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Poverty as Misrecognition: What Role for Anti-discrimination Law in Europe?

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Abstract

It is widely agreed on that victims of discrimination on traditional status grounds such as gender, race and religion are overrepresented among the poor and undereducated. People living in poverty also face discrimination because of their socioeconomic situation. Many national, European and international anti-discrimination provisions prohibit discrimination based on a person's socioeconomic situation. It is striking, however, that this is barely applied in practice. There is little case law related to this at national, international and European levels. This situation is surprising, especially in the context of the financial retrenchment ongoing since 2008, and regarding the numerous accounts of direct and indirect discrimination affecting people who are unemployed, undereducated, poor or homeless. On the basis of domestic – Belgian, French and British – and European material, this paper argues that the prohibition of discrimination on grounds of social condition is an empowering legal tool which adds value to Human Rights law, EU law and Discrimination law in the protection of socioeconomically disadvantaged people – especially regarding issues of misrecognition – for four main reasons: the exclusive applicability of this ground in some cases, its important cross-cutting role in cases of multiple discrimination, the direct scrutiny of the socioeconomic position of the applicants which this ground implies, and its determining role in combating stereotypes, prejudice and stigma against poor and undereducated people.

Keywords

Poverty – discrimination – misrecognition – vulnerability – intersectionality – social condition

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Table of contents

Abundant societies that could actually solve the problem of poverty seem to care less about doing so than societies of scarcity that can't. This paradox may help to explain why the rights revolution of the past forty years has made inequalities of gender, race, and sexual orientation visible, while the older inequalities of class and income have dropped out of the registers of indignation. Abundance has awakened us to denials of self while blinding us to poverty. We idly suppose that the poor have disappeared. They haven't. They've merely become invisible.

Michael Ignatieff[1]

Introduction

In June 2010 the European Council committed to reduce the number of people at risk of poverty or exclusion by at least 20 million by 2020.[2] Ten years on, it is hard to imagine that this objective has been fulfilled, though the data are not yet all available at the time of writing. As shown by Eurostat, in 2017, 112.8 million people – i.e. 22.4 % of the population in the then EU-28 – were still at risk of poverty or social exclusion.[3] Poverty remains a question of crucial importance, despite the fact that it has fallen over years.[4]

In philosophical, political and critical legal studies, poverty essentially refers to the issue of 'redistribution', aiming at correcting 'economic injustices in terms of access of individuals to resources'.[5] It is related to the economic and social inequalities regarded as 'misdistribution', traditionally addressed by the welfare state.[6] In the legal sphere, one usually attached the issue of redistribution to social and economic rights, which notably provide resources to correct socioeconomic inequalities. However, renowned scholars such as Sen consider that 'inequality is a distinct issue from poverty'.[7] As explained by Moyn, material equality is best understood 'not as an end in itself but as a means to the other ends established by economic and social rights. Put another way, if "extreme inequality" were shown to be causally related to "extreme poverty" or the violation of human rights, then the law demanded more equal outcomes'.[8]

Beyond poverty and redistribution issues, and material inequality, the questions of *status-based* discrimination have attracted increasing attention over the last 20 years at European level and across the Atlantic, especially in the US and Canada. In the EU context the three anti-discrimination directives on discrimination in employment and occupation,[9] including gender discrimination,[10] race and ethnic discrimination[11] play an increasingly important role in terms of equality.

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[1] Michael Ignatieff, *The Rights Revolution* (Toronto: Anansi, 2000) 92.
[2] Conclusions of the European Council, 17 June 2010, EUCO 13/10, CO EUR 9 CONCL 2, 12.
[3] Eurostat, 'People at risk of poverty or social exclusion' (2017) (available online).
[4] Branko Milanovic, *Global Inequality: A New Approach for the Age of Globalization* (Harvard University Press 2016).
[5] Sandra Fredman, 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23 South African Journal on Human Rights, 216; Nancy Fraser and Axel Honneth, *Redistribution or Recognition?: A Political-Philosophical Exchange* (Verso 2004).
[6] Fredman, 'Redistribution and Recognition: Reconciling Inequalities' (n 5) 214; Fraser and Honneth, *Redistribution or Recognition?* (n 5).
[7] Samuel Moyn, *Not Enough. Human rights in an unequal world* (Harvard University Press, 2018) 137.
[8] Ibid 210.
[9] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *OJ* L 303, 2 December 2000.
[10] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), *OJ* L 204 26 July 2006.
[11] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *OJ* L 180/22, 19 July 2000.

