February 2021.

In November 2020 I contacted my aunt Delma Fernandez, who is a teacher at Duke's Aldridge Academy: a co-educational, multi-ethnic academy with a large black demographic, based in North London - with the intention of carrying out research at the school. In March 2021, I sent a list of questions that I intended to ask both students and staff to the school's principal. In April 2021, I had a meeting with the school's principal where we discussed the questions and agreed on the number of pupils and staff I would interview. Later that month, I sent two different letters to the principal's secretary. One was to be distributed to the boys in year 9 by their academic coordinator and signed by both them and their parent(s) and the other was to be passed on to any teacher who was willing to be interviewed. A copy of the letters and consent form can be found under appendix VI.

I conducted individual interviews in May 2021 with four members of staff: the Sociology and English teacher; the Drama teacher, the Food and Nutrition teacher; and the school's Principal. The teachers are referred to as A, B, F and G and one of the initials has been changed because the teacher did not consent for their real name to be used. All interviews were transcribed but only selected quotes are used in throughout chapter 4.4; a copy of the questions can be found in appendices I – IV.

Upon receiving the consent forms, in June 2021, I held a focus group instead of individual interviews with thirteen boys in year 9 (ages 13-15) . The topic list included (i) their views on school (ii) school punishments (iii) the CJS and (iv) solutions. Not all questions were asked as the aim was for them to take the lead in the conversation. Although the focus group was transcribed, only selected quotes are used throughout chapter 4.4. The questions and topic list are in appendix V.

The overall aim of this form of qualitative research was to gain first-hand understanding of how the boys perceived their schooling and whether any parallels could be drawn between their treatment in school and in the CJS. Interviewing staff members was also important to establish solutions and recommendations.

The secondary data collection entailed desk research. A variety of primary and secondary sources were collected which included international, regional and domestic legislation as well as case law. Furthermore, journal articles, human rights monitoring bodies publications', government and NGO reports were used. Sociological, psychological and philosophical contributions were also utilised to add to the discussion.

⁸ David is a Professor of Critical Race Studies, editor-in-chief of the journal '*Race Ethnicity and Education*', and Director of the Centre for Research in Race and Education (CRRE).

⁹ Karen is a former prison teacher and sociologist of education. Her work to date has been at the nexus of education practice, academic research and scholar activism.

In order to narrow the scope of the research, the focus of this thesis is on racial discrimination against black boys specifically. This has been done to solely examine the impact of racial stereotyping and to limit the influence of the intersectionality of discrimination that race, and gender could have on the discrimination studied. Moreover, research shows that black boys are more likely than girls to simultaneously encounter the justice system face discrimination.¹⁰ The focus on discrimination in the CJS mainly concerns 'stop and search' checks as there is a historical and documented legacy of these being operationalised to discriminate against black boys. Therefore, these are able to provide an accurate picture of how black boys may come into contact with the CJS to begin with.

1.3. Limitations

Empirical research was subject to four limitations. First, the initial strategy was to conduct individual interviews with the thirteen pupils that took part in the focus group. However, due to lack of time, a joint focus group was held. This meant that not all pupils were as vocal, and it was at times difficult to gauge individual opinions on the subject matter. The pupils suggested it would be beneficial for them to do it individually or in pairs in the future. Second, the COVID-19 pandemic meant that the focus group and interviews had to be carried out online. As such, at times, some interviews had to be cut short and poor internet connectivity hindered the conversation. Third, as will be explained in chapter four, Duke's Aldridge Academy has set up a successful 'School-within-a-School' programme in order to decrease the number of school exclusions. Unfortunately, it was not possible to interview the teacher overseeing the programme and thus an in-depth analysis of its effectiveness was not possible. Fourth, the findings are not extrapolatory to the entire school nor all schools in London or the UK because the sample size was minimal.

The next section will address international legal framework which seeks to protect children from discrimination and upholds their right to identity.

¹⁰ R. Eddo-Lodge, 2018 at 66.

2. International Legal Framework

This chapter will discuss the international legal framework which seeks to protect children from discrimination and upholds their right to identity. It is divided into two sections.

Part I analyses the right to non-discrimination by looking at its development under the three major international legal instruments: the UDHR, the ICCPR and the ICESCR. The section continues the analysis of this right under the CRC. Consequently, discrimination is discussed through the lens of the ICERD, which provides specific guidance regarding racial discrimination. Thereupon, discrimination is discussed under regional legal instruments, focusing specifically on the European system as the ECtHR has issued several rulings addressing racial discrimination.

Part II analyses the right to identity as a foundational right for all human beings. This section begins by briefly providing an outline of the meaning of 'identity' and then highlights the main provisions under the three major international human rights instruments that cater to the right to identity. Subsequently, the section traces the enactment of a specific right to hold an identity under the CRC back to the kidnappings in Latin America during the 1970s. Identity is thereafter analysed through the lens of rulings from the ECtHR, to which the UK is bound, because the scope of this paper does not allow for an analysis of the rulings of the IAHR. The chapter concludes that race discrimination constitutes an infringement on a child's right to identity because race is an element of a child's identity.

2.1. The Right to Non-Discrimination

2.1.1. Background

The Human Rights Committee has defined discrimination as:

"any distinction, exclusion, restriction or preference which is based on any ground such as race [...] which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."¹¹

Non-discrimination, similarly, to equality is a fundamental moral principle.¹² However, it is important to differentiate between the two, as international agreements sometimes contain 'equality' provisions that inherently *forbid* certain kinds of discrimination. For example, the duty to ensure racial equality would logically prohibit state-imposed racial discrimination.¹³ Hence, this thesis analyses the right to non-discrimination as opposed to equality.

A difference must be struck between the right of non-discrimination and the principle of non-discrimination. Whilst a legal rule is a concrete 'do or do not' that controls behaviour; a legal principle

¹¹ CCPR/C/GC/18 at para. 6.

¹² S. Besson, 2005, at 434.

¹³ B, Abramson, 2008 at para. 23.

is only a guide to behaviour.¹⁴ Therefore, if the two are used interchangeably, it may mislead people to believe that the state has a right to practice discrimination, as the notion of 'principle' would allude that non-discrimination is a guide to behaviour rather than a legal rule.¹⁵ Furthermore, it has been argued that many commentators do not mean 'the principle of non-discrimination' but may be referring to the principle of proportionality.¹⁶ When the principle of non-discrimination is referred to, it may invoke one of the four general principles of the CRC which contribute to the general attitude towards children and their rights. In this thesis, the principle of non-discrimination is identified by the CRC Committee to explain that all children should enjoy their rights and should never be subjected to any discrimination.¹⁷ This principle of proportionality however, is a test of reasonableness which balances discriminatory means employed against the aim sought to be realized.¹⁸ The test is undoubtedly subjective, and as such, a state has the right to discriminate as long as it is acting proportionately, legitimately and in the pursuit of a legitimate aim.¹⁹

The right to non-discrimination can take multiple forms. It can call for negative duties of *abstention from* and positive duties to *ensure the absence of* discrimination.²⁰ It can be classified as either de jure or de facto. Whilst de jure discriminates by law, de facto discrimination may occur as a result of a social pressure. For example, racial discrimination may be outlawed de jure through legislation, but de facto racial discrimination could be an initiative of employees who undertake the face-to-face allocation of social goods.²¹ In this regard it would be counterproductive to assume that de jure outlawing of discrimination in turn means that discrimination does not occur de facto. This is because a de jure prohibition of discrimination would again not capture the lived experience of many individuals who may be subject to de facto discrimination notwithstanding its prohibition.

It is also important to note that discrimination itself may be positive or affirmative, whereby discrimination is aimed at redressing a situation of material inequality of some groups, who deserve special protection measures in order to eliminate the conditions which perpetuate or caused the discrimination in practice.²² For example, in the UK, the mere existence of non-discrimination laws do not have the effect of redressing the injustices that black people have historically suffered from.

¹⁴ R. Dworkin, 1977, at 24.

¹⁵ See Abramson, *supra* note 13, at para. 109.

¹⁶ *Supra* at para. 110.

¹⁷ <https://www.unicef.org/armenia/en/stories/four-principles-convention-rights-child> (last visited 15/05/2021).

¹⁸ See Abramson, *supra* note 13, at para. 112.

¹⁹ *Supra*, at para. 113.

²⁰ See Besson *supra* note 12 at 437.

²¹ See Abramson, *supra* note 13, at para. 101.

²² See Besson *supra* note 12 at 439.

Therefore, it would be useful for the government to take 'affirmative' action in conjunction with prohibitions to remedy the imbalances that history and culture have produced in society.²³

Additionally, it may be direct or indirect. Whereas direct discrimination is defined as treating a person less favourably than another, on grounds such as race; indirect discrimination occurs when a law has a differential impact on people from a certain group.²⁴ Although only indirect discrimination has been equated to structural or institutional discrimination, indirect discrimination is in effect direct discrimination because it nevertheless affects the members of a particular disadvantaged group.²⁵ Within this, a difference can be struck between overt and covert discrimination.²⁶ Whilst overt discrimination refers to law – mandated differential treatment, thus open and readily seen; covert discrimination hides behind a neutral-looking law that has the intention to disadvantage a particular group.²⁷ Therefore, similarly to de facto/de jure discrimination, it would be a mistake to assume that because discrimination is not law-mandated or readily-seen, that discrimination does not occur. Since discrimination can take multiple forms and hide behind processes that may not seem discriminatory but that have discriminatory effect some groups, discrimination must be analysed holistically. Consequently, groups who share a protected characteristic, for example black people, must be carefully protected against de facto, indirect and covert discrimination because of the effect that these discriminatory processes may subject them to.

Furthermore, non-discrimination has been described as manifesting horizontally. Therefore, the principle should be used to interpret the law in a way that prohibits discrimination amongst private parties and as being directly enforceable against states.²⁸ Hence, it is a state's responsibility to ensure the implementation of the necessary measures to guarantee that some individuals are not discriminated against by private parties. Accordingly, states must be held accountable for indirectly discriminating against certain individuals, as a result of the lack of implementation of adequate measures to ascertain that adequate safeguards are in place to protect individuals from private party induced discrimination.

Thus, it is important to recognise that, as explained above, not all discrimination is negative nor ought to be outlawed because, in many instances discrimination plays a role in achieving equity between different groups. For instance, when attempting to redress past injustices, certain degree of discrimination is necessary in order to restore the status quo between different races. In this regard, not all equality provisions would adequately capture the lived reality of many minorities within minorities, who would indeed benefit from affirmative action or positive discrimination to mitigate the

²³ See Abramson, *supra* note 13, at para. 147.

²⁴ *Supra* at para. 133-135.

²⁵ *Supra* at para. 137.

²⁶ *Supra* at para. 50.

²⁷ *Supra*.

²⁸ See Besson *supra* note 12 at 438.

effect of the imbalances created by systemic de facto discrimination. In this respect, many international legal instruments have formulated provisions describing and outlawing discrimination.

2.1.2. Non-child specific International Legal instruments

In principle, children are protected by general non-discrimination clauses found in the three major international human rights instruments: the UDHR, the ICCPR and the ICESCR, which protect the principle of non-discrimination in a general clause.²⁹ In this section I will briefly address the relevant provisions.

2.1.2.1. *The UDHR, ICCPR and ICESCR*

The UDHR has recognised the principle of equality and non-discrimination under its article 2, whereby 'everyone is entitled to the rights and freedoms' in the declaration 'without distinction of any kind'. Article 7 states that 'all human beings are equal before the law [and] are entitled without discrimination to equal protection of the law.' Consequently, as provided by in the UDHR, human beings have the right to be treated equally simply by virtue of being human beings. This notion has been incorporated into subsequent binding international legal instruments, some of which will be discussed below.

The UK ratified the ICCPR in 1976. The ICCPR devotes articles 2 and 26 to non-discrimination. Under article 2(1), 'state parties undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant, without distinction of any kind, such as race [...]' Under article 26, 'all persons are equal before the law and entitled without discrimination to the equal protection of the law [...] the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on grounds such as race [...]' Although the HRC notes under GC 18 that the ICCPR does not directly define discrimination, it borrows from both the ICERD and CEDAW and believes discrimination shall constitute 'any 'distinction, exclusion, restriction or preference [...] which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons of all rights and freedoms.'³⁰ The HRC requires state parties to take affirmative action in order to eliminate conditions which perpetuate discrimination - thereby acknowledging that not every differentiation of treatment will constitute discrimination, but only that which is not reasonable nor objective and which does not aim to achieve a legitimate purpose will be discriminatory.³¹

Therefore, although there is consensus surrounding the fact that discrimination must be prohibited, there is also general acceptance that it will undoubtedly occur notwithstanding legislation in place to outlaw it. When this occurs, a state such as the UK, must take action to ensure that measures are implemented to mitigate the effect of discrimination on groups. In this sense, it would not be enough for the UK to claim that anti-discrimination legislation is in place, but it would have to ensure that it is

²⁹ J. Tobin, 2019 at 44.

³⁰ CCPR/C/GC/18 at para. 6-7.

³¹ CCPR/C/GC/18 at para.10-13.

aware of the occasions in which de facto discrimination occurs and effectively take action to eradicate it.

The UK ratified the ICESCR in 1976. Under article 2(2) of the ICESCR 'state parties must undertake to guarantee that the rights in the convention be exercised without discrimination of any kinds such as race [...] or other status.' In relation to children, child specific non – discrimination clauses, otherwise known as *leg speciales* expend the applicability of their respective general non-discrimination clauses to children. Article 24(1) of the ICCPR outlaw's discrimination against children and article 10(3) of the ICESCR grants special measures of protection to children. As a result, it could be argued that these instruments take discrimination a step further than the UDHR in that they cater for discrimination beyond its general meaning and recognise that children may be subject to a different kind of discrimination by virtue of their age and vulnerability. Therefore, this begs the question of whether as set forth in the UDHR, human beings are equal simply by the virtue of being human? If this were truly the case, then specific groups would not benefit from special protection and child-specific instruments such as the CRC would not be necessary. (Un)fortunately human beings and especially children do not exist in a utopia and instruments such as the CRC are in fact incredibly necessary to achieve equality.

2.1. 3. Child-Specific International Legal Instrument - the CRC

Recognising that children require special measures of protection that take into account their particular vulnerability vis a vis the state, their families and other individuals, the CRC provides for further protection.³² This is because children are also discriminated against in comparison to adults and are often discriminated against as members of a specific group, hence there is a need for a special international instrument guaranteeing children the respect of their human rights without discrimination.³³

The right to non-discrimination is enshrined under article 2 of the CRC, it is the most important general clause of non-discrimination for children and is one of the four general principles of the CRC according to the Committee.³⁴ Although it is acknowledged that children can face discrimination because of their parents, this thesis will only concern an analysis of article 2(1) because of its limited scope.

Article 2 states that:

- (1) 'State parties shall respect and ensure the right of each child [...] without discrimination of any kind' and

³² See Tobin, *supra note 29*, at 48.

³³ *Supra*.

³⁴ Alongside Article 3 on best interest, Article 6 on life, survival and development and Article 12 on participation.

- (2) 'The child is protected against all forms of discrimination on the status [...] of the child's parents [...]'

Similarly to article 2(1) of the ICCPR, article 2(1) of CRC foresees a duty to *respect* – these are negative obligations and generally require states to refrain from violating any rights enshrined in the convention.³⁵ It also foresees a duty to *ensure* – this is a positive duty that consists of the obligation to *protect* individuals against interference by third parties; an obligation to *fulfil* which incorporates and facilitates the enjoyment of human rights and services.³⁶ This model, consisting of obligations to respect, protect and fulfil is otherwise known as the typology of tripartite obligations.³⁷

There are three key elements to the right to non-discrimination: (i) an *unfavourable* treatment based on a (ii) *prohibited* ground that (iii) cannot be *justified*.³⁸ Firstly, discrimination implies a difference of treatment in similar situations or similar treatment in different situations.³⁹ For example, when a state offers a social good, it would be infringing upon individuals right to non-discrimination if it were to treat certain individuals differently in the enjoyment of that social good.⁴⁰ Secondly, a differential treatment of comparable cases may only be deemed discriminatory if the ground on which the differential treatment is based, constitutes a prohibited ground of discrimination or if the consequence of that differential treatment puts a certain group at a disadvantage.⁴¹ For example, the state would be infringing upon black boys' right to non-discrimination if a social good that it offers did not extend to black boys, solely based on their race. Thirdly, as the HRC has explained 'not every differentiation in treatment will constitute discrimination.'⁴² It is only when these differences of treatment are unreasonable and lack an objective justification that they may be deemed discriminatory.⁴³ Moreover, article 2(1) serves three interconnected functions. To begin with, it prevents offences to human dignity, thereby affirming that discrimination is an assault to the personhood of the individual.⁴⁴ It also

³⁵ See Tobin, *supra* note 29 at 42.

³⁶ *Supra* at 38.

³⁷ W. Kalin and J. Kunzil, 2009 at 96.

³⁸ See Tobin, *supra* note 27 at 60.

³⁹ P. Alston, 1992 at 9.

⁴⁰ See Abramson, *supra* note 13 at para. 38.

⁴¹ See Tobin, *supra* note 29, at 61.

⁴² CCPR/C/GC/18 at para. 21.

⁴³ Belgian Linguistics case (No. 2), 1968, § 113.

⁴⁴ See Abramson, *supra* note 13 at 32.

functions as a trump to politics and thus puts a wall around sectoral rights, protecting them from the political process.⁴⁵ Lastly, it affirms the moral norm of non-discrimination.⁴⁶

Article 2 has been described as an ‘umbrella’ right.⁴⁷ It’s function is twofold; on the one hand, adding protection to sectoral rights for example, article 40 on the administration of juvenile justice,⁴⁸ and, on the other, it forms part of other rights pertaining to a sector of life, for example, self-expression.⁴⁹ The Committee has considered the issue of non-discrimination in relation to the administration of juvenile justice in depth in GC10. This has now been replaced by GC24; however, it has provided valuable insights relating to non-discrimination. The Committee reiterated that state parties had to take all necessary measures to ensure that all children in conflict with the law are treated equally. Specifically, it called attention to be paid to de facto discrimination and disparities, which may [...] involve vulnerable groups of children, such as [...] children belonging to racial [...] minorities.⁵⁰ The Committee recommended that states parties conduct regular evaluations of their practice of juvenile justice, in particular of the effectiveness of the measures taken, including those concerning discrimination.⁵¹ More recently, in GC24, The Committee called for safeguards against discrimination from the earliest contact with the criminal justice system and throughout a trial, as well as for active redress in cases of discrimination.⁵² The Committee maintains its recommendation relating to the regular evaluation of the youth justice system, and matters relating to discrimination.⁵³ It has put in place thorough measures of monitoring and implementation for states in order to achieve this.

For the 193 states that have ratified the CRC, for instance, the UK that ratified it in 1991, the implementation of state parties’ duties in regards to monitoring and implementation is controlled domestically through the monitoring of international courts, and the internationally through the Committee.⁵⁴ Since the UK has ratified the CRC, it should be directly transposing the CRC into

⁴⁵ *Supra* at 39.

⁴⁶ *Supra* at 39.

⁴⁷ The word ‘umbrella’ was used during the issuing of the Covenants; UN Doc. E/2256, Supl. No. 4, 1952, at 14.

⁴⁸ Article 40 UNCRC outlaw’s discrimination in the administration of justice.