In philosophy, discrimination is usually attached to issues of 'recognition' arising 'when cultural value patterns constitute some as inferior, excluded or invisible'.[12] In other words, recognition refers to 'an ideal reciprocal relation between subjects in which each sees the other as its equal and also as separate from it'.[13] It is related to an issue of social status,[14] which usually involves stigma, prejudice and stereotypes. As Fredman explains, '[s]tatus groups are consequently defined not by relations of production, but of esteem, respect and prestige enjoyed relative to other groups in society'.[15]

'Discrimination is both a cause and a consequence of poverty'.[16] The overlap between recognition and redistribution has already been extensively studied in the literature.[17] It is widely agreed that '[g]roups which suffer from discrimination on status grounds [gender, race …] are disproportionately represented among people living in poverty'[18] and it has become clear that 'status-based discrimination is frequently closely correlated with socio-economic disadvantage'.[19] Poverty is in this sense a consequence of the discrimination that vulnerable groups and minorities such as Roma, migrants, black people, single women and persons with disabilities have historically had to endure. Because of the long-standing discrimination against them, these groups have been experiencing structural socioeconomic disadvantages which are extremely difficult to overcome. In this context, misrecognition is the cause of misdistribution.

There is another side to this coin, however. Poor people themselves are subjected to stereotyping, prejudice, stigma and discrimination because of their precarious situations. In this regard, poverty is not only a consequence but also a cause of discrimination, creating a vicious cycle. In other words, misdistribution raises important issues of recognition resulting from a person's socioeconomic status. This question is less well developed and analysed in the literature, especially from a legal perspective. It is essential, though. As put by Michael Ignatieff, 'while inequalities of gender, race, and sexual orientation have been made visible the last forty years, older inequalities of class and income have dropped out of the registers of indignation'.[20] Indeed, antidiscrimination law and more generally human rights have mainly focused on the status equality of individuals based on traditional discrimination status grounds, rather than the 'distributive equality of classes'.[21] Moreover, the issue of recognition in antidiscrimination, status-based inequalities on grounded in tradition are also blind to the issue of redistribution and socioeconomic inequalities, as shown by Samuel Moyn: 'Human rights did not abet neoliberalism, but precisely because the human rights revolution has its most ambitious dedicated itself to establishing status equality with an ethical and actual floor of distributive protection, it has failed to respond to – or even allowed for recognizing – neoliberalism's obliteration of the ceiling of material inequality'.[22] In short, it seems that antidiscrimination law and human rights have been powerless to tackle recognition and redistribution effectively so far.

Some scholars have proposed new approaches in antidiscrimination law to address the specific problem of people being discriminated against for their socioeconomic status. For instance, on the basis of a comparative case law review of Canada, South Africa and India, Shreya Atrey argues that 'the

[12] Fredman, 'Redistribution and Recognition: Reconciling Inequalities' (n 5) 216.
[13] Fraser and Honneth, *Redistribution or Recognition?* (n 5).
[14] Ibid.
[15] Fredman, 'Redistribution and Recognition: Reconciling Inequalities' (n 5) 216.
[16] Human Rights Council United-Nations General Assembly, 'Final Draft of the Guiding Principles on Extreme Poverty and Human Rights, Submitted by the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona' (2012) para 18.
[17] Fredman, 'Redistribution and Recognition: Reconciling Inequalities' (n 5); Fraser and Honneth, *Redistribution or Recognition?* (n 5).
[18] Sandra Fredman, 'The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty' (2011) 3 Stellenbosch Law Review 567.
[19] Fredman, 'Redistribution and Recognition: Reconciling Inequalities' (n 5) 214–2015.
[20] Ignatieff, *The Rights Revolution* (n 1) 92.
[21] Moyn, *Not Enough* (n 7) 205.
[22] Ibid 203.

intersectional nature of poverty can be appreciated in discrimination law through, for example, adopting a contextual approach to establishing discrimination or by attaching a substantive equality interpretation to equality and non-discrimination guarantees'.[23] In other words, she adopts a 'contextual perspective', considering it necessary to think beyond the perspective of poverty as a ground upon which inequality or discrimination are based and to tackle it 'as inhering in the very ideas or discourses of inequality or discrimination more broadly'.[24] If this approach is essential, it would appear that it remains very important to address the very legal question of whether invoking the legal argument of discrimination to address a person's underprivileged socioeconomic status is likely to protect that person and drive towards greater equality, especially when it comes to the issue of recognition.

As for the specific question of the added value of the poverty ground in antidiscrimination law, speaking of formal equality – a 'sameness of treatment equality framework' – Fineman argues that '[t]his version of equality is […] weak in its ability to address and correct the disparities in economic and social wellbeing among various groups in our society'.[25] In other words, '[f]ormal equality leaves undisturbed – and may even serve to validate – existing institutional arrangements that privilege some and disadvantage others. It does not provide a framework for challenging existing allocations of resources and power'.[26] Fineman's approach is based on American law, which approaches anti-discrimination differently from European legal systems: wealth in not considered by the American Supreme Court as a 'suspect ground', making a claim of discrimination based on it hopeless.[27] Moreover, she approaches this question and addresses this critique only under formal equality, while the ground of social condition or poverty in anti-discrimination can also concern other dimensions of equality, as I shall explain. Regarding the question of redistribution in a European context, Sandra Fredman also argues that anti-discrimination law cannot 'address status inequalities which require resources to correct them'.[28] In fact, Fineman's and Fredman's arguments both echo Samuel Moyn's broader claim that human rights in general – and not only the anti-discrimination law – have been unable to address socioeconomic inequalities and have been a powerless companion of capitalism.

On the other hand, there are some rare voices in the literature to defend the view that antidiscrimination law can enable a much broader approach to socioeconomic inequalities than its critics would argue. For instance, Juan Carlos Benito Sánchez claims that socioeconomic disadvantage ought to be recognised as a prohibited form of discrimination in law, especially in the field of housing, to address the issue of misdistribution, misrecognition and the lack of social participation or political representation linked to socioeconomic disadvantage.[29]

Of course, Atrey, Fineman and Fredman are right when they explain that anti-discrimination will not itself resolve the issue of redistribution. Although it can contribute to it, redistribution calls for a much more structural and holistic approach than the individual one developed in anti-discrimination law. However, as I will explain in this article, anti-discrimination law is a particularly important tool in addressing the *issue of recognition* regarding socioeconomic status and discrimination on the ground of

[23] Ibid 413.
[24] Ibid 414.
[25] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) Yale Journal of law and Feminism 1.
[26] Ibid 3.
[27] *San Antonio Independent School District et al., v. Demetrio P. Rodriguez et al*., 411 U.S. 1 (1973); See for example Frank I. Michelman, 'The Supreme Court, 1968 Term, Foreword – On protecting the poor through the fourteenth Amendment' (1969) 83 Harv. L. Rev. 7; Note, 'Discriminations Against the Poor and the Fourteenth Amendment' (1967) 81 Harv. L. Rev. 435; Gerald N. Neuman, 'Equal Protection, "General Equality" and Economic Discrimination from a U.S. Perspective' (1999) 5 Colum. J. Eur. L. 281; Richard M. Re, 'Equal Right to the Poor' (2017) 84 U. Chi. L. Rev. 1149.
[28] Fredman, 'Redistribution and Recognition: Reconciling Inequalities' (n 5) 221.
[29] Juan Carlos Benito Sánchez, 'Towering Grenfell: Reflections around Socioeconomic Disadvantage in Antidiscrimination Law' (2019) 5(2) QMHRR 1–19.

social condition: a middle ground between the various approaches currently found in the literature. In short, in this paper I will attempt to tackle the issue of *recognition* in socioeconomic discrimination by describing how to protect people who are being stereotyped, stigmatised and discriminated against on account of their disadvantaged socioeconomic position – especially when they are poor, yet not only –, and in doing so, make them visible.

As I will explain, there is scope in European, international and domestic discrimination law to protect against this kind of status discrimination on the grounds of 'socioeconomic situation', 'social origin', 'wealth', 'class' etc. But such grounds are rarely invoked before courts and when they are, the courts seem quite reluctant to engage with them. In other words, the social condition status ground does not seem to have become widespread in practice. However, in the past few years, some politicians, judges and advocates general appear to have slowly rediscovered its potential.

This paper does not claim to be exhaustive. It aims at offering some key ideas to foster the debate about the social condition ground in antidiscrimination law. More specifically, the paper will offer 1) a descriptive overview of the role of the 'social condition' (or 'social origin') ground in existing international/regional human rights law and selected domestic and European jurisdictions; 2) provide a number of hypotheses for why the ground is not invoked and applied more often; and 3) propose a normative argument on the value to discrimination law and human rights law of increased use of this ground in the recognition of the poverty dimension.