⁴⁹ See Abramson, *supra* note 13 at para. 14.

⁵⁰ CRC/C/GC/10 at para. 6.

⁵¹ CRC/C/GC/10 at para. 99.

⁵² CRC/C/GC/24 at para. 40.

⁵³ CRC/C/GC/24 at para. 114.

⁵⁴ See Tobin, *supra* note 29, at 66.

domestic jurisdiction and courts should use its principles when interpreting cases.⁵⁵ Consequently, the right to non-discrimination gives rise to detailed implementation duties that are complemented by positive duties of protection, which are directly justiciable.⁵⁶ Therefore, it is not subject to the progressive realisation principle.⁵⁷ This means that a state has a duty to ensure the implementation of measures, so that when non-justified discrimination occurs, measures are implemented to outlaw it. It also has a duty to monitor its implementation, which could entail paying close attention to discrimination faced by vulnerable groups and guarantee that measures are put in place to adequately ensure that de facto discrimination does not occur.

Article 4 of the CRC requires state parties to establish coordinating and monitoring bodies; to collect comprehensive data; to raise awareness-raising and training and to develop and implement appropriate policies, services and programmes to make children's rights a reality.⁵⁸ This means that although it is the state which takes on obligations, the task of implementation needs to engage all sectors of society.⁵⁹ In regard to article 2, the Committee highlights the need for data collection to be desegregated for discrimination to be identified that addressing discrimination may require changes in legislation, administration and resource allocation, as well as educational measures to change attitudes. The Committee also emphasizes that the application of the non-discrimination principle of equal access to rights does not mean identical treatment.⁶⁰

The international monitoring of state parties also involves scrutinising the country reports submitted periodically to the Committee for examination.⁶¹ In its concluding observations issued following examination, the Committee provides specific recommendations relating to general measures. It expects the State party to describe action taken in response to these recommendations in its subsequent periodic report.⁶²

So, this means that technically, when effectively implementing the CRC, a state such as the UK should provide visible cross-sectoral coordination to recognise and realise children's rights between different levels of government and civil society.⁶³ The UK would also be expected to consider

⁵⁵ *Supra*.

⁵⁶ See Besson *supra* note 12 at 453.

⁵⁷ UN Doc E/1991/23, at para. 5.

⁵⁸ CRC/GC/2003/5 at para. 9.

⁵⁹ CRC/GC/2003/5 at para. 1.

⁶⁰ CRC/GC/2003/5 at para.12.

⁶¹ See Tobin, *supra* note 29, at 67.

⁶² CRC/C/5 at para. 2.

⁶³ CRC/C/5 at para. 27.

recommendations and give particular attention to identify and prioritise marginalised and disadvantaged groups of children.⁶⁴

In this respect, the CRC is clear about the fact that the non-discrimination principle does not prevent the taking of special measures to diminish discrimination.⁶⁵ This is because there is consensus surrounding the fact that again, *de facto* discrimination is a reality that is experienced by many children, especially those belonging to marginalised or vulnerable groups. Therefore, the task of realistically implementing the right to non-discrimination goes further than issuing legislation against discrimination because that alone will not prevent discrimination from occurring. As acknowledged by the Committee, the reality of discrimination often stems from negative societal attitudes.⁶⁶ Therefore, to realistically eradicate discrimination, the state must change both legislative and educational measures because notwithstanding all the legislation in place to outlaw discrimination, if people believe some groups to be less deserving of rights than others, legalisation alone will never achieve what it sets out to do. This is because oftentimes those who have the duty to oversee the implementation of the legislation may be the ones who hold those negative attitudes. Since the task of implementation must engage all sectors of society, if any sector holds a negative societal attitude towards a particular group, implementation will never occur.

The recognition of the vulnerability of groups other than children has been recognised under specialised legal treaties that specifically forbid discrimination on specific grounds, these will be discussed below.

2.1.4. Specific Conventions

The two most prominent ground-specific prohibitions of discrimination can be found in the 1965 ICERD and the 1979 CEDAW. Although they do not create a right-holder/duty bearer relationship between the individual and the state, they help the state fulfil its duties to the rights holders under the human rights treaties.⁶⁷ In this regard, they both aim to combat various forms of discrimination by granting non-discrimination rights.⁶⁸ It is important that the intersectionality of discrimination is not overlooked. Whilst the ICERD and CEDAW cater for groups, the CRC caters for children, so children who fall under any category protected by either the ICERD or CEDAW will in turn be entitled to double protection and therefore subjected to double discrimination. However, since the focus of this thesis revolves around racial discrimination against boys, it is worthwhile to analyse the right to non-discrimination in relation to race as discussed under ICERD and note that black children will be subjected to discrimination and awarded protection on account of being a boy *and* being black.

⁶⁴ CRC/C/5 at para. 30.

⁶⁵ *Supra*.

⁶⁶ *Supra* at note 57.

⁶⁷ See Abramson, *supra* note 13 at para. 37.

⁶⁸ See Tobin, *supra* note 29 at 46.

2.1.4.1. ICERD

Specifically, the ICERD commits all State parties to eliminate all forms of racial discrimination and to promote understanding amongst all races. The term 'racial discrimination' is defined as:

'Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, [...] of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.'

'Racial discrimination' is therefore stipulated by the Convention as concerning precisely the five 'grounds' set out in Article 1, so it is not necessary to support the social constructions of race in order to combat racial discrimination.⁶⁹

Under article 2 (1) state parties must refrain from any act or practice of racial discrimination against any person, [...] and to ensure that all public authorities and public institutions, [...] act in conformity with this obligation. Moreover, article 4(c) prohibits public authorities or public institutions, from promoting or inciting racial discrimination. Furthermore, article 7 obliges states parties to 'undertake to adopt immediate and effective measures, particularly in the fields of teaching [and] education [...] with a view to combating prejudices which lead to racial discrimination.' On its face, there is consensus amongst the 176 states that have ratified the convention that racial discrimination ought to be outlawed in all ambits of society.

The ICERD has played a distinctive role in alerting governments to the ubiquity of discrimination, acting under the obvious assumption that a problem cannot be addressed unless it is first recognised.⁷⁰ It has managed to do this through the establishment of a committee which is the mechanism to oversee its implementation.⁷¹ Its reporting function is almost identical to that of the Committee.⁷²

The right to non-discrimination is entrenched in several international legal instruments, and states must report to the international community on their implementation of the right in their respective jurisdictions. Furthermore, they are bound to non-discrimination clauses by regionally specific legislation.

⁶⁹ See remarks of the representative of Belgium at the adoption of the draft declaration and programme of action at the Durban World Conference against Racism.

⁷⁰ P. Thornberry, 2005 at 241.

⁷¹ *Supra* at 242.

⁷² *Supra*.

2.1.5. Regional legal Instruments

The right to non - discrimination can be found in the ACHR (Article 1); the ACHPR (Article 2); the ACRWC (Article 3). and in both the CFR (article 21) and the ECHR (Article 14, and Protocol 12). However, the scope of this thesis confined to a discussion on non-discrimination in Europe as the UK is bound by the rulings to the ECtHR. EU anti-discrimination laws will be discussed below.

2.1.5.1. The ECHR

For member states of the Council of Europe, since 1953, article 14 of the ECHR guarantees the 'enjoyment of rights and freedoms without discrimination on any ground such as sex or [...] race [...].' Alongside it, Article 1 of Protocol No. 12 to the Convention prohibits discrimination on any ground such as sex, race or colour. The ECHR established the ECtHR in order to hear individual cases of right violations by state parties.

The ECtHR confirmed that the term discrimination itself does not signify uniformity and there are differences in situation between one person and another.⁷³ This was confirmed in the case of *Thlimmenos v Greece*, whereby it was held that: 'the right not to be discriminated against is violated when States [...] treat differently persons in analogous situations without providing an objective and reasonable justification. The right not to be discriminated against is also violated when States without an objective and [...] reasonable justification fail to treat differently persons whose situations are significantly different.'⁷⁴ This ruling highlights that discrimination may not always be an infringement on a person's rights – it is only an infringement when there is no justification for it, for example in the case of racial discrimination.

Regarding racial discrimination, the ECtHR has maintained that discrimination on account of a person's actual or perceived ethnic origin is a form of racial discrimination.⁷⁵ The ECtHR has affirmed that due to the perilous consequences of racial discrimination, it requires special vigilance and vigorous reaction from the authorities.⁷⁶ Therefore, authorities should use all available measures to combat racism.⁷⁷ The ECtHR concluded that where a difference in treatment is based on race or ethnicity, the notion of objective and reasonable justification must be interpreted as strictly as

⁷³ Supra at 255.

⁷⁴ ECtHR, *Thlimmenos v. Greece*, 2000, § 44.

⁷⁵ Supra.

⁷⁶ Discrimination by race in the ECHR: Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention.

⁷⁷ ECtHR, *Sejdi. and Finci v. Bosnia and Herzegovina* [GC], 2009, § 43; *Nachova and Others* [GC], 2005, § 145; *Timishev v. Russia*, 2005, § 56; *Soare and Others v. Romania*, 2011, § 201; *Stoica v. Romania*, 2008, § 117.

possible,⁷⁸ and thus differential treatment based exclusively or to a decisive extent on a person's ethnic origin is incapable of being objectively justified.⁷⁹ Additionally, it is widely accepted that discrimination based on race could, in certain circumstances, of itself amount to “degrading treatment” within the meaning of article 3 as well as discrimination on the basis of identity, which can be read into article 8 of the ECHR.⁸⁰

2.1.5.2. Anti-discrimination laws in the European Union

Furthermore, there are several directives and Commissions that oversee the principle of non-discrimination in the European Union, those relating to racial discrimination will be discussed below.

In a 1995 resolution, the European Parliament called on the Kahn Commission to send a clear political signal regarding its commitment to the fight against racism and xenophobia.⁸¹ The Kahn commission issued a report in 1996 proposing legislative measures to combat racism and xenophobia.⁸² By 1996, the European Commission had referred to the symbolic value of laws against racial discrimination, as a result 1997 was made the European year against racism.⁸³ The European Commission drafted the ‘Europe against Racism’ declaration that called upon all European institutions to contribute in everyday life to the struggle against racism.⁸⁴ It was against this backdrop that the 1999 Treaty of Amsterdam, introduced article 13 to the EC Treaty, allowing the Council of Europe on proposal of the Commission, to take measures in respect of discrimination. As a result, in June 2000, the Race Directive was adopted.⁸⁵ This directive represented the first legislative framework against racial or ethnic discrimination within the European Union and it had great symbolic value as a statement against racism and racial discrimination.⁸⁶ The following year, the CFR came into force with article 21 outlawing any discrimination based on any ground such as sex, race, colour, ethnic or social origin or genetic features.

⁷⁸ ECtHR, *D.H. and Others v. the Czech Republic* [GC], 2007, § 196; *Sejdi. and Finci v. Bosnia and Herzegovina* [GC], 2009, § 44.

⁷⁹ ECtHR, *Sejdi. and Finci v. Bosnia and Herzegovina* [GC], 2009, § 44; *Timishev v. Russia*, 2005.

⁸⁰ ECtHR, *East African Asians v. the United Kingdom*, 1973 § 60.

⁸¹ Resolution [1995] 03 C 308:140.

⁸² V/618S/97 EN, 1996120.

⁸³ Resolution [1996] OJ C 237: I.

⁸⁴ Declaration of Intent: 'Europe against Racism', (1997).

⁸⁵ Council Directive 2000/43/EC, [2000] OJ L 180:22-6.

⁸⁶ E, Howard, 2000 at 154.

Although de facto discrimination is still commonplace, the international community has imposed strong legal duties both internationally and regionally to condemn de jure discrimination based on race when it is not objectively or reasonably justifiable.

2.1.6. Conclusion

Theoretically under the UDHR, all human beings should be equal by the virtue of being human beings. Unfortunately, that is not the case, and the international community has established a series of conventions to address the specific discrimination that different groups may face. In doing so, it has established that all human beings, are in fact not equal by the mere virtue of being human and that some groups necessitate special protection. This protection may come from a degree of positive discrimination to redress past injustices and level the playing field to realistically achieve equality. This has been done to capture the lived reality of certain groups that will encounter indirect discrimination notwithstanding legislation in place to outlaw it. As a result, the UNCRC and the ICERD attempt to provide the necessary protection for the two groups they aim to protect. However, to assume that the mere existence of a separate convention is sufficient protection for the discrimination that minorities within minorities realistically endure could be too ambitious. This is because discrimination is in fact intersectional and there is a myriad of ways in which discrimination can present itself. Therefore, the implementation of the right to non-discrimination goes beyond the mere existence of legislation. For adequate implementation, states ought to ensure that all sectors of society are trained about how discrimination may manifest itself.

2.2. The Right to Identity

2.2.1. Background

The right to one's identity is another fundamental right for all human beings.⁸⁷ Identity is crucial from a human rights perspective because it 'transforms the biological entity into a legal being and confirms the existence of a specific legal personality capable of bearing rights and duties.'⁸⁸ However, there is no prevailing legal definition of identity. An attempt to define identity must start with a nuanced understanding of the concept itself.⁸⁹ Scholars have therefore emphasised the importance of an individual's personal and social realities in the formation of a stable and dynamic identity.⁹⁰ While identity encompasses relatively "static" personal attributes, such as biographical data and physical

⁸⁷ M. Freeman, 1996 at 273-28.

⁸⁸ G. Van Beuren, 1995 at 117.

⁸⁹ S. Besson, 2007 at 141.

⁹⁰ C. Fernandez Sessarego, 1992 at 113.

traits, it also extends to an individual's outward expression,⁹¹ as such identity comprises those aspects of the social profile that are significant to the person.⁹²

Thus, individual identity consists of three elements: who and what you are at a given time; the sense of being the same 'who' or 'what' over time; and the external aspects of an identity, i.e., how a person is classified by others.⁹³ In this sense, the attachment of labels to a person can be constitutive; applying specific labels to people in turn operates to mould identification. The specific label plays a role in shaping the way a person makes decisions about how to conduct their life.⁹⁴ Although identity is defined primarily as an individual right, there is also a collective dimension to identity rights. This dimension is made up of three components: firstly, the network of the social relationships constituting the collective; secondly, the distinguishing internal attributes of the collective itself; and thirdly, the collective's significant, external ties, which would lead 'a' group to be treated collectively 'as' something.⁹⁵ For example, when applying this concept to race, and comparing it to gender; it becomes clear that being black, *and* a boy would constitute an aspect of a person's individual identity. However, it would also form part of a collective identity due to the connotations attached to being black or being a boy. Therefore, people belonging to that specific category (black/boy) would share that aspect of their identity with other people belonging to the same category. Consequently, the individual right to identity that is afforded to each black boy of the collective of black boys, would protect the identity rights of the collective. Furthermore, each member of the collective would become an individual guarantor of the collective's identity.⁹⁶

Since states have historically manipulated individual identities in order to promote racial and ethnic superiority for example, by forcibly assimilating children of disfavoured ethnicities into the dominant culture - international law has mobilised to protect the right to identity.⁹⁷ The major international human rights instruments therefore provide protection for elements of a person's identity.

⁹¹ Supra.

⁹² Y. Ronen, 2004 at 150.

⁹³ R. Tallis, 2010 at 189.

⁹⁴ J. Marshall, 2014 at 66.

⁹⁵ K.A. Appiah, 2005 at 66–9.

⁹⁶ *Acción de Tutela Ati Seygundiba Quigua Izquierdo v. Tribunal Administrativo de Cundinamarca*, Colombia Const. Trib. T-778-05, 2005.

⁹⁷ T. McCombs and J.S. González, 2007 at 5.

2.2.2. Non-child specific International Legal Instruments:

2.2.2.1. *The UDHR, the ICESCR and the ICCPR*

Article 1 of the UDHR can be read as accounting for the right to preserve one's identity because 'All human beings are born free and equal in dignity and rights.' Dignity can be categorised as a constraint which allows humans to be free and realize what is within them to become consistent with their essence or nature.⁹⁸ However, dignity may also be categorised as 'personal autonomy', 'enlightenment' or 'dignity as empowerment' which advocates personal freedom and one's own choice.⁹⁹ If identity is understood as personal autonomy, dignity could be interpreted as a type of identity. This is because respecting people's dignity would include respecting their autonomy, and their right to control their future.¹⁰⁰

As mentioned in section 2.1.2.1., article 26 of the ICCPR guarantees equality before the law. The preamble of the ICESCR recognises the 'inherent dignity [...] of all members of the human family.' Although the right to identity includes cultural aspects, it is more directly situated within civil rights.¹⁰¹ Hence, pursuant to the typology of tripartite obligations, states must take necessary measures to prevent others from interfering with an individual's identity and they are required to allocate resources to develop the means to preserve the child's right to identity.¹⁰² In depicting the scope of a state's obligations towards the right to identity, article 8 of the CRC should be understood as follows: In *respecting* the right to identity, states must refrain from actively interfering with an individual's identity, for example, if a state disrupts a child's familial ties, this will amount to a violation of the state's duty to respect the child's identity.¹⁰³ When *protecting* the right to identity, a state must take all necessary measures to prevent others from interfering with the individual's identity. A state's failure to establish boundaries between ancestral people's lands may amount to a violation of the protection of their identity in relation to their ties to the land.¹⁰⁴ In *fulfilling* the right to identity, states must progressively ensure that each person has opportunities to develop their identity. For example, a state may be ordered to "adopt all necessary positive measures to guarantee that [children] . . . can access the late registration procedure . . . and fully exercise their rights to nationality."¹⁰⁵

⁹⁸ See Marshall, *supra* note 94 at 42.

⁹⁹ *Supra*.

¹⁰⁰ J. Griffin, 2009 at 83.

¹⁰¹ See Tobin, *supra* note 29, at 287.

¹⁰² *Supra*.

¹⁰³ Comm. No. 400/1990, ¶¶ 2.1, 10. U.N. Doc. CCPR/C/53/D/400/1990 (1995).

¹⁰⁴ See *Awas Tingni*, 79 Inter-Am. Ct. H.R. (ser. C) at ¶ 153.

¹⁰⁵ *Supra* at ¶ 171.

2.2.3. Child-Specific International Legal instrument: The CRC

Although states ought to respect people's right to identity, this right has become entrenched in law under the CRC, which was the first human rights treaty to explicitly recognise the right to preservation of the child's identity under article 8.¹⁰⁶ Article 8 of the CRC is unique in several aspects. It expressly guarantees a child's right to an identity and their right to have such an identity preserved or where necessary, or re-established by the state.¹⁰⁷

- i. States Parties undertake to respect the right of the child to preserve their identity, including nationality, name and family relations as recognized by law without unlawful interference.
- ii. Where a child is illegally deprived of some or all the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity

This right became explicitly recognised following the 1970s and 80s disappearances and kidnappings of children in the Latin American region as these prevented many children from knowing their biological origins.¹⁰⁸ Although the core intention of the article was to create a legal obligation for states to prevent disappearances, and to provide assistance and protection where disappearances occur, the right goes beyond the context of child abductions.¹⁰⁹ In recent years, the child's right to identity has arisen in a broad set of contexts¹¹⁰ which illustrate the increasing consideration given to the preservation of a child's identity which extends beyond the original intention of article 8.¹¹¹ The article also relates to several other provisions of the CRC,¹¹² particularly article 7 which establishes a child's right to a name, nationality and to be cared for by his or her parents. Article 8(1) provides a non-exhaustive list of elements constituting a child's identity whilst also supplementing other articles in the CRC. Article 8 supplements article 7 in its inclusion of nationality. Significantly, it addresses the relationship between a child and his family whereas other articles in the CRC recognises the importance of a child's family. However, article 8 goes one step further in that it requires states to ensure children are not deprived of their familial relations.¹¹³

¹⁰⁶ See Tobin, *supra* note 27, at 282.