I have adopted an integrated approach[30] to discrimination law to develop my arguments. It is based on the most relevant cases from the European jurisdictions. I will mainly refer to the case law of the European Court of Human Rights (ECtHR), where important cases have been litigated on the basis of Article 14 of the European Convention of Human Rights (ECHR). Some cases from the European Committee of Social Rights (ECSR) and the European Court of Justice (ECJ) will also be employed to support my reasoning. I will also draw on various domestic European comparative legal material, primarily from the UK, France and Belgium. The UK is at the forefront of the development of the right to equality at the domestic level while the latter two have witnessed considerable development in antidiscrimination law over the last years under the influence of EU law. I am entirely aware that European and national jurisdictions adopt different approaches to the standard of review in discrimination analysis.[31] However, the aim of the present paper is not to discuss the standard of review of each Court, but the opportunity to invoke and apply the social condition ground in the various national and European legal orders. To this end, it seems very interesting to have a broad idea of the cases that some national and European courts have already ruled on or could have ruled on this basis.

I will first present some legal and theoretical explanations on the ground of social condition in antidiscrimination law (I). I then argue that this ground can constitute an interesting complementary legal tool to protect socioeconomically underprivileged people in human rights law more generally (II) and in antidiscrimination law more specifically (III).

Legal and Theoretical Perspectives on the Social Condition Status Ground

This section begins with a quick overview of the different concepts and definitions linked to discrimination of socioeconomically underprivileged people in international, European and national law (1). In the second part, I will attempt to explain why the social conditions ground is underused in practice (2).

[30] Eva Brems and Ellen Desmet, 'Introduction: Theorizing the Multi-Layered Nature of Human Rights Law' (2014) 3 Journal européen des droits de l'homme 289; Eva Brems, 'Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration' (2014) 4 European Journal of Human Rights 447.
[31] Mel Cousins, 'The European Convention on Human Rights, Non-Discrimination and Social Security: Great Scope, Little Depth?' (2009) 16 Journal of Social Security Law, 127 and seq.

The Social Condition Ground at International, European and National Levels

The first question to answer in this section is whether people who are discriminated against because of their socioeconomic status have legal remedies to bring their claim before national, European and international courts or interpretative committees.[32] The answer is much more complex than 'yes' or 'no' and depends on many factors which I will shortly explain hereafter.

International and European levels

At United Nations (UN) level, Articles 2(1) and 26 of the Covenant on Civil and Political Rights expressly protect people against any discrimination on grounds of 'social origin […] or other status'. Article 2(2) of the Covenant of Economic, Social and Cultural Rights provides a similar protection. This social origin ground is also specified as a protected ground in the antidiscrimination provision of Article 14 of the European Convention on Human Rights (ECHR) and Article 1 of Protocol No 12. As a reminder, Article 1 of Protocol No 12 stands alone and does not have to be invoked in conjunction with another right guaranteed by the Convention, as opposed to Article 14.[33] Article E of the European Social Charter also prohibits discrimination on grounds of social origin or other status. Finally, Article 21 of the Charter of Fundamental Rights of the European Union forbids discrimination on grounds of 'social origin', as opposed to Article 19 of the Treaty on the Functioning of the European Union and the abovementioned anti-discrimination directives, which do not.

As a consequence, discrimination on the grounds of social origin is widely prohibited at international and European levels. Several nuances should be pointed out, though.

First, 'social origin' is presented as a very vague concept and is rarely explained. General Comment No 20 'Non-discrimination in economic, social and cultural rights' of the UN Committee on Economic, Social and Cultural Rights explains that '"Social origin" refers to a person's inherited social status and refers to "property" status, descent-based discrimination under "birth" and "economic and social status"'.[34] The Committee seems to attribute quite a broad meaning to 'economic and social status', since it considers that '[i]ndividuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society. A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places'.[35]

However, the concept of social origin is limited to an inherited situation. Its scope is very narrow since it must encompass a 'heritage/ancestry dimension'.[36] This is why authors and organisations have argued for the acknowledgement of a broader concept such as 'social condition' which does not require any inherited characteristic.[37]

Social condition is about a present situation and refers to the condition of inclusion of the individual, in a socially identifiable group which suffers from social or economic disadvantage resulting from poverty, low income, illiteracy, poor education or any other similar circumstance.[38] It encompasses many features of socioeconomic position but does require the victim of discrimination to be 'a member of a socially

[32] The interpretative committees also state what the law should be despite the fact that they do not make any enforceable pronouncement on a question of law.
[33] However, only 20 Member States have ratified it so far.
[34] General Comment No. 20, 'Non-discrimination in economic, social and cultural rights' (2009) UN Committee on Economic, Social and Cultural Rights, para 24.
[35] Ibid para 35.
[36] Wayne MacKay and Natasha Kim, 'Adding Social Condition to the Canadian Human Rights Act' (2009) 37.
[37] Ibid.
[38] Ibid 127.

disadvantaged group',[39] to prevent wealthy people from claiming that they have been discriminated against because of social policies which they do not benefit from.

But can an applicant claim to be a victim of discrimination on social condition grounds on the basis of the abovementioned international and European anti-discrimination provisions, despite this ground not being enshrined in law as such? The answer seems to be 'yes' for most since they are all 'open-ended clauses', meaning that criteria beyond those specified can be invoked.[40] Therefore, discrimination can be challenged on grounds other than 'social origin', and notably on the basis of poverty.[41] For example, in its interpretative statement on Article 30 of the European Social Charter (the right to protection against poverty and social exclusion), the European Committee of Social Rights insists on 'the important impact of the non-discrimination clause (Article E), which obviously includes non-discrimination on grounds of poverty'.[42]

One nuance should be pointed out regarding Article 14 of the ECHR, though. The interpretation of the 'open-ended character' of this provision is not straightforward in the case law of the European Court of Human Rights (ECtHR).[43] Janneke Gerards explains that it is not consistent and coherent and is sometimes very confusing.[44] Nonetheless, it seems unlikely that the Court would refuse to consider a claim of discrimination based on an applicant's low level of education, employment or wealth. Indeed, the Court has already acknowledged the grounds of employment[45] and wealth[46] as being personal characteristics in the sense of Article 14.

It is interesting to note that in the British *RJM* case, the House of Lords concluded that homelessness constituted a personal characteristic in the sense of Article 14 ECHR and that 'there is no Strasbourg jurisprudence to justify a contrary conclusion'.[47] In that regard, Lord Neuberger recalled that the ECtHR applies 'a liberal approach to the "grounds" upon which discrimination is prohibited' and it is 'entirely in accordance with the approach one would expect of any tribunal charged with enforcing anti-discrimination legislation in a democratic state in the late 20th, and early 21st, centuries'.[48] The case concerned a rule according to which persons without accommodation ('rough sleepers') who would have otherwise satisfied the requirements for receipt of a disability premium were not entitled to that premium.[49]

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[39] Ibid 10.

[40] Renata Uitz, 'The Old Wine and the New Cask: The Implications of the Charter of Fundamental Rights for European Non-Discrimination Law' (2013) European anti-discrimination law review 24, 26; Nicholas Bamforth, Maleiha Malik and Colm O'Cinneide, *Discrimination Law: Theory and Context* (Sweet & Maxwell 2008); Janneke Gerards, 'Chapter on Discrimination Ground' in Dagmar Schiek, Lisa Waddington and Mark Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing 2007).

[41] MacKay and Kim, 'Adding Social Condition to the Canadian Human Rights Act' (n 36) 127.

[42] ECSR, Conclusions 2013 – Statement of interpretation – Article 30.

[43] Cousins, 'The European Convention on Human Rights, Non-Discrimination and Social Security'(n 31) 123. See notably ECtHR, *Carson and others v. the United Kingdom*, 16 March 2010; ECtHR, *Belgian Linguistics Case (No 2)*, 23 July 1968, para 10.

[44] Janneke Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights' (2013) 13 Human Rights Law Review 99, 6 and seq.

[45] ECtHR, *B.S. v. Spain*, 24 July 2012.

[46] ECtHR, *Chabauty v. France*, 4 October 2012; ECtHR, *Chassagnou and others v. France*, 29 April 1999.

[47] Speech of Lord Neuberger of Abbotsbury in House of Lords (opinion of the Lords of appeal), *R (on the application of R.J.M.) (FC) (Appellant) v. Secretary of State for Work and Pensions (Respondent)* 25 June 2008 [2008] UKHL 63, para 42.

[48] Ibid.