¹⁰⁷ Jaap E. Doek, 2006 at para 1.

¹⁰⁸ *Supra* at para. 6.

¹⁰⁹ *Supra* at paras. 8-11.

¹¹⁰ For example, amongst other, children's right to know their genetic identity.

¹¹¹ See Tobin, *supra* note 18, at 282.

¹¹² Articles 9, 16, 20, 21, 30 and 2.

¹¹³ See Tobin, *supra* note 29, at 297.

Regarding the meaning of article 8(1), the Committee has stressed the importance of children's role in defining their identity. While the meaning of identity has external dimensions marked by identifiable factors, identity can also be constituted by an internal dimension which is defined by those attributes that are unique to a child's own sense of identity.¹¹⁴ In terms of the preservation of a child's identity, states are not obliged to preserve a fixed understanding of a child's identity, but rather to enable a child to access information that will enable them to understand the historical elements of their identity. As well as an obligation to take reasonable measures so that the child can explore and enjoy his/her identity without any interference.¹¹⁵ Thus, this obligation requires effective measures to ensure a child is not forced to conceal certain aspects of their identity for fear of discrimination or reprisal.¹¹⁶ Furthermore, an interference with the right to identity will only be lawful when the purpose for doing so is legitimate, the measures taken are reasonable, proportionate and such action is supportive of the child's best interests.¹¹⁷ In relation to the obligation to re-establish a child's identity, appropriate measures for doing so can be identified although the list may evolve over time.¹¹⁸

Concerning a state's obligation with respect to a child's identity, a state is required to take reasonable measures to protect children against unlawful interference with elements of their identity by state or non-state actors *and* to take reasonable measures to enable children not simply to preserve their identity in a historical sense but to enable them to discover and develop their identity.¹¹⁹ Article 8(1) contains a provision obliging states to 'undertake to respect.' The language stresses the serious nature of the obligation imposed on states with respect to the preservation of a child's identity.¹²⁰ Although states have discretion in determining which measures to adopt in order to respect, protect and ensure the child has the right to preserve their identity, the Committee has recommended that certain aspects are imperative for the preservation of a child's identity, a two of these will be discussed.

Firstly, the Committee has called on states to provide children of ethnic minorities with identity documents.¹²¹ However, the Committee has yet to decide on what information should be included in identity documents as the inclusion of traits central to one's identity such as ethnicity create

¹¹⁴ D.Isom, 2012 at 135.

¹¹⁵ See Tobin, *supra* note 29, at 295.

¹¹⁶ See Tobin, *supra* note 29, at 296.

¹¹⁷ *Supra*.

¹¹⁸ *Supra*.

¹¹⁹ *Supra* at 285.

¹²⁰ See Van Bueren, *supra* note 88, 119.

¹²¹ CO Costa Rica, CRC/C/CRI/CO/4 at para. 36.

opportunities for discrimination.¹²² Secondly, the committee urges states to take appropriate protective measures to address the threat posed to a child's identity by non-state actors.¹²³ Article 8 must be read in the context of the object and purpose of the CRC as required by article 31 of the VCLT, whereby state parties are obliged to take all appropriate measures to support children in the preservation of their identity. Identity is incredibly important to a child and that means that states ought to give due consideration to the scope and content of the right. Since the right to identity is broad and constantly evolving, it must be clearly articulated to ensure that states realise its full potential in protecting the evolving dimensions of a child's identity.¹²⁴

Prior to the adoption of the CRC, no other general human rights treaty had included a right to preservation of identity.¹²⁵ It was not until the 2010 adoption of ICPPED that another treaty included this.¹²⁶ Although other international human rights treaties do not explicitly refer to a right to identity, this issue remains notable in international law.¹²⁷ The Genocide Convention deals with the issue of identity indirectly¹²⁸ and the ECtHR has recognised elements of individual and family identity as part of the right to private and family life under article 8 of the ECHR.¹²⁹

2.2.4. Regional Legal instruments

2.2.4.1. ECHR

In the ECtHR, a so-called right to identity has largely developed from article 8's right to respect for one's private life.¹³⁰ This has sometimes been used together with a right to be free from discrimination, and a right to claim one's identity.¹³¹ Article 8 protects against unwanted intrusions into

¹²² See Tobin, *supra* note 29, at 289.

¹²³ CO Ukraine, CRC/C/15 Add.42 paras. 11-28.

¹²⁴ See Tobin, *supra* note 29, at 306.

¹²⁵ *Supra* at 283.

¹²⁶ UN Doc A/RES/61/177 art 25.

¹²⁷ See Van Bueren, *supra* note 75, at 17-30

¹²⁸ Genocide Convention, 1948 at 11 (e).

¹²⁹ ECtHR, *Pretty v UK* at para. 61.

¹³⁰ ECtHR, *Goodwin v UK* at para. 90

¹³¹ *Supra* note 128.

people's lives in guarding a person's private space.¹³² This protection of people's inner privacy relates to their identity formation.¹³³ The ECtHR has 'gone beyond the established traditional meaning of private life and ha[s] extended this meaning to cover [...] manifestations of the individual's personality.'¹³⁴ In this regard there is a recognition of the right to express one's identity through personal autonomy, as the principle of personal autonomy - pivotally gives protection to an individual's personal sphere, including 'their right to establish details of their identity without interference from the state.'¹³⁵ Accordingly, the ECtHR has stated that 'human dignity and human freedom imply that a man should be free to shape himself and his fate in the way that he deems best fits his personality.'¹³⁶ In the landmark case of *Pretty v UK*, the ECtHR interpreted article 8 to mean that the state must refrain from unwanted intrusions and act in ways that enable personal identities to be built and allowed to exist.¹³⁷ The court went further to explain that the concept of 'private life' under article 8 is a broad term and not susceptible to exhaustive definition. Therefore, it may encompass aspects of an individual's physical and social identity,¹³⁸ such as gender identification, name and sexual life which would all fall within the personal sphere protected by article 8. Accordingly, the court considered that personal autonomy was an important principle underlying the interpretation of its guarantees.¹³⁹

Applying this to the notion of race, if 'black' were to constitute a part of a person's individual and collective identity, an intrusion or discrimination based on a person's race may amount to a violation of their right to hold an identity. Hypothetically, if the ruling in *Pretty v UK*, were to be applied to the question at hand, the UK would have to act in a way that would allow black boys to build their personal identities, based on belonging to 'a' group and be allowed to exist free of discrimination based on their race. Black boys have often been discriminated against in schools for their respective hairstyles such as braids.¹⁴⁰ If applying the ECtHR's interpretation of article 8, hairstyles would constitute a 'manifestation' of their personality because a black boy growing his afro hair and subsequently braiding it would simply be a manifestation of his wish to grow his hair. Therefore,

¹³² See for example *Tysiac v Poland*.

¹³³ J. Marshall, 2016 at 37.

¹³⁴ L. Loucaides, 1990 at 189.

¹³⁵ ECtHR *I v UK*, at para. 70.

¹³⁶ ECtHR, *Cossey v UK* at paras. 24–25.

¹³⁷ Supra note 128.

¹³⁸ ECtHR, *Mikulić v. Croatia* at para. 53.

¹³⁹ Supra note 128.

¹⁴⁰ V. Gillies, 2010 at 25-26.

excluding black boys from school due for this reason, would infringe upon their right to express their identity.

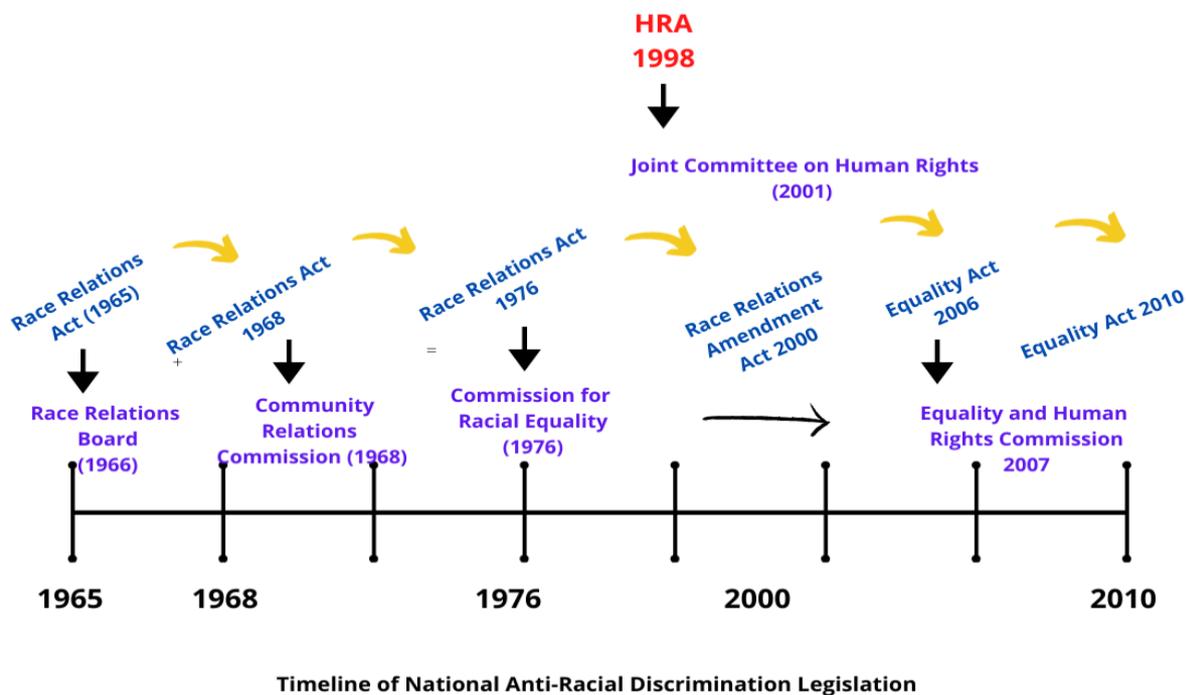
2.2.5. Conclusion

Individual Identity can be summarised as (i) who a person is at a given time (ii) the sense of being the same 'who' or 'what' over time; and (iii) the external aspects of an identity. Collective identity can be explained as (i) the network of the social relationships constituting the collective; (ii) the distinguishing internal attributes of the collective itself; and (iii) the external ties, leading to 'a' group to be treated collectively 'as' something. In recognising the importance of the right to identity, article 8 of the UNCRC stresses that state parties must respect the right to hold an identity and that interfering with any aspect of a child's identity is therefore prohibited. However, it is important to note that similarly to the right to non-discrimination; the legislative upholding of the right to hold an identity may not necessarily mean that children are realistically allowed to manifest their individual and collective identity without fear of reprisal. Although the ECtHR has extended the meaning of identity to cover manifestations of an individual's personality, thereby recognising the right to express one's identity through personal autonomy; it is important to remember that black boys are still subjected to state interference for displaying certain aspects of their individual and collective identity. In this respect it becomes clear that some identities are more socially *acceptable* and *desirable* than others because human beings are in fact not equal. Therefore, states ought to take appropriate measures to train and educate all sectors of society to adequately outlaw de facto racial discrimination and make black boys right to non-discrimination and identity a reality.

3. UK Legal System

This chapter discusses the UK’s legal system and highlights how notwithstanding legislation to outlaw racial discrimination, in line with article 2 of the CRC, racial discrimination against black boys is still widespread. This discrimination is most notably felt in the CJS, where black boys are tremendously overrepresented. The CRC Committee is concerned over this disproportionate representation,¹⁴¹ and the CERD committee has issues recommendations for thorough investigation,¹⁴² as well as measures to ensure that ‘stop and search’ are used in a non-discriminatory manner.¹⁴³

The aim of this chapter is threefold. First, to explain the events that led to the to the anti-discrimination laws entrenched in the system today, with specific reference to the Equality Act 2010. Second, to show how and why poor police-community relations in Britain have rendered anti-racial discrimination legislation meaningless. Third, to examine the labelling of black boys as aggressive and the resulting infringement upon their right to non-discrimination and identity under the CRC.



¹⁴¹ CRC/C/GBR/CO/5 at para. 78.d.

¹⁴² CERD/C/GBR/CO/21-23 paras. 28-19.

¹⁴³ CERD/C/GBR/CO/21-23 at para. 27.

3.1. Legislation

3.1.1. The Human Rights Act 1998

The UK ratified the ECHR in 1953.¹⁴⁴ The HRA, fully incorporating the ECHR into domestic law, received royal assent in 1998 and came into effect in 2000.¹⁴⁵ There are three ways in which the ECHR forms part of UK law through the HRA: first, by interpreting all law, insofar as possible in a way compatible with HRA rights. Second, by being able to declare an act of parliament to be incompatible with the rights enshrined in the HRA. Third, by stating that it is unlawful for any public authority to act in a way that is incompatible with human rights. However, there is only a duty for the courts to consider decisions made by the ECtHR to the extent that the court deem them to be of relevance.¹⁴⁶ The HRA has fifteen substantive rights, four being absolute, and non-derogable rights and the rest can be limited or qualified. Article 15 of the ECHR sets out the circumstances where states may validly derogate from their Convention obligations. This means that the UK government can set out limitations on those rights if those limitations seek a legitimate aim and are necessary in a democratic society.¹⁴⁷ An example of this, is the right to respect for family and private life enshrined under article 8. As discussed in the previous chapter, the ECHR has read the right to identity to be encompassed within this right, similarly, the HRA assumes the right to personal autonomy and integrity to be included within this right.

Interestingly, article 14 of the HRA, requires there to be no discrimination in the application of human rights on any grounds such as race, sex or colour. However, it does not provide for a free-standing right to non-discrimination unlike other regional and international legal instruments, only that the other rights enshrined in the HRA be secured without discrimination.¹⁴⁸ Hence, if a person were to complain about being discriminated against on the grounds of race under the HRA, they would only be able to argue it insofar as the discrimination interferes with another right in the HRA. This is problematic as the right to non-discrimination ought to be both an umbrella right and a right on its own. Fortunately, the UK has other specific legislation to outlaw discrimination.

3.1.2. The Equality Act 2010

The Equality Act 2010 was primarily designed to simplify and strengthen the diverse discrimination that had emerged over the past 40 years.¹⁴⁹ The Act replaces nine earlier pieces of legislation covering gender, race, disability, religion or belief, sexual orientation and age. It also seeks to fully

¹⁴⁴ *A Parliamentarian's Guide to the Human Rights Act*, 2010 at 5.

¹⁴⁵ Although it came into force in 2000, it is referred to as HRA 1998 as it was given Royal Assent in 1998.

¹⁴⁶ *Supra* note 144 at 7.

¹⁴⁷ *Supra* note 144 at 15-16.

¹⁴⁸ *Supra* at 44.

¹⁴⁹ B.A. Hepple; M. Coussey and T. Choudhury, 2000 at 5-6.

implement the principal EU directives in these fields.¹⁵⁰ Alongside part 1 of the Equality Act 2006 that set up the EHRC, to monitor its implementation, it is the core of the fifth generation of equality and non-discrimination law in Britain.

The Equality Act has three distinctive features. Firstly, it is *comprehensive* and adopts an integrated perspective of equality enforced by the EHCR. The EHCR marks a decisive shift away from the politics and law of single identities such as race – towards the politics and law of fundamental human rights.¹⁵¹ Secondly, it *harmonises, clarifies and extends* the concept of discrimination, harassment and victimisation and applies them across nine protected characteristics.¹⁵² Thirdly, it contains measures of *transformative* equality extending positive duties on public authorities to have due regard to the need to eliminate discrimination and foster good relations between different groups.

Race was the first ground on which discrimination was outlawed in Britain. Race is defined as including colour; nationality; and ethnic or national origin.¹⁵³ However, the Equality Act does not define the term 'ethnic or national origin.' On this issue, the house of Lords laid down guidance as to what was covered under this concept.¹⁵⁴ The characteristics include: a long-shared history and a cultural tradition. In addition, factors such as: a common geographical origin; a common language; common literature; a common religion; and being a minority or being oppressed by a dominant group within a community may be of relevance. However, in the case of *Dawkins v Department of the Environment*, it was held that Rastafarians did not satisfy these requirements as their history only went back 60 years and there was nothing to distinguish them from other Jamaican or Afro-Caribbean descent.¹⁵⁵ This case highlights the problematic definition of what constitutes an ethnic minority - whilst Jews and gypsies have historically been considered ethnic minorities and have been able to seek redress, other minorities within minorities have not. Therefore, the intersectional, institutional, anti-black racism that different groups of black people face has not been recognised.¹⁵⁶ As such, although legislation condemning racial discrimination has been in place in Britain since 1965, it has been argued that 'piecemeal' reforms have been unsuccessful in protecting black people from institutional racism in Britain.¹⁵⁷

¹⁵⁰ See for example Council Directive 2000/43/EC.

¹⁵¹ Supra at 33.

¹⁵² Supra.

¹⁵³ *Equality Act*, 2010, s 9(1).

¹⁵⁴ *Mandla v. Dowell Lee* [1983] UKHL 7.

¹⁵⁵ *Dawkins v. Department of the Environment* [1993] IRLR 284.

¹⁵⁶ F, Brennaan 2017 at 96-97.

¹⁵⁷ R. Joseph-Salisbury; L. Connelly and P. Wangari-Jones, 2020 at 2.

3.1.3. Anti – Racial Discrimination Legislation

In 1965, Britain saw its first Race Relations Legislation: 'The Race Relations Act.' It came about as a result of resentment towards the black population who had been invited from Commonwealth Caribbean nations - to settle in Britain, in efforts to assist the empire during the war.¹⁵⁸

The Act outlawed discrimination on the "grounds of colour, race, or ethnic or national origins" in public places in Great Britain.¹⁵⁹ It prompted the creation of the Race Relations Board which considered complaints under the Act.¹⁶⁰ The Act specifically excluded shops and private boarding houses, only outlawing discrimination in "places of public resort."¹⁶¹ The Race Relations Board was rather weak in its enforcement capabilities, being limited to conciliation and an assurance not to return to the discriminatory behaviour.¹⁶² It was "a weak piece of legislation" and failed to end racial discrimination in the UK fully.¹⁶³ The Act was thereafter strengthened by the Race Relations Act 1968, which extended the legislation's remit to cover employment and housing.¹⁶⁴ It was part of the second generation of anti-discrimination legislation in Britain and was also a measure of formal equality.¹⁶⁵ This Act created the Community Relations Act. It was subsequently repealed and sections from the two earlier Acts incorporated in and by the Race Relations Act in 1976. This Act created the CRE which was formed through the amalgamation of the Race Relations Board and the Community Relations Commission. The 1976 Act was eventually repealed and amended by the Race Relations Amendment Act 2000 - obliging schools, local authorities and the Department of Education to 'have due regard to the need to: eliminate unlawful racial discrimination; promote equality of opportunity between different racial groups; and promote good race relations between different ethnic groups.'¹⁶⁶ This period also saw the enactment of the CRE's Statutory Code of Practice, advising schools on how they ought to meet the duty by specifically mentioning the need to assess the impact of behaviour,

¹⁵⁸ Supra note 10 at 27.

¹⁵⁹ (http://news.bbc.co.uk/onthisday/hi/dates/stories/december/8/newsid_4457000/4457112.stm), visited (12/05/2021).

¹⁶⁰ B.A. Hepple, 1966 at 809.

¹⁶¹ *Race Relations Act*, 1965, Chapter 73, s.1(2).

¹⁶² P.N. Sooben, 1990 at 1.

¹⁶³ (<https://www.nationalarchives.gov.uk/cabinetpapers/themes/discrimination-race-relations-policy.htm>), (last visited 15/05/2021).

¹⁶⁴ B.A. Hepple, 2011 at 36.

¹⁶⁵ Supra.

¹⁶⁶ *Race Relations Act*, 1976, s.71(1).

discipline and exclusion policies on different ethnic groups.¹⁶⁷ This legislation was then merged into the Equality Act 2006 which created the Equality and Human Rights Commission - replacing the CRE. All legislation has now been merged into the Equality Act 2010. However, these 'piecemeal' reforms have proven to be inadequate in dealing with structural racism, this inadequacy has been highlighted by decades of tweaks to the system with little change to the hegemony of white supremacy policing.¹⁶⁸

3.2. Police - Community Relations

Britain has a history of poor police and black community relations. Racist 'stop and search' sparked the Brixton uprisings of 1981,¹⁶⁹ and four years later, following the police shooting of Cherry Groce, a black mother of two, crowds began to gather on Brixton streets and the clashes left two days of rioting and the killing of a journalist.¹⁷⁰ Only a week later, a police officers 'non-deliberate push' resulted in the death of Cynthia Jarret - another black woman in north London. The following day, crowds gathered outside the police station in what culminated in the 1985 riots.¹⁷¹ A few years later, the tragic murder of Stephen Lawrence, a black 17 year old boy in 1993 by a group of white youths resulted in the Macpherson Report, an inquiry that, in 1999, after years of the public being led to believe that the investigation had been carried out satisfactorily,¹⁷² concluded that the investigation into the teenager's murder was 'marred by a combination of professional incompetence, institutional racism and a failure of leadership by senior officers.'¹⁷³ 'At its most stark the case against the police was that racism infected the Metropolitan Police Service and that the catalogue of errors could only be accounted for by something more than incompetence.'¹⁷⁴ The report has been described as "one of the most important moments in the modern history of criminal justice in Britain,"¹⁷⁵ as it propelled the concept of institutional racism to the top of the political agenda, as demonstrated through the introduction of the Race Relations (Amendment) Act 2000 that placed unprecedented duties to pursue race equality

¹⁶⁷ Department for Education and Skills (DfES) Priority Review: Exclusion of Black Pupils, *Getting it. Getting it right*, 2006 at 18.

¹⁶⁸ See R. Joseph-Salisbury et al. at supra note 157 at 2.

¹⁶⁹ Supra at 5.

¹⁷⁰ (http://news.bbc.co.uk/onthisday/hi/dates/stories/september/28/newsid_2540000/2540397.stm), last visited 14/05/2021).

¹⁷¹ See R. Eddo-Lodge, *supra* note 10 at 52.

¹⁷² *The Macpherson report*, 1997 at para. 46.2.

¹⁷³ Supra at para. 46.1.

¹⁷⁴ Supra at para. 46.27.

¹⁷⁵ (http://news.bbc.co.uk/2/hi/uk_news/3685733.stm), last visited (12/05/2021).

on all publicly funded educational institutions.¹⁷⁶ However, it was not a novelty in shedding light onto the issue of deteriorating police-community relations.

Back in 1981, the Scarman report had concluded that it was important to tackle racial discrimination and disadvantage and that 'efforts should be made to recruit more ethnic minorities into the police force and changes in training and law enforcement.'¹⁷⁷ Unfortunately the recommendations of the Scarman report were not adequately implemented. Similarly, the overall aim of the Macpherson report was the elimination of racist prejudice and disadvantage as well as the demonstration of fairness in all aspects of policing in order "to increase trust and confidence in policing amongst minority ethnic communities."¹⁷⁸ The extent to which police - community relations had ameliorated by 2011 was scant, as demonstrated by the London Riots - the deadliest riots that Britain had ever seen,¹⁷⁹ which erupted following the police 'lawful killing' of yet another black man. To declare these cases as 'exceptional' obscures the reality of police - community relations and therefore, these high-profile cases are not anomalies, but are 'symptomatic of structural and institutional racism.'¹⁸⁰

Therefore, although anti- racial discrimination laws do exist in Britain today, it can be argued that it is the police itself who is the perpetrator of racial discrimination. This renders anti – racial discrimination legislation fundamentally meaningless when those responsible for enforcing it use their power as a justification for acting in contravention to anti-discrimination laws. This would explain why the Committee stated that the eradication of discrimination may require changes in both legislation and educational measures to change attitudes¹⁸¹ - because a discriminatory act may very well stem from the police itself. Considering this, the mere existence of anti-discriminatory legislation would be insufficient when a civil authority of the government is the one responsible for perpetuating discrimination. The potential police execution of discriminatory acts against black people, especially children is best demonstrated with the 'stop and search' checks.

3.3. Criminal Justice System (CJS)

3.3.1. Stop and Search

Notwithstanding the legislation in place to outlaw racial discrimination, in the 1970s, the criminal justice system continued to rely upon sections of the 1824 Vagrancy Act. Section 8 gave police officers the power to 'stop and search' anyone suspected of having committed a crime - officers could

¹⁷⁶ D. Gillborn, N. Rollock, P. Warming ton, S. Demack, 2012 at 5.

¹⁷⁷ *The Scarman Report*, 1981 at para. 773.

¹⁷⁸ *Supra* note 172 at para. 47.1

¹⁷⁹ (<https://www.bbc.com/news/newsbeat-36944509>), last visited (12/05/2021).

¹⁸⁰ See R. Joseph-Salisbury et al. at *supra* note 157 at 3.

¹⁸¹ CRC/GC/2003/5 at para.12.

search anyone who was “disorderly [...] or vagabond.”¹⁸² These were otherwise known as SUS laws and they brought with them a coded implication that black people were ‘suspected persons.’¹⁸³ As such, cases resembling that of “the Oval 4” in 1972 - who were arrested for ‘looking like criminals’ were not uncommon. Today, ‘stop and search’ checks continue to be commonplace and the power to conduct these searches stem from three pieces of legislation. Firstly, the PACE was brought in following the repeal of the controversial SUS Laws in 1988.¹⁸⁴ Under PACE, police officers have legislative powers to ‘stop and search’ those they suspect to have certain items.¹⁸⁵ In order to carry out the checks, ‘there must be reasonable grounds to believe in criminal activity [...] based on objective factors.’¹⁸⁶ Secondly, under the Misuse of Drugs Act 1968, the police can search individuals on suspicion of drugs.¹⁸⁷ In this case, there must also be reasonable grounds - which can be a person matching a description, portraying suspicious behaviour or the smell of cannabis.¹⁸⁸ Thirdly, section 60 of the Criminal Justice and Public Order Act allows for the police to carry out these checks based on no suspicion searches.¹⁸⁹ These searches can also be referred to as “pre-condition” searches” as they require specific pre-conditions to be met before their use is authorised.¹⁹⁰

Although since the 1991 Criminal Justice Act, governments are obliged to publish data on ethnicity and the CJS,¹⁹¹ with the purpose of ‘avoiding discriminating against any persons on the grounds of race, sex or any other improper ground;’¹⁹² The use of ‘stop and search’ has been argued to not only be ineffective, but also highly discriminatory against black communities and has led to harmful police-

¹⁸² *The Vagrancy Act 1824*, s.8.

¹⁸³ See R. Eddo-Lodge, *supra* note 10 at 34.

¹⁸⁴ J. Brown, 2020 at para. 4.2.

¹⁸⁵ *Police and Criminal Evidence Act*, 1984 at para. 1.4.

¹⁸⁶ *Supra* at para. 2.2.

¹⁸⁷ *Misuse of Drugs Act 1971*, s.23(2).

¹⁸⁸ (<https://www.justiceinspectrates.gov.uk/hmicfrs/publications/peel-police-legitimacy-2017/>), last visited (25/10/2020).

¹⁸⁹ *Criminal Justice and Public Order Act*, 1994, s60

¹⁹⁰ *Supra*.

¹⁹¹ *The Lammy Review*, 2017 at 11.

¹⁹² *Criminal Justice Act*, 1991, s.95.

community relations.¹⁹³ Stop and search is often promoted as a useful police tactic to reduce crime and, whilst many young black men agree, this is only when it is used fairly.¹⁹⁴ However, when stop and search is used in a way that is perceived to be unfair or ineffective, it has a lasting corrosive impact on young peoples' trust in the police. Moreover, there is virtually no data to corroborate whether 'stop and search' checks are effective as only 15% of them result in arrest.¹⁹⁵ Young black people maintain that they felt that police had often made incorrect assumptions about them, most often because of their ethnicity.¹⁹⁶ This has undermined young black men's trust in the police and further exacerbated poor community - police relationships.

3.3.1.1. Children

Despite a decrease in the number of children in the youth CJS in England, the proportion of black boys has been increasing. Black children are over-represented in every stage of the youth justice systems in England and Wales.¹⁹⁷ In the last five years, whilst the number of 'stop and searches' conducted on white suspects decreased from 75% in 2014/15 to 59% in 2018/19, the numbers increased from 13% to 22% for black suspects.¹⁹⁸ From the first point of contact in the youth justice system, there are a disproportionate number of Black children entering the system as a result of discriminatory police 'stop and search' practices.¹⁹⁹ Firstly, in 2018, black boys were four times more likely than white children to be arrested.²⁰⁰ Secondly, the number of black boys given a caution or sentence was also three times higher than that of the general 10–17-year-old population.²⁰¹ Thirdly, whilst there has been a reduction in the number of white children sentenced for indictable offences between 2013 and 2018, the proportion of all occasions where Black children were sentenced for indictable offences increased from 13% to 21% over the same period.²⁰² Today, black children make

¹⁹³ (<https://www.theguardian.com/uk-news/2019/apr/14/stop-and-search-metropolitan-police-sajid-javid>), last visited (27/10/2020).

¹⁹⁴ P. Keeling, 2017 at 2.

¹⁹⁵ *Supra* at 6.

¹⁹⁶ *Supra* at 3.

¹⁹⁷ L. Robertson and J.P. Wainwright, 2020 at 1.

¹⁹⁸ *Statistics on Race and the Criminal Justice System 2018/19* at 3.

¹⁹⁹ See L. Robertson, et al. *supra* note 208 at 3.

²⁰⁰ *Supra* note 197 at 23.

²⁰¹ Youth Justice Statistics 2018/19 at 16.

²⁰² *Supra* at 7.

up one-third of the custodial remand population and the proportion of children in youth custody from a black background accounts for a quarter of the youth custody population.²⁰³

These numbers are not surprising when considering that in 2017, MP David Lammy conducted a review of the treatment of and outcomes for BAME individuals in the Criminal Justice System.²⁰⁴ The Review gave special focus to the youth system and revealed the prejudice that black and minority ethnic children continue to face in the justice system.²⁰⁵ Lammy's greatest concern was the inaccurate success story that the CJS claimed the youth justice system to be: although far fewer young people were offending, reoffending and going into custody; the BAME proportion on each of those had been rising significantly over the last ten years.²⁰⁶ As such, it had not been successful for the entire population. The BAME proportion of youth prisoners had risen from 25% to 41% in the decade 2006-2016.²⁰⁷ The review also found that, in many prisons, relationships between staff and BAME prisoners were poor and many BAME prisoners believed they were being actively discriminated against which contributed to a desire to rebel against the system rather than reform. Furthermore, BAME children's prisoners were less likely to be recorded as having problems, i.e. mental health, learning difficulties and troubled family relationships, which suggests that many simply had unmet needs, thereby hindering efforts to tackle the root causes of offending and reoffending amongst BAME children and thus entrenching disproportionality.²⁰⁸ The review recommended, amongst others that: if CJS agencies could not provide an evidence-based explanation for the disparities between ethnic groups then reforms should be introduced to address those disparities. There should be robust systems in place to ensure fair treatment in every part of the CJS and that to remove the symbols of an 'us and them' culture – the lack of diversity among those making important decisions in the CJS, had to be addressed and much more had to be done to demystify the way decisions are made at every point in the system.

3.3.1.2. Impact

The impact that 'stop and search' checks may have on children can be very detrimental to their overall development. Firstly, 'stop and search' checks can strip children of their personality and make them become aggressive.²⁰⁹ For example, young children who constantly get stopped by the police

²⁰³ Supra note 1 at para. 231.

²⁰⁴ Black and minority Ethnic (this term is only being used in this paper when quoting from other sources).

²⁰⁵ (<https://www.theguardian.com/commentisfree/2017/sep/08/david-lammy-review-bame-children-face-prejudice-flawed-criminal-justice-system>), last visited (20/05/2021).

²⁰⁶ *The Lammy Review*, 2017 at 4.

²⁰⁷ (<https://www.gov.uk/government/statistics/youth-justice-statistics-2015-to-2016>), last visited (19/05/20221).

²⁰⁸ (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/585904/key-characteristics-admissions-april-2014-to-march-2016-supplementary-tables.xls), last visited (19/05/20221).

²⁰⁹ P. Quinton, N. Bland, and J. Miller, 2000 at 47.

for 'fitting a description' internalise the message that they *look like* or *should be* criminals, thereby making them angry about the preconceived view the police may have of them, independently of whether they have done anything wrong.²¹⁰ Secondly, the 'stop and search' checks may also have a detrimental impact on a child's psychological well-being as they can undermine their sense of belonging to society.²¹¹ For example, some children get stopped throughout their entire school career, which inadvertently results in a negative view of the police, and unlike other members of society, they do not rely on the police to seek redress.²¹² Consequently, the 'stop and search' checks can push boys to engage in criminal activity and increase, rather than decrease criminality as boys may turn to informal street justice in which friends, relatives or the victims themselves take action to seek redress.²¹³

The disproportionate number of black children in the CJS may thus be explained through the 'Labelling Theory.' This is because children play an important role in defining their identity, and no child should be forced to conceal certain aspects of his/her identity for fear of discrimination or reprisal.²¹⁴ However, when black children are 'stopped and searched' for displaying aspects of their identity, such as having braids or wearing a hoodies they are more likely to be 'stopped and searched' by the police.²¹⁵ Many children thus feel that certain aspects of their identity such as their clothing or hairstyles are 'targeted' by the police and some feel that they have to change the way they dress or speak in order to reduce the number of times they are stopped by the police.²¹⁶ This is in stark contrast with their white counterparts who can express their identity without fear of being stopped by the police for doing so.²¹⁷ Therefore, the difference in treatment, in similar situations without a legitimate explanation as well as the concealment of aspects of their identity, could be seen as an infringement on their right to non-discrimination and to identity under the CRC.

Despite the Lammy Review, and its 35 recommendations, in January 2021 the YJB commissioned and published a full report on the ethnic disproportionality in remand and sentencing in the youth justice system. The report concluded that, all other factors being equal, black boys are ending up in the CJS at rates much higher than any other demographic - solely based on their race.²¹⁸ To this end,

²¹⁰ Supra at 56.

²¹¹ Supra at 49.

²¹² Supra at 50-52.

²¹³ Supra at 53.

²¹⁴ See Tobin, *supra* note 29, at 296

²¹⁵ D. Bear, 2013 at 166.

²¹⁶ S. Flacks, 2017 at 373-375

²¹⁷ V. Stone, and N. Pettigrew, 2000 at 13.

²¹⁸ Supra note 1.

it becomes clear that 'piecemeal' legislative reforms and recommendations are insufficient to tackle the discrimination that black boys face in the CJS. Alternative underlying causes for black children ending up in a CJS that is already skewed against them, must thus lie outside the CJS itself. Some of these have been identified as: poverty,²¹⁹ lone parent households²²⁰ and school exclusions.²²¹ Within the educational setting, research has similarly found racial and ethnic disparities in the application of school sanctions, with black boys receiving harsher punishments compared to their white counterparts.²²²

3.4. Conclusion

Britain has a strong legislative system in place to outlaw racial discrimination, one that has been in place for almost 60 years. Yet, racial discrimination, particularly against black people, is predominantly found in the CJS today. The effects of this are most striking in relation to black men and boys who suffer the consequences of being labelled as aggressive and criminal which results in a lack of trust in the system and overall poor police-community relations. However, it is important to address the fact that the CJS does not exist in a vacuum and is also part of a wider structure that may have labelled young black boys as aggressive and criminal. To this end, the following chapter will focus on schools as one of the underlying causes for the disproportionate number of black children in the CJS, and how the violation of their right to non - discrimination on grounds of race, impacts and infringes upon their right to identity under the UNCRC.

²¹⁹ (<http://www.jrf.org.uk/data/poverty-rate-ethnicity>), last visited (20/06/2021).

²²⁰ (<https://www.google.co.uk/search?q=dependent+children+in+families+by+family+type+and+child's+ethnicity>), last visited (25/05/2021).

²²¹ (<https://www.gov.uk/government/statistics/permanent-and-fixed-period-exclusions-in-england-2015-to-2016>), last visited 26(06/2021).

²²² M. Rocque, and R. Paternoster, 2011, at 640.

4. Schools

This chapter will focus on the de Jure application of the principle of non-discrimination in schools. It will then examine the de facto discrimination that occurs against black boys in schools despite its de jure outlawing. Finally, the case study of Duke's Aldridge Academy will be explored in order to elucidate on the lived experiences of young black boys.

4.1. De Jure

Schools are regulated by several pieces of legislation. To begin with, the Equality Act 2010, makes it unlawful for schools to discriminate against students because of any protected characteristic. Within schools, the Education Act 2002 (amended by Education Act 2010), and the Education and Inspections Acts 2006 bind schools to its duties and as such, schools are regulated by these acts and regulations.

4.1.1. Schools under the Equality Act

The Equality Act makes it unlawful for the responsible body of a school 'to discriminate against, harass or victimise a pupil or potential pupil by treating them less favourable because of any protected characteristics.'²²³

There are several general exceptions to the Act, for instance, the curriculum and school uniforms.²²⁴ Nonetheless, schools must ensure the way in which issues are taught do not subject any student to discrimination. Whilst school uniforms or other aspects of appearance such as hair colour or style are not covered, the general requirement is not to discriminate in the treatment of students on this basis.

The Act has introduced a single 'Public Sector Equality duty.' It has three main components that oblige public bodies to: eliminate discrimination; advance equality of opportunity between people who share a protected characteristic and those who do not share it; and to foster good relations across all characteristics – including those who share and those who do not share the protected characteristic.²²⁵ In this respect, any failure of schools to address their racial exclusion gaps is not due to the lack of sufficient legislative base.²²⁶

4.1.2. The Education Acts and Education and Inspections Act

In terms of school exclusions, the EA 2002 and the EIA 2006 include provisions relating to exclusions permanent and fixed term exclusions.²²⁷ Under the acts, a school can permanently exclude a pupil if

²²³ *The Equality Act 2010 and schools*, 2014 at paras. 1-5-1.9.

²²⁴ *Supra* at paras. 2.8-2.12 and paras. 2.15-2.18.

²²⁵ *Supra* at para. 5.1

²²⁶ *Supra* note 167.

²²⁷ *Education Act 2002*, s.52; *Education and Inspections Act 2006*, s. 97-108.

they have seriously broken the school behaviour policy and when allowing that pupil to remain in the school would seriously harm the education of that pupil or others. The power to exclude rests on the head teacher and this must be on disciplinary grounds.

A school may exclude a pupil for a fixed period for persistent disruptive behaviour where this is not serious enough to warrant a permanent exclusion.²²⁸ A student may be excluded for one or more fixed periods, so long as it does not surpass 45 days in total out of an academic year, however these are not required to be for a continuous period.²²⁹

Regarding establishing the facts, the civil standard of proof must be established on 'the balance of probabilities.' However, in carrying out this function, they ought to have due regard to eliminate discrimination as established under the Equality Act.²³⁰ Since the exclusion rates for particular ethnic groups of students are disproportionately higher, for example, black Caribbean students, headteachers ought to examine what specific assistance can be rendered to those students to minimise the effects of disproportionate exclusions in the school system.²³¹

4.2. De Facto

Despite the clear outlawing of racial discrimination in schools, the reality for many black boys who experience schooling is significantly different to that in legislation. Black boys' parents reported that their children were 'automatically not expected to pass examinations'²³² and there is extensive research to suggest that black boys are excluded from schools up to six times more often than their white counterparts.²³³ Scholars and policy makers have speculated about the causes of this disparity. Today, there are two leading schools of thought regarding the disproportionate higher number of school exclusions for black boys, they are denominated as in-school factors and out-of-school factors.

The argument for in-school factors revolves around the fact that black pupils are excluded in circumstances where white pupils would be less likely to be excluded.²³⁴ Therefore, the exclusion gap is due to institutional racism, because as scholars argue, all other factors controlled for, black boys have a higher chance of being excluded – hence the disproportionate number of school exclusions is

²²⁸ *The Equal Rights Review*, 2012 at 114.

²²⁹ *Education Act*, 2002, s.51A.

²³⁰ *Exclusion from maintained schools, academies and pupil referral units in England*, 2017 at para 11.

²³¹ *Supra* at para. 21.

²³² D. Gillborn, N. Rollock, C. Vincent and S. J. Ball, 2012 at 131.

²³³ (<https://www.independent.co.uk/news/education/education-news/black-caribbean-children-schools-excluded-b1822163.html>), last visited 10/06/2021.

²³⁴ R. Majors, 2001 at 100.

a symptom of institutional racism within schools.²³⁵ The argument builds on evidence to suggest that black boys are disciplined more frequently; more harshly for less serious behaviour than other pupils; and they are less likely to be praised for good behaviour, as such this differential approach is likely to lie with the teachers, in the school rather than with the students. This (un)intentional racism has been argued to stem from decades of negative portrayal of black men as aggressive, coupled with negative media portrayal of 'street culture' which encourage staff to *expect* black pupils to be less well behaved and to *perceive* them as a greater threat.²³⁶

The argument for focusing on out-of-school factors alleges that black boys are subjected to negative influences outside of school that lead them to become more aggressive inside school. Therefore, black boys are more likely to be excluded from school for 'violence against other pupils' more often than other pupils who may be excluded for 'persistent disruptive behaviour' because the cultural factors they are presented with have encouraged young black men and boys to posture as aggressive as a means of getting respect.²³⁷ Proponents of this school of thought claim that factors such as poverty, single-parent household and community disempowerment are the main drivers behind the disproportionate number of school exclusions that black boys face. For example, Sewell argues that reason behind the disproportionate amount of violent crime committed by young black males and high exclusion rates from schools is due to the damage that results from black boys not knowing their fathers.²³⁸

However, whether it be in, or out of school factors; the reality is that school exclusions, together with the gap in educational achievement between ethnic groups, remain ongoing areas of contention for Black boys specifically.²³⁹

4.2.1. School Exclusions

In 2006, the UK government commissioned a report titled 'Getting it. Getting it right,' concluding that every year, 1000 Black pupils were permanently excluded and nearly 30,000 received a fixed period exclusion. Black pupils were three times more likely to be excluded than their white peers, even after all other background factors being considered.²⁴⁰ Considering this, exclusion has been and continues

²³⁵ D. Gillborn, and C. Gipps, 1996 at 5.

²³⁶ Supra note 167 at 11.

²³⁷ Supra.

²³⁸ T. Sewell, 2010 at 16.

²³⁹ D. Abbott, 2010 at 10.

²⁴⁰ Supra note 167 at preface.

to be an iconic issue within Black communities that highlights the way the education system discriminates against Black pupils.²⁴¹

In 2019, the government published the Timpson Review on School exclusions which highlighted how rates of exclusions continued to vary considerably by ethnicity.²⁴² The review revealed how Black children were still 1.7 times more likely to be permanently excluded compared to white children and had a higher chance of having a fixed-period exclusion compared to white British pupils. It went further to state that there were cases where this was due to 'cultural misunderstanding' which led to behaviour being misinterpreted and the unconscious lower expectations for some black children coupled with the 'labelling' of black pupils had a role to play in the disproportionately high number of school exclusions for certain ethnicities.²⁴³

(Appendix VII) In February 2021, black pupils continued to be disproportionately affected by school exclusions, both permanent and fixed term. Black Caribbean were the most likely to be excluded, followed by mixed white and black Caribbean and then black other. Unfortunately, despite the government report in 2006 and the 35 recommendations made by Timpson in 2019, school exclusions continue to disproportionately affect black pupils.

The 2006 report showed that excluded Black pupils were less likely to fit the typical profile of excluded white pupils such as being eligible for free school meals; having special needs; having a history of poor attendance; having a criminal record or being looked after children.²⁴⁴ This evidence challenges the proponents of out-of-school factors and that racial inequalities are only a result of socio-economic inequalities in society.²⁴⁵ Hence, this alludes to the existence of an X factor related to ethnicity which would explain the exclusions gap.²⁴⁶ Moreover, it would also support the focus on in-school factors rather than out of school factors as the driver behind the school exclusions gap as it would mean that the education system treats black pupils differently from others.²⁴⁷

In light of this, it is problematic to solely focus on out-of-school factors as there is comparatively weak evidential basis for arguing that 'street culture' has a more persuasive influence on Black young boys than it has on any other young boys.²⁴⁸ So, out of school factors could explain the background to

²⁴¹ Supra.

²⁴² *Timpson Review of School Exclusion*, 2019 at 35.

²⁴³ Supra.

²⁴⁴ Supra note 167 at 10.

²⁴⁵ Supra.

²⁴⁶ Supra.

²⁴⁷ Supra.

²⁴⁸ Supra.

individual exclusions, however it would be difficult to use them as an explanation for an entire 'exclusions gap'.²⁴⁹ Moreover, a general acceptance of the view that out-of-school factors are the major cause of exclusions would imply that black boys are more likely to be excluded because they are less well behaved than other boys or that all black boys come from single parent households or lower socio economic backgrounds.²⁵⁰ This has the capacity to be seen as a racist and discriminatory viewpoint since it would be generalising an entire race. Furthermore, a hyper-focus on out-of-school factors has the potential of contributing to the negative portrayal of young black men as violent, misogynistic, aggressive and disruptive has the potential to reinforce some teachers negative attitudes towards black boys.²⁵¹ Moreover, to argue that absent black fathers and lone-parent households are to blame for the disproportionate number of school exclusions,²⁵² fails to consider that there are many other male role models other than fathers in black households.²⁵³ Consequently, the argument for the view that cultural factors involving black communities, otherwise known as the 'deficit model', is to blame for poor behaviour in schools may be used to legitimise subconscious racist perception of young black people and, as such further discriminate against them.²⁵⁴

As per the Education Act, schools may exclude a pupil when he has seriously broken the school behaviour policy. However, under the Equality Act, it is unlawful to discriminate against any pupil based on a protected characteristic - although a schools uniforms policy is exempt from this rule. As a result, universal models of the ideal 'disciplined and well behaved' pupil best suit the white, middle class pupil for whom the rules have often been designed for and therefore run the risk of discriminating against pupils who do not fit that description.²⁵⁵ For example, there have been instances whereby schools have rules in place forbidding hats or certain hairstyles, and an infringement on these uniform policies have resulted in exclusions. Unsurprisingly, these rules have disproportionately affected black pupils for whom different hairstyles or hats may be of high value.²⁵⁶ For instance, for some black pupils, the inability to make sense of these rules was misread as defiance and/or aggression – resulting in exclusions.²⁵⁷ More recently, the case of Chikayzea Flanders, aged 12 has demonstrated how the banning of certain hairstyles runs the risk of causing

²⁴⁹ Supra at 13.

²⁵⁰ Supra at 13.

²⁵¹ U. Sesimi, 2010 at 14.

²⁵² See Sewel, *supra* note 238 at 16.

²⁵³ T. Reynolds, 2010 at 18-19.

²⁵⁴ Supra note 167 at 13.

²⁵⁵ See Gillies, *supra* note 140 at 25-26.

²⁵⁶ Supra.

²⁵⁷ Supra.

indirect discrimination and infringing on a black boys right to express his identity.²⁵⁸ Fulham Boys School had forced Chikayzea to shave off his dreadlocks or remain in isolation. When he refused to cut them off, he was excluded from the school as he was told that the hairstyle went against the uniform policy. Lawyers from the Equality and Human Rights Commission won the landmark case, arguing that the school's uniform rules were discriminatory, and that the hairstyle represented a fundamental part of the youngster's identity.²⁵⁹

The impact that school exclusions have on children can be extremely detrimental because an exclusion from school represents the 'most stark and absolute' denial of education.²⁶⁰ This means that black pupils become increasingly denied mainstream education and as a result are denied the improved life chances that stem from education. Therefore, it has been argued that 'for black communities, exclusions are to education what 'stop and search' is to the CJS.'²⁶¹ The result of ending up in the CJS at a young age has been linked to reduced life opportunities and a loss of educational and future life opportunities. Similarly, the result of being excluded from school can amount to a lack of improved life chances.

Furthermore, since only 15% of permanently excluded pupils get back into mainstream schooling, there is an increased relationship between being out of school and falling into delinquency and crime.²⁶² For example, the labelling that occurs in the CJS, whereby youth are more likely to engage in deviance if they are labelled as deviant and therefore at risk of developing a deviant identity;²⁶³ can also be seen in schools, whereby for many years black youth have been problematised and pathologized and have been blamed for their educational failures by relying on the deficit model.²⁶⁴ In this respect, the labelling and stigmatisation that black boys face in schools has meant that they have come to occupy a marginal status. Many young black boys have felt that a school exclusion was indicative of the discriminatory process they would face in wider society, thereby damaging their self-esteem and leading them to behave in 'difficult, aggressive or criminal' ways since that is what they have been labelled as in school.²⁶⁵ Research has found an almost direct correlation between youth

²⁵⁸ (<https://expressdigest.com/rastafarian-boy-12-wins-discrimination-case-over-dreadlocks-ban/s>), last visited 13/06/2021.

²⁵⁹ Supra.

²⁶⁰ Supra note 167 at 15.

²⁶¹ Supra at 14.

²⁶² G. German, 2010 at 12.

²⁶³ J.M. Chavez and G.C. Rocheleau, 2020 at 67.

²⁶⁴ C.Wright, 2010 at 22-23.

²⁶⁵ Supra.

crime rates in an area and the 'out of school' population.²⁶⁶ However, it is also important to recognise that the link between exclusion and criminality is made whilst ignoring the similarities in behaviour that lead to exclusion and criminality.²⁶⁷ Therefore, to focus solely on the exclusion may be a distraction from the more complex issues occurring in the lives of black children in schools such as lower teacher expectations that may be leading to an increased number of school exclusions and contact with the CJS.

4.2.2. Low Expectations

In response to the 2006 report, Sewell argued that the report had failed to focus on the out-of-school factors and instead blamed institutional racism for the over representation of boys in the CJS and the disproportionate number of black boys being excluded from school.²⁶⁸ Yet, in 2012, research involving 62 Black families revealed that teachers tended to have systematically lower academic expectations for black children regardless of their social class or background.²⁶⁹ Gillborn et al showed that when controlling for factors such as class, and marital status (the main out-of-school factors that have been argued to play a role in school exclusions) black students were still the least likely to attain national achievement benchmarks and more likely to be permanently excluded from schools.²⁷⁰ Therefore, regardless of class or background, it was shown that teachers had lower expectations for black children and that heightened disciplinary scrutiny, coupled with criticism operated despite the parents' professional success and stable relationships.²⁷¹

Gillborn's study showed that it would be a mistake to imagine that the relative absence of overt racism in schools signals a sea in change of deeper attitudes.²⁷² This was because many children reported that they were not even put in for exams as teachers simply assumed they would not get the results. Hence, faced with little or no academic expectations, children's sense of self diminished considerably, and they were more likely to get in trouble and excluded from school. Pupils and parents reported that white teachers were content with black students so long as they did not cause trouble and achieved a basic passing grade. However, there was no evidence to suggest the teachers pushed black students to attain the highest grades possible.²⁷³ For example, one student stated that a teacher told him 'Well

²⁶⁶ D. Gillborn, N. Rollock, P. Warmington and S. Demack, 2016 at 15.

²⁶⁷ D. Tucker, 2010 at 20-21.

²⁶⁸ See Sewell, *supra* note 238 at 16.

²⁶⁹ See Gillborn et al. *supra* note 232 at 122

²⁷⁰ *Supra*.

²⁷¹ *Supra*.

²⁷² *Supra* at 130.

²⁷³ *Supra* at 131.

you got a pass, so what more do you want? we weren't expecting you to get a pass.'²⁷⁴ In this instance, children's parents middle-class and marital status was no protection from the low expectations black boys were confronted with.²⁷⁵

The impact that lower teacher expectations can have on black boys irrespective of their socio-economic and parental circumstances can also be incredibly detrimental to their overall sense of identity, as many may feel that they are discriminated against in comparison to their white peers because they have it harder than them in schools:

My son said to me this morning. . . (. . .) 'if you are a White kid, you can just be a kid, you can just be a child. But if you're Black, you're a *Black* child.' You know, you can just *be*, it's much easier if you're White but if. . . Black comes first. And he's fourteen and he was saying that, as an example, that his friends, his White friends just have a different experience, a completely different experience, a freedom that [my son and his Black friends] don't have, that he feels he doesn't have as a Black child. (Barbara, Child Health Professional)

D. Gillborn, N. Rollock, C. Vincent and S. J. Ball, 2012 at 131.

Numerous qualitative studies have revealed that chronically low teacher expectations for black students tend to be the norm in many British schools and many teachers simply accepted the lower level of attainment as indicative of student's true potential.²⁷⁶ For instance, children are likely to be taught in hierarchical sets, which are known to place disproportionate numbers of black students in the lower ranked sets. This has the cumulative negative impact of branding the black boys in the lower sets as simply 'not going anywhere.' Once they become labelled, and teachers have no expectations of them, they become completely demotivated and disaffected, this in turn results in a lack of self-confidence and a diminished sense of self, whereby black boys feel they will never achieve anything in relation to school.²⁷⁷ Sequentially, the labelling of young black boys as aggressive and disruptive or the assumptions made about their ability (or lack thereof) to excel in school could have the same effect as the labelling of young black boys as aggressive or threatening in the CJS. Whilst in the CJS, labelling may result in defiance and in children developing a sense of self consistent with the perceptions of others. In the case of schools - their labelling as disruptive, or as unable to excel in school may have the effect of making children become more disruptive and demotivated to do well in school which could potentially turn into a school exclusion for defiance of authority.

As the Timpson review showed, it was 'clear' that the drivers behind trends by ethnicity are complex and can include factors specific to a child's ethnicity as well as others broader than this. Hence, for

²⁷⁴ Supra.

²⁷⁵ Supra.

²⁷⁶ Supra at 127.

²⁷⁷D. Gillborn, 2015 at 282.

each individual child, the extent and impact of both in and out of school factors ought to be adequately balanced. Since these factors will vary from child to child and according to local context, it is important that schools understand what lies behind trends,²⁷⁸ this is especially true for areas with high deprivation such as some boroughs of London. Therefore, the following section will discuss the reality of Duke's Aldridge Academy in Tottenham, London.

4.3. Duke's Aldridge Academy, Tottenham London – Case Study

4.3.1. The school

When asked about whether they liked school and the subjects taught, some boys said that they did not like certain subjects such as History because they only learnt about 'White Man's History.' For example, 'Richard III' who many of them did not care about because they wanted to learn something 'useful' or learn about 'the real world.'²⁷⁹

This highlights the potential for indirect discrimination as a result of the exemption of the curriculum from the Equality Act. This neutral-looking provision may in fact have the underlying effect of leaving some learners feeling left out because of (i) the clear lack of representation between them and important historical figures and (ii) because what they learn about does not cater for the world they experience. Consequently, this can make them lose interest in school.

Although most boys concurred that they came into school wanting to learn something useful, they agreed that sometimes they did not enjoy school because of the teachers and/or the punishments they received.²⁸⁰ Many of them felt that they were blamed for things they had not done and thus got punished for wrongful acts they had not committed. For instance, one boy said that he had been put in detention for breaking a computer he had not broken and another one explained that the teacher had stereotyped him because he was 'young and black.' The teacher had automatically assumed it was him making noise when it was the white people who we are making noise.²⁸¹ They all felt that many times teachers had automatically assumed they were being disrespectful because their tone of voice was perceived as being disrespectful, and they believed that they were treated differently to their white counterparts. An example included one black boy having done the same amount of work as his white classmate but only he had gotten in trouble. The same boy believed that 'teachers use their authority and take it too far because they use their authority to not listen to me.'²⁸²

This shows that the manifestation of their either individual or collective identities was misinterpreted by the teachers as many boys felt that their tone of voice - an aspect of their identity resulted in

²⁷⁸ Supra note 242 at 36.

²⁷⁹ Appendix V, *Boys Focus Group* at 00:04:52 - 00:07:08.

²⁸⁰ Supra at 00:07:13.

²⁸¹ Supra at 00:07:55.

²⁸² Supra at 00:16:53.

discriminatory actions taken against them. For a teacher to perceive a 13-year-olds black boys' tone of voice as disrespectful but not perceive a white boys' voice as disrespectful highlights how black boys are racially discriminated against in school.

In relation to exclusions, all boys had either been excluded or knew someone who had. When discussing the in and out school factors that lead to exclusions, one of the boys said that:

'I think when you're from a rough area... especially because we're living in Tottenham, the place where you live can influence you. We live in a place with lots of gangs and crackheads and stuff, so that can make you act more rough... so that can make us act a bit different.'

Appendix V Boys Focus Group 00:21:15

However, the place where they lived did not take away the fact that there were in-school factors that also played a role. All the boys agreed that it was *because* they lived in a 'rough' area that teachers *perceived* them as more aggressive – therefore, the teachers' perceptions and assumptions made about where they were from was more determinant than who they were.²⁸³ The committee has reiterated that children must not be discriminated against on the basis of origin, however, at Duke's Academy many boys felt discriminated against on this basis – an infringement on their right under article 2 of the CRC.

4.3.2. CJS

Regarding their encounters with the CJS, almost all boys had experiences with 'stop and search' checks. They all described the experiences as aggressive and felt they were treated like objects.²⁸⁴ One of them described an encounter where he and his cousins were treated 'like animals' to which another one of the boys agreed and said that:

'You get treated like dogs... that's what they tend to do nowadays... If you're from this area [...] if you're from Tottenham, it's something you get used to because like, we're like a minority and we're an ethnic minority, and we're black so we're a danger to society.'

Appendix V Boys Focus Group 00:17:30

A 'stop and search' check carried out under PACE; the Misuse of Drugs act or the Criminal Justice and Public Order Act, obliges police officers to explain what law they are using to conduct the search. However, when asked whether police officers had ever explained this or whether they had ever been able to ask why they were being searched, all boys responded that if they were ever to ask under what law they were being searched 'you would definitely go to jail' 'they'd arrest you and say you're being aggressive' and that 'the best thing to do in that situation is to stay calm and be quiet.'²⁸⁵

²⁸³ Supra at 00:19:40-00:21:50.

²⁸⁴ Supra at 00:27:06-00:27:12.

²⁸⁵ Supra at 00:18:09.

Moreover, a 'stop and search' check may only be conducted if the person matches the description of a suspect, and a search must not be based on what a person is wearing. However, the boys maintained that they had been stopped many times simply on account of 'looking suspicious' and that this tended to happen when they were wearing certain types of clothing. For example, one boy said that:

'More times it depends on what you wear. So, like if you wear a big black puffer jacket, black joggers and black shoes they just automatically assume like... this guy must be selling weed... this guy must be carrying a knife. But I could be wearing black and not be carrying a knife you know.'

Appendix V Boys Focus Group 00:18:38

This shows how the boys were discriminated against based on their collective identity. The boys described their encounter with the police as being treated 'like dogs' which shows how the external ties that constitute their collective identity led to 'a' group of black boys being treated collectively 'as' dogs. Moreover, the boys explained how the amount of stop and search checks were dependent upon their clothing. In this respect, wearing black clothing equates to being a criminal. This means that to avoid being stopped and treated collectively 'as' animals, black boys had to repress certain aspects of their identity such as avoiding black clothing. This is an infringement on their right to hold and manifest their identity because as per the CRC, individuals should have the right to manifest their identity without fear of reprisal.

All the boys agreed that there were similarities between the way the police and teachers treated them. One boy said:

'I feel like police officers and teachers judge us because of how we look and not really who we are.' Another one explained that 'we get judged because of what we wear, like I usually wear my shorts sagging, and because my shorts are sagging that doesn't mean I'm bad in school or selling weed, it just means my shorts are sagging.'

Appendix V Boys Focus Group 00:21:56- 00:23:24

Hence, it may be argued that the labelling that occurs in the CJS bears resemblance with the labelling that occurs in schools. Whilst black boys wearing certain types of clothing may be perceived as more of a 'threat' or 'suspicious' to the CJS; black boys' tone of voice or (mis)behaviour may be perceived as more 'aggressive' or 'violent' than other pupils - thereby warranting a detention, referral or exclusion. Irrespective of whether this occurs because of how they are perceived due to where they come from, how they act or what they look like - it consequently results in an infringement on their right to non-discrimination and identity under the CRC. To judge and make assumptions about a 13-year-old black boy by equating wearing sagging shorts to selling weed is undeniably discriminatory, because the way a boy chooses to display his identity should bear no effect on how he is treated by the system.

4.3.3. Labelling

All boys were self-aware of the fact that their race was a determinant factor in the way they were treated both in school and in the CJS. However, some believed that the way people perceived and stereotyped them was also partly their own fault:

'It's probably us as well, like in our school, the group of us black boys we're quiet dominating like compared to everyone else, we're a big group, very dominant and if someone comes for one of us, they come for all of us.'

Appendix V Boys Focus Group 00:25:05

Some boys described their 'funny and dominant' personalities as being perceived as aggressive and threatening. When questioned about whether a group of thirteen-year-olds could pose a threat to adults, some boys explained that they felt that when seen as a big group, their age 'cancelled out.' When questioned about whether they felt a big group of thirteen-year-old *white* boys would have the same impact and be perceived as threatening they all said: 'if it was a group of white boys, you wouldn't even care... and I think that's also down to social media.'²⁸⁶

One boy explained the impact of social media on their labelling and stereotyping as:

'A lot of people are racist against black people, if you and I think we can all agree... If you saw a black boy with a big black puffer jacket; a hoodie and everything you'd be more scared than if you saw a white boy wearing that same outfit...And that's kind of how social media has portrayed us.'

Appendix V Boys Focus Group 00:26:40

There are several children rights issues with the above statements. First, under article 1 of the CRC, a child means every human being under the age of eighteen. However, the boys believed that their collective identity rendered them adults in the eyes of the law before the age of eighteen. This highlights the lack of adequate monitoring and implementation of children's rights in the UK as there is no legitimate justification for treating a thirteen-year-old as anything other than a child under international law. Second, the incorrect assumptions made about them had shaped their individual identities to the point where the external aspects of their identity had been discriminated against and incorrectly determined by how social media and society had labelled them. Third, there is a case of direct discrimination based on race because when asked whether a group of white thirteen-year-old would induce the same threat, the boys explained that people 'wouldn't care.' This suggests that the determining factor behind a black boy's identity being deemed threatening was their race.

Moreover, every boy who did not have short hair, agreed that the way they wore their hair influenced how they were perceived. They felt labelled because of the way they did their hair, especially those with plaits of cornrows. For instance, one boy said:

'Since my hair grew over the pandemic, I got plaits and so did my friend. Ever since the first day we stepped into school we was getting comments about our hair. One teacher even said if this new problematic behaviour is about your hair, you're going to have to cut it off.'

Appendix V Boys Focus Group 00:30:33

²⁸⁶ Supra at 00:24:38 - 00:26:03.

Another boy with plaits responded, 'me having plaits should not affect my education.'²⁸⁷

This shows how the exception made for the school uniform under the Equality Act may be allowing for (in)direct discrimination. This is because although the provision allowing a school to determine its rules regarding its uniform may not seem to affect a particular group more than another; a teacher's ability to force a black student to cut his hair off because that hair brings with it aggressive or threatening connotations is discriminatory. Moreover, the infringement that unsolicited comments about their hair – similarly to the case of Chikayzea Flanders, resulted in a direct infringement on their right to education because their education should not be jeopardised because of their hairstyles.

Therefore, it could also be argued that the labelling of the boys, which stems from the way others perceive them, infringes on their right to identity, and consequently is discriminatory because unlike white boys, *black* boys may feel the need to repress certain aspects of their identity to avoid being labelled something they are not – both in the CJS and in school.

4.3.4. Staff

4.3.4.1. Teaching

As explained in chapter 2.1.3., while it is the state which takes on obligations under the CRC, the task of implementation needs to engage all sectors of society.²⁸⁸ When analysing the school and teachers' responsibilities towards their students in terms of making children's rights a reality in the school, there was nothing to suggest that the teachers were not taking on their obligations under the CRC.

Teachers described their role as 'role models' 'mother like' and 'making a difference in the children's lives.' Regarding how the teachers experienced the responsibility of the school towards their students; B, F and A, all agreed that the main role and responsibility of the school was to provide the children with a good education, and all four concurred with the fact that the school lived up to its expectations.

These statements can be contrasted with those of the boys. For instance, the boy who suggested that his hair should not determine his education or the one who explained that learning about Richard III was not useful. In this regard, if the school's responsibility is to provide all students with a good education, why would some students feel that their education is hindered by factors such as their hair or lack of curricula representation? Although F described how there was positive representation in terms of the black teaching population in the school, the boys' concerns portray how this may not be enough. Therefore, the issue may not solely lie with the responsibility of the individual teachers nor solely with the responsibility of the school towards its students - the state may have a greater role to play in adequately engaging all sectors of society including children themselves.²⁸⁹

²⁸⁷ Supra at 00:31:55.

²⁸⁸ Supra at note 59.

²⁸⁹ Supra.

4.3.4.2. Punishments

In terms of punishments for the disruption children might cause, three teachers referred to the 'Rewards and Behaviour' policy, which is to be determined by the headteacher under the EIA 2006.²⁹⁰ B and A described the importance of 'having structures and systems in place' because 'there is a need for consistency in punishments.'²⁹¹ However, they both agreed on the fact that they always give due consideration to what the situation is and 'although there are systems and structures in place, things 'flex and move sometimes for example if there is a situation outside school or at home.' When questioned about the disproportionate number of black pupils being excluded, G remarked that:

'Exclusion rates are predominately black boys [...] there is no way you can get around that because you cannot keep a student in a school if they are outrageously breaking the rules because what kind of message does that send other students?'

Appendix III G Interview 00:19:16-00:21:17

The way teachers perceived punishments and discipline in comparison to the boys was completely different. Although it is positive for the state to allow a school to determine its own rewards and behaviour policy to allow for increased flexibility - this can result in indirect discrimination. This is because as explained in chapter 4.3.1, many boys felt that they were punished for wrongful acts they had not committed. They explained that they were treated differently in comparison to their white counterparts. In this sense, although in principle, there is a system in place to allow for consistency in punishments, the lived reality of many Black boys is that there is in fact no consistency in punishments when they are punished more frequently than their white counterparts. Interestingly, G explained that exclusion rates are predominately black boys and that 'you cannot keep someone in school if they are outrageously breaking the rules.' However, hypothetically, if a black boy is repeatedly getting into trouble as a result of his race and is labelled as a troublemaker – that boy will undoubtedly internalise the message that he is a troublemaker and cause further disruption. The issue may not solely be that 'there is no way to get around exclusion rates being predominately black' but that there are a series of underlying causes behind these numbers, that may stem from policies that have the potential of being indirectly discriminatory when used biasedly by teachers.

It is also important to note that positive discrimination may have a role to play in getting around the fact that exclusion rates are predominately affect black boys. Positive discrimination can be used with the purpose of redressing a situation of material inequality of some groups to eliminate the conditions that cased the discrimination in practice.²⁹² The fact that exclusion rates are predominately black speaks to a situation of material inequality marked by decades of anti-black racism in the UK as explained in chapter 3. Therefore, although G said that, keeping a student who breaks the rules in the school may send a wrong message to the other students, this may not necessarily be the case. This is because the disproportionate number of school exclusions is not caused because black boys misbehave more than any other demographic – it is caused due to a combination of in and out-of-

²⁹⁰ *Education and Inspections Act 2006*, s. 89.

²⁹¹ Appendix I. A *Interview* at 00:22:46.

²⁹² *See Besson supra* note 12 at 437.

school factors. As such, taking affirmative action to not exclude black boys even when they have outrageously broken the rules would redress the situation of material inequality that black boys face in school – a situation they are not wholly responsible for but end of facing the consequences thereof. The solution would not be to simply not punish them but, for instance, Duke’s Academy has recently set up the ‘School within a school’ system which aims to stop the process of school exclusion. In this respect, solutions such as this could be a better alternative to mitigate the disproportionate number of school exclusions - thereby using affirmative action to redress inequality between black and other boys.

4.3.4.3. Labelling

With respect to the relationship between disruption and labelling, G explained that:

‘Sometimes children struggle, and that struggle isn’t recognised. So, the only way out is to disrupt. So, they disrupt. Then they become labelled, and the rest is a self-fulfilling prophecy because people respond to that label.’

Appendix III G Interview 00:15:18

Interestingly, G acknowledged the fact that black boys get labelled and then respond to that label. This proves Tannenbaum’s Labelling Theory right. It also speaks to the out-of-school factors that may play a part in black boys’ lives. If boys experience struggle such ‘coming from a rough area’ and the repercussions of that are not recognised, it is easy to brand a disruptive student as simply disruptive without looking at the underlying causes of that disruption. When this occurs and the boy is labelled, he will undoubtedly fit that label. G also ascertained that in fact black boys get attracted to criminality because they are highly stereotyped. This is similar to the statements made in chapter 4.3.3, where a boy described the labelling endured in the CJS and in school as ‘being down’ to them and that people are more scared of black boys because of how social media had portrayed them. This begs the question of how far are black boys right to hold an identity truly realised? If black boys’ external ties to identity are moulded by factors out of their control namely social media and being from a ‘rough’ area, there is little an individual black boy can do to remove himself from the label created for him by society. Since schools are institutions that are part of society, the labels that may stem from factors outside of the school, inevitably permeate into the school and as such, affect a boy’s right to hold and manifest his identity within the school.

F revealed how she is a form tutor how her students had been late because they and been stopped by the police on their way to school:

‘They’ve been stopped and searched by the police whereas their white classmates are sitting in class because no one stopped them. That feeling leads to anger and frustration because they think why have I been stopped again? Now if the teacher gets angry because they’re late that just adds to the feeling of anger and frustration, and it could start a confrontation in school that is based on something that happen out of school.’

Appendix IV F Interview 00:12:11-00:12:57

It is important to draw parallels between the labelling the repercussions thereof that occur in the CJS with that, that occurs in schools. This is because the out-of-school factors that lead the police and teachers to make incorrect assumptions about black boys are the same. These may be coming from a rough area or social media portrayal of black men as the boys described. It could be single-parent households and other negative influences as described by Sewell. The teacher could be getting angry because he/she has stereotyped the black boy. Irrespective of the reason why, the fact is that a

combination of all these factors can undoubtedly cause both teachers and the police to make assumptions and label black boys collectively 'as' something. Moreover, if these are not analysed in unison, we run the risk of perpetuating further discrimination, because as showed in the statement above, 'if the teacher gets angry because they are late to school because they were stopped this adds to the feeling of anger and frustration'. Therefore, the combination of the labelling that occurs in the CJS which led to the black boy getting stopped in the first place and the assumptions made about the boy being late to school results in double discrimination.

4.3.5. A Way Forward?

In its GC10, in 2007, the Committee referred to state parties having to take all necessary to measures to ensure that children in conflict with the law are treated equally and that special attention is paid to de facto discrimination and disparities – especially those involving children belonging to ethnic minorities. It also highlighted the importance of training of all professionals involved in the administration of juvenile justice.²⁹³

Interestingly, in 2021, the boys from Duke's Academy explained that the police were 'too aggressive.' They felt the police was not 'here' for them because of the way they act. They suggested that police try different methods as to how to interact and treat young people because:

'Just coming up and touching you like that, it's not comfortable, a lot of people wouldn't be comfortable with someone touching them. Like if you think I'm carrying a weapon just tell me to remove what you think I'm hiding.'

Appendix V Boys Focus Group 00:23:15 - 00:29:08

They all concurred with the fact that police officers need specific training to deal with children because the way they behave was 'not [a] clever' way of addressing the situations. In this regard, it can be argued that although the Committee issued guidance with the intention of acknowledging the fact that children from ethnic minorities would be impacted by de facto discrimination, it failed to recognise the importance of providing guidance as to how to adequately mitigate the effect of this discrimination. Moreover, it failed to account for the fact that there is a difference, especially in a country like the UK, between the discrimination that *black* children face and those from other ethnic minorities. The UK has a history of poor police-community relations stemming from decades of institutional anti-black racism. Therefore, it is not enough to issue advice acknowledging that some children in conflict with the law may also be victims of discrimination, because there is a discriminatory reason behind them encountering the law to begin with.

Rather, there is a need for societal recognition regarding the fact that black boys specifically are in a situation of material inequality *because* they are black. It is also important to recognise that the mere existence of the Equality Act outlawing racial discrimination does not encompass the indirect discrimination that stems from exemptions to the curriculum and school uniforms, which have the indirect effect of discriminating against black pupils. Therefore, specific guidance in relation to the discriminatory effect that neutral-looking laws have on black students must be issued.

²⁹³ CRC/C/GC/10 at para. 6.

As a result of this recognition, constructive dialogues, education and training of all professionals, coupled with affirmative action, could redress the situation of material inequality black boys are in through no fault of their own. Moreover, once this recognition has taken place, naturally, there would be a decrease in the in-school factors that lead to both school exclusions and low academic expectations as well as the disproportionate number of 'stop and search'. This is because professionals would have undergone extensive training to recognise their own biases and stereotypes, and the state would have allocated sufficient funds for this, as it would have been recognised as a pressing need.

In relation to the schools, both pupils and staff had ideas regarding how schools could mitigate the effect of in and out-of-school factors on both exclusions and low expectations:

The boys believed that having after school activities such as badminton, table tennis or football would be beneficial to them as it would keep them off the streets after school before their parents came home. They found that being around their friends after school in a safe environment was positive. Although G mentioned the idea of Youth clubs as an alternative for 'hanging around on the streets' after school, the boys said that youth clubs 'are still outside school' so you're still not really *in* school.' Therefore, the idea of remaining *in* school, in a less formal setting after classes ended would be a better avenue.

F explained that teachers would benefit from increased time, training and resources. She stated how if teachers were taught to tackle the pressing needs and pressures that many black boys face outside school, then when coming into school they would be able to communicate in a more effective way. She believed that schools could help educate boys as to how to deal with the unfair situation they are in.

F also highlighted the importance of representation in the curriculum - a theme that came up in most interviews. For example, A described, how she chose a syllabus that included aspects of multiculturalism. In this regard, as F pointed out, a change in the curriculum to include black history is needed. G also explained that the only time Black history is spoken about in school is during Black History Month and black history is much more than that. F explained how black people's narratives solely revolve around slavery, criminalisation and poverty whereas white history encompasses different types of white people. Therefore, people acknowledge and recognise that there are many different types of white people - unlike the single narrative under which black people are represented. The boys spoke of how they did not enjoy learning 'White Man's history' as they simply were not interested nor found it useful. In this respect, as F explained, schools would also benefit from a unit about 'society' or 'community' with the aim of exploring the themes and challenges that affect the area where the school is located and ensure that students are taught aspects of history they can identify with.

5. Conclusion and Recommendations

To conclude, I revisit the main research question of this thesis:

To what extent is the labelling of black boys in the CJS and in schools an infringement on their right to non-discrimination and to identity under the UNCRC *and* what should the Committee, states and schools be doing to challenge this?

In answering this question, I seek to address the first sub question:

- What are the rights to non-discrimination and identity, and what should states do to uphold them?

As put forward by the HRC, discrimination is any distinction, based on a ground such as race which has the purpose of nullifying or impairing the recognition or enjoyment of all rights or freedoms. This right is enshrined as a general principle in article 2 of the CRC. As explained in chapter 2.1, the right to non-discrimination is different to the principle of non-discrimination as the former is a concrete legal rule whilst the latter is a guide to behaviour. Non-discrimination is also different to equality because *equality* forbids certain types of discrimination. Discrimination may take multiple forms as it may be *de jure* or *de facto*. The former being legislative imposed or outlawed discrimination and the latter referring to the lived experience of the individual who may suffer from discrimination. It may also be direct or indirect whereby to directly discriminate against an individual would be treating them less favourably than another on a ground such as race. Indirect discrimination could occur when a neutral looking provision has the effect of discriminating against a group. Lastly, discrimination is not always negative as a state may discriminate if it is acting proportionately and in the pursuit of a legitimate aim. For instance, when redressing past injustices on some groups.

The right to identity is enshrined under article 8 of the CRC and expressly guarantees a child's right to an identity, to have that identity preserved and if necessary re-established. An individual's identity may manifest itself as individual or collective Identity. Individual identity consists of (i) who and what you are at a given time; (ii) the sense of being the same 'who' or 'what' over time; and (iii) the external aspects of an identity. Collective identity is made up of (i) the network of the social relationships constituting the collective; (ii) the distinguishing internal attributes of the collective itself; and (iii) the collective's significant, external ties, which would lead 'a' group to be treated collectively 'as' something.

Under article 4 of the CRC, states should be taking all appropriate legislative, administrative and other measures to implement the rights under the CRC. So, although it is the state which takes on obligations, the task of implementation needs to engage all sectors of society. In relation to the right to non-discrimination, states are required to make changes to legislation and to put in place educational measures to challenge discriminatory attitudes. States also have a duty to ensure the implementation of measures, so that when non-justified discrimination occurs, measures are implemented to outlaw it. Regarding the right to identity, states are required to take reasonable measures to protect children against unlawful interference with elements of their identity by state or non-state actors *and* to take reasonable measures to enable children not simply to preserve their identity.

Although states *should* be upholding black boys right to not be discriminated against and protecting them from unlawful interference with their right to identity, as this thesis has shown this is not the case. To show this I turn to the second sub question:

- How and why has black youth been discriminated against and criminalised by the UK's legal system?

In respect to its obligation to make changes in legislation to uphold the right to non-discrimination, the UK has been successful. As portrayed in chapter 3, since 1965, there have been six amended anti-racial discrimination legislations; the inclusion of the HRA; and the creation of four commissions to oversee their adequate implementation. So, it can be argued that the racial discrimination experienced by black boys in the UK today does not stem from the *lack* of legislative measures but rather their adequate oversight and implementation.

Although the UK takes on the obligation of not discriminating against black boys and protecting their right to identity, it has been unsuccessful in engaging all sectors of society in its task of implementing these two rights. This is because black boys continue to be overrepresented at every stage of the youth system – black boys are four times as likely to be stopped by the police than white boys; the number of cautions given to black boys were three times higher than those given to white boys and although there has been a reduction in the number of white children sentenced for indictable offences, the proportion of Black children sentenced for indictable offences increased.

It would be discriminatory to suggest that black boys simply commit more offences than white boys because an individual's race cannot be equated to criminality. The reality is that, although the legislation that allows for 'stop and search' checks calls for 'reasonable grounds to believe in criminal activity based on objective factors', many black boys are stopped because of how they look. Boys reported that aspects of their identity such as being in big groups, wearing black clothing and hoodies or having plaits increased the likelihood of being stopped by the police. How a black boy exercising his agency in deciding how to dress or how to socialise with friends could in any way warrant a 'stop and search' check based on *objective and reasonable* grounds is problematic.

Therefore, the fact that boys are stopped because 'they look suspicious' alludes to the fact that the UK has not done enough to put in place educational measures to challenge discriminatory attitudes as required under the CRC. This is because had the UK allocated sufficient resources and training for the police to undergo extensive training about bias and stereotypes, black boys wearing black clothing; a hoodie and socialising in big groups would not be seen as a threat to society. However, in this respect, the Committee itself may be at fault as it may not have provided sufficient guidance to states as to what is meant by putting educational measures in place to challenge discriminatory attitudes. For instance, the Committee has yet to issue a GC on discrimination, and the inclusion of it could have the potential of providing a detailed explanation as to the intersectionality of discrimination faced by *black children* and the importance and impact of challenging individual bias and stereotypes.

The lack of resource allocation and training to tackle stereotyping and bias is also problematic in schools and to show this I turn to the third sub question:

- How do schools de facto discriminate against black boys notwithstanding legislation in place to outlaw it?

The Equality Act, outlaw's discrimination in schools based on a protected characteristic. The EA, and the EIA all maintain that in excluding a pupil, the headteacher ought to have regard to eliminate discrimination under the Equality Act. Unfortunately, the Timpson review showed that (i) black boys are 1.7 times more likely to be excluded from school than their white counterparts and (ii) there was 'cultural misunderstanding' of black boys' behaviour in schools and (iii) unconscious lower expectations for black pupils.

As explained in chapter 4.2, this disproportionality has been explained by 'in and out-of-school factors', however, a hyper-focus on out-of-school factors is problematic because the view fails to consider the fact that schools have an obligation and responsibility to not discriminate in school, irrespectively of whether children face problems outside school.

Unfortunately, schools de facto discriminate against black boys and thus do not fulfil their responsibility under the Equality Act. This can happen with neutral-looking policies that have the effect of discriminating against black boys. This can be seen in cases where black pupils are forced to cut their hair because it is deemed to contravene the school's uniform policy. This was demonstrated by the case of Chikayzea Flanders, whereby the school's uniform policies had the potential of being indirectly discrimination as his hairstyle represented a fundamental part of his identity. De facto discrimination can also be seen in cases where teachers have low expectations for black boys simply because they are black. For instance, Gillborn's study showed many black children were not even put in for exams as teachers simply assumed they would not get the results.

So, as reiterated by the HRC, to have legislation in place outlawing discrimination is not enough to make non-discrimination a reality. This is because, in the case of the UK, legislation already exists. The issue then becomes that the UK and consequently schools are not doing what is required of them to de facto outlaw racial discrimination. To address the issue of to what the schools should be doing to outlaw the de facto discrimination that occurs in them, I turn to the fourth sub question:

- What can be learnt from the pupils and the staff at Duke's Aldridge Academy about discrimination?

The boys at Duke's confirmed that, indeed, their race was a determining factor in how they experienced their schooling and affected their encounters with the CJS. They also alluded to the fact that teachers and the police judged them because of what they looked like. This shows how labels that are created for black boys outside the school impacted the treatment they received in school. In this respect, the over representation of boys in the CJS and the disproportionate number of school exclusions experienced by black boys are not mutually exclusive. These two issues stem from the same underlying cause – the collective labelling of black boys 'as' a threat to the system.

The boys also highlighted their fear of reprisal by the police and/or if they were to display certain aspects of their identity such as clothing or hair. Although aware of their right to question the police about a 'stop and search' their fear of 'getting arrested' meant that to exercise their rights in this way was out of the question. Moreover, in school, the fear of displaying certain aspects of their individual or collective identity – such as their tone of voice or being in big groups, could be misinterpreted as disrespectful and had the effect of shaping their own identities as they branded themselves as 'dominating' as a result of how they had been labelled. This shows that notwithstanding all the legislative changes that the UK has made to its legislation, in accordance with its international obligations, the task of implementation and monitoring has not taken place as it is the police and teachers who are responsible to discriminating against children.

So, effectively the labelling experienced by black boys in the CJS and in schools is an infringement on their right to non-discrimination and to identity. However, the boys and the staff clarified what the school and the state should be doing to uphold children's rights and mitigate the effect of discrimination.

For the foregoing reasons, I make the following recommendations to schools, the state and the Committee:

Schools

1. To organise after school activities that boys can enjoy and benefit from until their parents come home such as football, badminton or table tennis.
2. To provide 'safe spaces' where black boys can speak openly about their experiences and how to adequately channel anger and frustration in relation to the discrimination they face outside the school.
3. To facilitate the training of teachers in collaboration with civil society to ensure teachers recognise the needs of black boys.
4. To promote productive communication with parents in order to foster good relationships between the parents, the pupil and the school.
5. To ensure diversity in teaching staff to adequately represent the student body.

State

1. To provide, ensure and make mandatory and subject to 'Continuing Police Education' the training of police forces at all levels regarding the treatment of children.
2. To provide, ensure and make mandatory and subject to 'Continuing Police Education' the training of police forces regarding racial prejudice and bias.
3. To provide, ensure and make mandatory and subject to 'Continuing Security Education' the training of all security personnel regarding racial prejudice and bias.
4. To provide sufficient budgetary allocation to teacher trainings to recognise the individual needs to black boys both in and outside of school.
5. To provide sufficient budgetary allocation for schools to have the ability to hire administrative staff to carry out paperwork and thus allow increased time for teachers to handle the needs of black students.
6. To encourage the provision of systems such as the 'School within a School' set up to decrease the number of school exclusions.
7. To make mandatory the teaching of Black History in the curriculum.
8. To include in the curriculum a mandatory unit 'Society and Community' targeted at the recognition of the issues in the specific area the school is located in.

CRC Committee

1. The drafting of General Comment 27 on Discrimination.
2. The strengthening of guidance in relation to Juvenile Justice.
3. To hold a Day of General Discussion on Children and Racism.

6. Bibliography

6.1. Books, articles and contributions to compilations

Abramson, B., *A Commentary on the United Nations Convention on the Rights of the Child, Article 2: The Right of Non-Discrimination* (2008)

Abbott, D., *The Aftermath of Getting It Right*, in: Weekes Bernard, W. (ed.), *Did they get it right? A Re-examination of school Exclusions and Race Equality* (2010)

Alston, P., *Cadre juridique de la Convention relative aux droits de l'enfant*, 91 *Bulletin des droits de l'homme* 1 (1992)

Appiah, K., *The Ethics of Identity* (2005)

Bear, D., *Adapting, acting out, or standing firm: Understanding the place of drugs in the policing of a London borough* (2013)

Besson, S., *Enforcing the Child's Right to Know his Origins: Contrasting Approaches Under the Convention on the Rights of the Child and the European Convention on Human Rights*, 21 *International Journal of Law Policy and the Family* 137 (2007)

Besson, S. *The Principle Of Non-Discrimination In The Convention On The Rights Of The Child*, 13 *The International Journal of Children's Rights* 433 (2005)

Besson, S. and Kleber, E., *Article 2: The Right to Non-Discrimination*, in: Tobin, J. (ed.), *The UN Convention on the Rights of the Child - A Commentary* (2019)

Brennan, F. *Race Rights Reparations Institutional Racism and The Law* (2017)

Brown, J., *Police Powers: Stop and Search* (2020)

Chavez J. and Rocheleau G., *Formal Labeling, Deviant Peers, And Race/Ethnicity: An Examination Of Racial And Ethnic Differences In The Process Of Secondary Deviance*, 10 *Race and Justice* 62 (2017)

Doek, J. E., *A Commentary on the United Nations Convention on the Rights of the Child, Articles 8-9: The Right to Preservation of Identity and The Right Not to Be Separated from His or Her Parents* (2006)

Dworkin, R., *Taking Rights Seriously* (1977)

Eddo-Lodge, R., *Why I'm No Longer Talking to White People About Race* (2017)

Fernandez Sessarego, C., *Derecho a la identidad personal* (1992)

Freeman, M., *The New Birth Right? Identity and the Child of the Reproduction Revolution*, 4 *International Journal of Children's Rights* 273 (1996)

German, G., *School exclusions: wasteful, destructive and discriminatory*, in: Weekes Bernard, W. (ed.), *Did they get it right? A Re-examination of school Exclusions and Race Equality* (2010)

Griffin, J., *On Human Rights* (2009)

Gillborn, D., *Intersectionality, Critical Race Theory, and the Primacy of Racism: Race, Class, Gender, and Disability in Education*, 21 *Qualitative Inquiry* 277 (2015)

Gillborn, D. and Gipps, C., *Recent Research on the Achievements of Ethnic Minority Pupils* (1996)

Gillborn, D., Rollock, N., Vincent, C. and Ball, S.J., *You got a pass, so what more do you want?: race, class and gender intersections in the educational experiences of the Black middle class*, 15 *Race Ethnicity and Education* 121 (2012)

Gillborn, D., Rollock, N., Warmington, P. and Demack, S., *Race, Racism and Education: inequality, resilience and reform in policy & practice. A Two-Year Research Project Funded by the Society for Educational Studies* (2012)

Gillie, V. and Robinson, Y., *Shifting the goalposts: Researching pupils at risk of school exclusion* (2010)

Hepple, B.A., *Race Relations Act 1965*, 29 *Modern Law Review* 806 (1966)

Hepple, B.A., *Equality: The New Legal Framework* (2011)

Hervey, T.K. and Kenner, J., *Rights under the EU Charter of Fundamental Rights: A Legal Perspective* (2003)

Horton-Cooley, C., *Human Nature and The Social Order* (1983)

Howard, E., *The EU Race Directive: Its symbolic value – it's only value?* 6 *International Journal of Discrimination and the Law* (2004)

Isom, D., *Fluid and Shifting: Racialized, Gendered and Sexual Identity in African American Children*, 6 *International Journal of Interdisciplinary Social Sciences* 127 (2012)

Joseph-Salisbury, R., Connelly, L. and Wangari-Jones, P., *The UK is not innocent: Black Lives Matter, policing and abolition in the UK*, 40 *Diversity and Inclusion* 21 (2020)

Kalin, W. and Kunzli, J., *The Law of International Human Rights Protection* (2009)

Kenner, J., *Economic and social rights in the EU legal order: The mirage of indivisibility*, in: Hervey, T.K and Kenner, J. (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective* (2003)

Kenner, J., *EU Employment Law: From Rome to Amsterdam and Beyond* (2003)

Liberty, *A Parliamentarian's Guide to the Human Rights Act* (2010)

Loucaides, L., *Personality and Privacy under the European Convention of Human Rights*, 61 *British Yearbook of International Law* 175 (1990)

Majors, R., *Understanding the current educational status of Black children*, in: Majors, R. (ed.), *Educating our Black Children: New directions and radical approaches* (2001)

Marshall, J., *Human Rights Law and Personal Identity* (2014)

McCombs, T. and Shull González, J., *Right to Identity* (2007)

Mead, G., *Mind, Self, and Society: The Definitive Edition* (2015)

Nowak, M., *UN Covenant on Civil and Political Rights: CCPR Commentary* (2005)

Quinton, P., Bland, N. and Miller, J., *The Impact Of Stops And Searches On Crime And The Community* (2000)

Reynolds, T., *Don't Believe the Hype: Towards a Contextualized Understanding of Absent Black Caribbean Fathers and Black Boys in Family Life. A Response to Tony Sewell*, in: Weekes Bernard, W. (ed.), *Did they get it right? A Re-examination of school Exclusions and Race Equality* (2010)

Robertson, L. and Wainwright, J.P., *Black Boys' and Young Men's Experiences with Criminal Justice and Desistance in England and Wales: A Literature Review*, 4 *Genealogy* (2020)

Rocque, M. and Paternoster, R., *Understanding the antecedents of the "school-to-jail" link: The relationship between race and school discipline*, 101 *The Journal of Criminal Law and Criminology* 633 (2011)

Ronen, Y., *Redefining the Child's Right to Identity*, 18 *International Journal of Law Policy and the Family* 147 (2004)

Rose, E. J. B. and Associates, *Colour and Citizenship: A Report on British Race Relations* (1969)

Sesimi, U., *Black Male School Exclusion: The Emotional Preparation for Adulthood*, in: Weekes Bernard, W. (ed.), *Did they get it right? A Re-examination of school Exclusions and Race Equality* (2010)

Sewell, T., *Why Black Boys are More Than a Racial Statistic: Getting it Right on Exclusions*, in: Weekes Bernard, W. (ed.), *Did they get it right? A Re-examination of school Exclusions and Race Equality* (2010)

Sooben, P. N., *The Origins of the Race Relations Act*, 12 *Ethnic Relations* (1990)

Tallis, R., *Personal identity: mind, body, community*, 81 *Journal of Neurology, Neurosurgery, and Psychiatry* e13 (2010)

Tannenbaum, F., *Crime and the Community* (1938)

Thornberry, P., *Confronting Racial Discrimination: A CERD Perspective*, 5 *Human Rights Law Review* 239 (2005)

Tobin, J. and Todres, J., *Article 8: The Right to Preservation of a Child's Identity*, in: Tobin, J. (ed.), *The UN Convention on the Rights of the Child - A Commentary* (2019)

Tucker, D., *A way forward?*, in: Weekes Bernard, W. (ed.), *Did they get it right? A Re-examination of school Exclusions and Race Equality* (2010)

Van Bueren, G., *International Law on the Rights of the Child* (1995)

Weekes-Bernard, D., *Introduction*, in: Weekes Bernard, W. (ed.), *Did they get it right? A Re-examination of school Exclusions and Race Equality* (2010)

Wright, C., *Young Black People Finding Paths to Success: Transforming School Exclusion/Marginalisation*, in: Weekes Bernard, W. (ed.), *Did they get it right? A Re-examination of school Exclusions and Race Equality* (2010)

6.2. Case law

1. UN Committees

Human Rights Committee, *Mónaco de Gallicchio v Argentina*, Communication No. 400/1990, U.N. Doc. CCPR/C/53/D/400/1990 (1995)

2. Regional courts

European Commission of Human Rights, *East African Asians v the United Kingdom*, 3 EHRR 76 (1973)

European Court of Human Rights, *Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v Belgium* (Belgian Linguistics case), no. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (1968)

European Court of Human Rights (GC), *Goodwin v The United Kingdom*, no 17488/90 (1996)

European Court of Human Rights (GC), *Thlimmenos v Greece*, no. 34369/97 (2000)

European Court of Human Rights, *Pretty v The United Kingdom*, no. 2346/02 (2002)

European Court of Human Rights (GC), *Nachova and Others v Bulgaria*, no. 43577/98; 43579/98 (2005)

European Court of Human Rights, *Timishev v Russia*, no. 55762/00 and 55974/00 (2005)

European Court of Human Rights (GC), *D.H. and Others v the Czech Republic*, no. 57325/00 (2007)

European Court of Human Rights, *Tysiac v Poland*. no. 5410/03 (2007)

European Court of Human Rights, *Stoica v Romania*, no. 42722/02 (2008)

European Court of Human Rights (GC), *Sejdi. and Finci v Bosnia and Herzegovina*, no. 27996/06; 34836/06 (2009)

European Court of Human Rights, *Soare and Others v Romania*, no. 24329/02 (2011)

Inter-American Court of Human Rights, *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Judgment of August 31, 2001, Series C No 79 (2001)

3. National courts

Corte Constitucional de Colombia, *Acción de Tutela Ati Seygundiba Quigua Izquierdo v Tribunal Administrativo de Cundinamarca*, T-778-05 (2005)

Court of Appeal (Civil Division), *Dawkins v Department of the Environment* [1993] IRLR 284 (1993)

House of Lords, *Mandla (Sewa Singh) and another v Dowell Lee and others* [1982] UKHL 7 (1983)

6.3. Documents of UN Committees

Committee on the Elimination of Racial Discrimination Concluding observations on the twenty-first to twenty-third periodic reports of United Kingdom of Great Britain and Northern Ireland, UN Doc. CERD/C/GBR/CO/21-23 (2016)

Committee on the Rights of the Child, Concluding Observations on the initial report of Sierra Leone, UN Doc. CRC/C/15/Add.116 (2000)

Committee on the Rights of the Child, Concluding observations on the second periodic report of Ukraine, UN Doc. CRC/C/15/Add.191 (2002)

Committee on the Rights of the Child, Concluding observations on the fourth periodic report of Costa Rica, UN Doc. CRC/C/CRI/CO/4 (2011)

Committee on the Rights of the Child, Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, UN Doc. CRC/C/GBR/CO/5 (2016)

Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Lithuania, UN Doc. CRC/C/LTU/CO/3-4 (2013)

Committee on the Rights of the Child, Concluding observations on the second to fourth periodic reports of Israel, UN Doc. CRC/C/ISR/CO2-4 (2013)

Committee on the Rights of the Child, CRC, General Comment No.5: UN Doc. CRC/GC/2003/5 (2003)

Committee on the Rights of the Child, CRC, General Comment No.10: UN Doc. CRC/C/GC/10 (2007)

Committee on the Rights of the Child, CRC, General Comment No.24: UN Doc. CRC/C/GC/24 (2019)

Human Rights Committee, CCPR General Comment No.18: Non-discrimination, UN Doc. CCPR/C/GC/18 (1989)

6.4. Legislation

6.4.1. International legislation

UN General Assembly, Resolution 260 A (III), Convention on the Prevention and Punishment of the Crime of

Genocide, UN Doc. A/RES/260(III) (1948)

UN General Assembly, Resolution 61/177, International Convention for the Protection of All Persons from Enforced Disappearance, UN Doc. A/RES/61/177 (2007)

6.4.2. Regional legislation

Council of the European Union, Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Council Directive 2000/43/EC (2000)

European Parliament, Resolution on racism, xenophobia and anti-Semitism, Official Journal C 308 (1995)

6.4.3. United Kingdom legislation

The Vagrancy Act 1824

Race Relations Act 1965

Police and Criminal Evidence Act 1984

Criminal Justice Act 1991

Criminal Justice and Public Order Act 1994

Education Act 2002

Education and Inspections Act 2006

Equality Act 2006

Equality Act 2010

Human Rights Act 1998

Race Relations Amendment Act 2000

Race Relations Act 1965

Race Relations Act 1968

Race Relations Act 1976

Misuse of Drugs Act

6.5. Websites

(<https://www.bbc.com/news/newsbeat-36944509>), last visited (12-06-2021)

(<https://expressdigest.com/rastafarian-boy-12-wins-discrimination-case-over-dreadlocks-ban/s>), last visited (02-06-2021)

(<https://www.google.co.uk/search?q=dependent+children+in+families+by+family+type+and+child's+ethnicity>), last visited (02-06-2021)

(<https://www.gov.uk/government/statistics/permanent-and-fixed-period-exclusions-in-england-2015-to-2016>), last visited (05-06-2021)

(<https://www.independent.co.uk/news/education/education-news/black-caribbean-children-schools-excluded-b1822163.html>), last visited (08-06-2021)

(<https://www.independent.co.uk/news/uk/home-news/white-riot-week-notting-hill-exploded-912105.html>), last visited (30-05-2021)

(<https://www.jrf.org.uk/data/poverty-rate-ethnicity>), last visited (12-06-2021)

(<https://www.museumoflondon.org.uk/discover/how-did-empire-windrush-change-london-docklands>), last visited (31-05-2021)

(<https://www.nationalarchives.gov.uk/cabinetpapers/themes/discrimination-race-relations-policy.htm>), last visited (26-05-2021)

(<http://www.nationalarchives.gov.uk/pathways/firstworldwar/spotlights/demobilisation.htm>), last visited (28-05-2021)

(http://news.bbc.co.uk/2/hi/uk_news/3685733.stm), last visited (10-06-2021)

(http://news.bbc.co.uk/onthisday/hi/dates/stories/december/8/newsid_4457000/4457112.stm), last visited (15-05-2021)

(<https://www.theguardian.com/politics/2005/nov/10/race.immigrationpolicy>), last visited (15-05-2021)

(<https://www.theguardian.com/uk-news/2019/apr/14/stop-and-search-metropolitan-police-sajid-javid>), last visited (02-06-2021)

6.6. National Reports and government publications

Department for Education and Skills, *Getting it, getting it right: exclusion of black pupils: priority review* (2006)

Department for Education, *The Equality Act 2010 and schools: Departmental advice for school leaders, school staff, governing bodies and local authorities* (2014)

Department for Education, *Exclusion from maintained schools, academies and pupil referral units in England Statutory guidance for those with legal responsibilities in relation to exclusion* (2017)

Macpherson Of Cluny, W., *The Stephen Lawrence Inquiry* (The Macpherson report) (1999)

HM Inspector of Constabulary and Fire & Rescues Services, *PEEL: Police Legitimacy 2017* (2017)

Keeling, P., *No respect: Young BAME men, the police and stop and search* (2017)

Lammy Review, *Lammy review: final report* (2017)

Liberty, *A Parliamentarian's Guide to the Human Rights Act*, (2010)

Ministry of Justice, *Statistics on Race and the Criminal Justice System 2018: A Ministry of Justice publication under Section 95 of the Criminal Justice Act 1991* (2019)

Ministry of Justice, *Tackling Racial Disparity in the Criminal Justice System: 2020: Update Includes progress responding to the Lammy Review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System* (2020)

Ministry of Justice and Youth Justice Board for England and Wales, *Youth justice annual statistics 2015 to 2016: supplementary tables* (2017)

Ministry of Justice and Youth Justice Board, *Youth Justice Statistics 2018/19: England and Wales* (2020)

Scarman, L., *The Scarman report* (1981)

Secretary of State for Education, *Timpson Review of School Exclusion* (2019)

Stone, V. and Pettigrew, N., *The Views of the Public on Stops and Searches* (2000)

The Equal Rights Trust, *The Equal Rights Review, Volume Eight* (2012)

Youth Justice Board and Ministry of Justice, *Key characteristics of admissions to youth custody: April 2014 to March 2016* (2017)

7. Appendices

Appendix I. A Interview

1. What subject do you teach?
2. Why did you become a teacher?
3. How much agency do you have in how you choose to teach?
4. What do you see your role as? (Not your job description) (both as a teacher and in the school)
5. In terms of schools, what do you see the role and responsibility of a school towards their students?
6. How would you describe a disruptive student?
7. What modes of punishment do you use if a student is disruptive?
8. When do you use those specific modes of punishments?
9. How much agency do you have in deciding when to punish a student and why? (Do you always follow specific guidelines for example)
10. Another teacher told me about parallel classrooms for disruptive students - how effective do you think those are?
11. School surveillance? Are there cameras or police in your school?
12. Has the BLM movement in any way changed the way you teach or approach your role as a teacher?
13. In light of the BLM movement last summer, do you think your school should in any way have changed anything about its policies?
14. In light of the fact that black boys end up in the CJS at disproportionate rates, do you think schools can do anything to mitigate that, or can you, as a teacher do anything to mitigate it?

Appendix II - B interview

1. What do you teach?
2. Why did you become a teacher?
3. What do you see your role as? (Not your job description) (both as a teacher and in the school)
4. In terms of schools, what do you see the role and responsibility of a school towards their students?
5. How would you describe a disruptive student?
6. What modes of punishment do you use if a student is disruptive?
7. When do you use those specific modes of punishments?
8. How much agency do you have in deciding when to punish a student and why? (Do you always follow specific guidelines for example)
9. How much agency do you have in how you choose to teach?
10. Has the BLM movement in any way changed the way you teach or approach your role as a teacher?
11. In light of the BLM movement last summer, do you think your school should in any way have changed anything about its policies?

Appendix III – G Interview

1. What do you teach?
2. Why did you become a teacher? And how did you become principal?
3. What does your current role entail?
4. What do you see your role as? (Not your job description) (both as a teacher and in the school)
5. In terms of schools, what do you see the role and responsibility of a school towards their students?
6. A lot of children don't like school. Do you think it's different at your school?
7. Does the fact that your school is multi-cultural make a difference?
8. Do you think criminality, could give boys a sense of belonging?
9. How would you describe a disruptive student?
10. Can you describe your behaviour policy?
11. What modes of punishment do you use if a student is disruptive? When do you use those specific modes of punishments?
12. To what extent do you have a say in the behaviour policy?
13. Could you tell me more about the 'School within a School' set up?
14. Has the BLM movement in any way changed the way you teach or approach your role as a teacher?
15. In light of the BLM movement last summer, do you think your school should in any way have changed anything about its policies?
16. In light of the fact that black boys end up in the CJS at disproportionate rates, do you think schools can do anything to mitigate that, or can you as a teacher can do anything to mitigate it?

Appendix IV – F Interview

1. What subject do you teach?
2. Why did you become a teacher?
3. What do you see your role as, as a teacher?
4. You are also the chair of well-being, how did that come about?
5. In terms of schools, what do you see the role and responsibility of a school towards their students?
6. Can you tell me more about the 'Schools within a School' set up? What do you think that does for the overall well-being of the children who are put into that?
7. In light of the fact that black boys end up in the CJS at disproportionate rates, do you think schools can do anything to mitigate that?
8. Some teachers have said that students are only in school for a limited amount of time and so schools themselves cannot do much to stop children coming into contact with the CJS, do you agree? Is there more the schools could be doing or is there only so much you can do?
9. Do you think labelling has any effect on how black boys are portrayed?
10. Has the BLM movement in any way changed the way you teach or approach your role as a teacher? Has it changed the way you approach your role as chair of wellbeing?
11. In light of the BLM movement last summer, do you think your school should in any way have changed anything about its policies? Do you think the government could have done more?
12. What solutions would you suggest ameliorating the situation that black boys face?

Appendix V – Boys Focus group

Questions

1. Do you like school?
2. Do you have a favourite subject?
3. What does a typical school day look like for you?
4. Have you ever been punished? If so, what did that punishment look like and what did you learn from it?
5. Do you know what a 'Stop and Search' check is?
6. Have you ever been stopped and searched?
7. Has your school (or any other school you may have attended) brought attention to the 'stop and search' checks?
8. Do you know what a school exclusion is?
9. Have you or anyone you know ever been excluded from school?
10. Explain in school and out of school factors – Do you agree with either of these?
11. Do you see any similarities between the treatment you receive in CJS and in schools?
12. What do you think could be done?

Topic List

1. School 00:04:52 - 00:07:08
2. Teacher/Punishments 00:07:11 - 00:16:53
3. 'Stop and Search' Check 00:17:05 - 00:19:17
4. School Exclusions 00:19:40 - 00:21:50
5. Similarities between Teachers & Police 00:21:56- 00:23:24
6. Perceptions 00:24:38 - 00:26:03
7. Social Media/ BLM 00:26:32 - 00:26:47
8. Hairstyles 00:30:02 - 00:31:55
9. School 00:23:15 - 00:29:08

Appendix VI – Staff + Boys Letter & Consent Form



Dear Teacher,

My name is Carlota Soumah and I am currently undertaking a masters (LLM) in Children Human rights at Leiden University in the Netherlands. In order to complete my LLM I will be writing a thesis which is titled:

'You Fit the Description'

What is the legal rationale behind black British boys coming into contact with, staying and returning to the criminal justice system and what role do schools as institutions have to play in their over - criminalisation.

1. Invitation

I would be most grateful for you to take part in my research study. Joining the study is entirely up to you, but before you decide, I would like you to understand why the research is being done and what it will involve.

2. Aim and Research Question

The main question this thesis aims to answer is: why behind the UK's ratification of the UNCRC,¹ black boys continue to be discriminated against on the basis of their race under article 2 of the CRC, and how this discrimination is in turn infringing on their right to identity under article 8 and infringing on their rights under articles 37 - inhumane or degrading treatment and 40 - administration of juvenile justice by pushing them into the Criminal Justice System (CJS). Ultimately, this thesis will show that despite the ratification of the UNCRC and multiple different policies and Acts to mitigate the effects of discrimination; black boys continue to be discriminated against in schools on the basis of their race, and this pushes them into the CJS - creating a never ending cycle. Hence, with the inclusion of spoken interviews that will be conducted, this thesis will also aim to shed some light on to what schools as institutions can do to minimise their role in the over-criminalisation of black boys.

3. What will happen during the interviews?

The interviews will take between 30 minutes - 1 hour depending on how much or how little you wish to share. The interviews will be conducted online via Google Meets and you are more than

¹ United Nations Convention on The Rights of the Child

welcome to have another person present with you.

4. What data will be collected?

The data collected will take the form of qualitative research which means that very brief notes will be taken during the interviews, as the goal is for the interviews to appear more like a conversation in order for the participants to be more comfortable in sharing their experiences. The audio-recordings will then be listened to and detailed notes taken in order to draw out main themes, conclusions and make recommendations to that school - regarding the role it has to play in the over-criminalisation of young black boys. The exact number of participants has not yet been confirmed but will range from approximately five or six teachers and approximately ten students. Two of the students who will be interviewed do not attend the same school as the rest of the participants. The results of this research can therefore not be generalised to all British schools across the UK, since this study will not reach a representative sample of participants. The interviews will be guided by a list of questions that has been prepared by myself on a basis of academic literature and an expert consultation with Karen Graham.²

5. What are the possible disadvantages, burdens and risks of taking part in the interviews?

There are no direct risks anticipated from participating in the interviews. You will not be forced to either finish the interview nor to answer any questions you are not comfortable answering. Moreover, your name, school or any other information which may identify you will not be included in the thesis either.

6. What are the possible advantages of taking part in the interviews?

In light of the tragic murder of George Floyd and the subsequent uproar against racial discrimination that occurred in the UK, I thought it to be important to shed light on the racial discrimination that occurs in the UK - especially that affecting young black boys. Moreover, since the recent publication of the Race Relations Act - which claimed that racism does not exist and the recent report on 'Ethnic disproportionality in remand and sentencing in the youth justice system' which showed that black children are oftentimes charged with crimes and convicted for longer sentences solely due on their race; I think it is important to portray how notwithstanding laws and policies to outlaw discrimination, institutional discrimination on the basis of race continues to happen. Therefore, you will be contributing to the shedding of light on how schools as institutions partake in their discrimination and possible ways to mitigate this in the future.

7. Will my data be kept confidential?

Yes. Your name, school or any information that you share with me during the interviews that you do not wish for me to include will not be shared.

² Karen Graham works at Sparks Inside and has undertaken research around the British school to prisons pipeline.

8. Will there be any compensation?

You will not receive any type of payment participating in this study.

10. What if I have more questions?

If you have any further questions or wish to contact me for further information you can reach me via:

Email: carlotasoumahfernandez@gmail.com

Phone: +447732416290



Dear Parent or Guardian,

My name is Carlota Soumah and I am currently undertaking a masters (LLM) in International Children Human rights at Leiden University in the Netherlands. In order to complete my LLM I will be writing a thesis which is titled:

‘You Fit the Description’

What is the legal rationale behind black British boys coming into contact with, staying in and returning to the criminal justice system and what role do schools as institutions have to play in their over - criminalisation.

1. Invitation

I would be most grateful for your consent for your son to take part in my research study. Allowing your son to join the research study is entirely up to you but before you decide, I would like you to understand why the research is being done and what it will involve.

2. Aim and Research Question

The main question this thesis aims to answer is: why after the UK’s ratification of the UNCRC,¹ black boys continue to be discriminated against on the basis of their race under article 2 of the CRC, and how this discrimination is in turn infringing on their right to identity under article 8 and infringing on their rights under articles 37 - inhumane or degrading treatment and 40 - administration of juvenile justice, by pushing them into the Criminal Justice System (CJS). Ultimately, this thesis will show that despite the ratification of the UNCRC and multiple different policies and Acts to mitigate the effects of discrimination; black boys continue to be discriminated against in schools on the basis of their race, and this pushes them into the CJS - creating a never ending cycle. Hence, with the inclusion of spoken interviews that will be conducted, this thesis will also aim to shed some light on to what schools as institutions can do to minimise their role in the over-criminalisation of black boys.

¹ United Nations Convention on The Rights of the Child

3. What will happen during the interviews?

The interviews will take between 30 minutes - 1 hour depending on how much or how little your son wishes to share. The interviews will be conducted online via Google Meets and you or another adult is more than welcome to be present. Your child will not be forced to answer any questions he's not comfortable with.

4. What if my child does not want to participate?

In addition to your permission, your child must agree to participate in the study. If your child does not want to participate they will not be included in the study and there will be no penalty. If your child initially agrees to be in the study they can change their mind later without any penalty.

5. What data will be collected?

The data collected will take form of qualitative research which means that very brief notes will be taken during the interviews, as the goal is for the interviews to appear more like a conversation in order for the participants to be more comfortable in sharing their experiences. The audio-recordings will then be listened to and detailed notes taken in order to draw out main themes, conclusions and make recommendations to that school - regarding the role it has to play in the over-criminalisation of young black boys. The exact number of participants has not yet been confirmed but will range from approximately five or six teachers and approximately ten students. Two of the students who will be interviewed do not attend the same school as the rest of the participants. The results of this research can therefore not be generalised to all British schools across the UK since this study will not reach a representative sample of participants. The interviews will be guided by a list of questions which has been prepared by myself on a basis of academic literature and an expert consultation with Karen Graham.²

6. What are the possible disadvantages, burdens and risks of taking part in the interviews?

There are no direct risks anticipated from participating in the interviews. Your son will not be forced to either finish the interview nor to answer any questions he is not comfortable answering. Moreover, your son's name, age or school will not be included in the thesis either.

7. What are the possible advantages of taking part in the interviews?

In light of the tragic murder of George Floyd and the subsequent uproar against racial discrimination that occurred in the UK, I thought it to be important to shed light on the racial discrimination that occurs in the UK - especially that affecting young black boys. I think it is important to portray how notwithstanding laws and policies to outlaw discrimination, institutional discrimination on the basis of race continues to happen. Therefore, your son would be contributing to the shedding of light on how schools as institutions partake in their discrimination and possible ways to mitigate this in the future.

² Karen Graham works at Sparks Inside and has undertaken research around the British school to prisons pipeline.

8. Will my son's data be kept confidential?

Yes. Your son's name, age, school or any information he shares with me during the interviews that he does not wish for me to include will not be shared. I will be the only person with access to the voice recordings and the name of your son. Once I have transcribed the interviews the recordings will be deleted.

9. Will there be any compensation?

Neither you nor your child will receive any type of payment participating in this study.

10. What if I have more questions?

If you have any further questions or wish to contact me for further information you can reach me via:

Email: carlotasoumahfernandez@gmail.com

Phone: +447732416290

If you are happy for your son to take part please sign the consent form below.

APPENDIX VI. PARENTAL CONSENT FORM

I, _____ (name of Parent or Guardian), have read the foregoing information in the Invitation, or it has been read to me. I have had the opportunity to ask questions about it and any questions that I have asked have been answered to my satisfaction. I understand that participation is voluntary and will not be compensated. I consent voluntarily for my child to participate as a participant in this study.

- _____ My child MAY be [audio] recorded.
- _____ My child MAY NOT be [audio] recorded.

Printed Name of Child

Signature of Child

Signature of Parent(s) or Legal Guardian

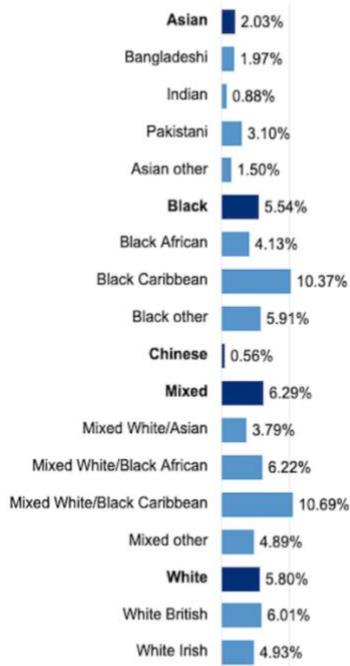
Date

Carlota Soumah-Fernandez
Signature of Investigator

3/4/2021
Date

Appendix VII – Graph

Temporary exclusion rate by ethnicity



UK GOVERNMENT ETHNICITY FACTS AND FIGURES - PUBLISHED FEBRUARY 2021

Permanent exclusion rate by ethnicity