[49] House of Lords (opinion of the Lords of appeal), *R (on the application of R.J.M.) (FC) (Appellant) v. Secretary of State for Work and Pensions (Respondent)* [2008] UKHL 63, paras 6–12; Cousins, 'The European Convention on Human Rights, Non-Discrimination and Social Security'(n 31) 120.

As a consequence, before the European Court of Human Rights and the European Committee of Social Rights, Article 14 ECHR and to Article E of the ESC are respectively applicable in cases of discrimination on the grounds of social condition. In other words, applicants can rely on the substantive vision of equality recently developed by the abovementioned bodies.

Applicants can claim that they have been discriminated against on the ground of social condition before the Strasbourg Court not only because they have been treated differently without an objective and reasonable justification in comparison to persons in relevantly similar situations, but also because the authorities failed to attempt to correct inequality through different treatment.[50] Moreover, a general policy or measure which has disproportionately prejudicial effects on a particular group can be considered discriminatory although it is not specifically aimed at that group[51] and couched in neutral terms.[52] In addition, given the vulnerable position of applicants, the Court has in some cases ruled that 'special consideration should be given to their needs'[53] which can require positive measures.[54] As a consequence, its case law is not limited to formal equality.

Things are no different before the European Committee of Social Rights, which considers that 'Article E not only prohibits direct discrimination but also all forms of indirect discrimination […] discrimination may arise either in situations where people in the same situation are treated differently or where people in different situations are treated identically. Discrimination may also arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all'.[55]

In other words, the Court and Committee can require 'differential treatment to assist persons living in poverty in overcoming socioeconomic barriers to the enjoyment of their human rights, raised by *de facto* discrimination, or to tackle seemingly neutral policies or measures having disproportionately prejudicial effects'.[56] On this basis, the applicants can claim direct and indirect discrimination on the grounds of their socioeconomic position which can lead not only to negative obligations but also to positive obligations such as to give 'special consideration to' or 'special protection of' their 'specificities' and 'needs'.

However, even though they adopt a broad understanding of discrimination, we will see the Court and the Committee tend to have different approaches to recognising socioeconomic situation as a prohibited ground of discrimination. As Juan Carlos Benito Sánchez explains, the ECtHR 'seems reluctant to adopt this approach, favouring an interpretation of "any ground" and "other status" strictly linked to well-established discrimination grounds, and is wary to consider social disadvantage in this regard despite some trends to the contrary in dissenting opinions' while the European Committee of Social Rights seems 'to defend a more encompassing interpretation of this notion […] and has more openly acknowledged this possibility in relation to collective complaints'.[57]

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[50] ECtHR, *D.H. and others v. The Czech Republic* (GC), 13 November 2007, para 175; ECtHR, *Sampanis and others v. Greece*, 5 June 2008, para 68; ECtHR, *Thlimmenos v. Greece* (GC), 6 April 2000, para 44; ECtHR, *Horváth and Kiss v. Hungary*, 29 January 2013, para 101.

[51] ECtHR, *D.H. and others v. The Czech Republic* (GC), 13 November 2007, para 175; ECtHR, *Sampanis and others v. Greece*, 5 June 2008, para 68; ECtHR, *Hoogendijk v. the Netherlands*, 6 January 2005.

[52] ECtHR, *D.H. and others v. The Czech Republic* (GC), 13 November 2007, para 184.

[53] ECtHR, *Horváth and Kiss v. Hungary*, 29 January 2013, para 102; ECtHR, *Oršuš and Others v. Croatia* (GC), 16 March 2010, paras 147–148.

[54] ECtHR, *Horváth and Kiss v. Hungary*, 29 January 2013, para 104; ECtHR, *Oršuš and Others v. Croatia* (GC), 16 March 2010, para 177.

[55] ECSR, *Centre on Housing Rights and Evictions (COHRE) v. Italy (no. 58/2009)*, 25 June 2010, para 35; ECSR, *Médecins du Monde – International v. France* (no. 67/2011), 11 September 2012, para 36.

[56] Lauren Lavrysen, 'Strengthening the Protection of Human Rights of Persons Living in Poverty under the ECHR' (2015) 33 NQHR, 317–318.

[57] Paul Craig, Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (OUP Oxford 2015) 895; Emmanuelle Bribosia, Isabelle Rorive Isabelle et Julien Hislaire, 'Article 21. – Non-discrimination' *in* Fabrice Picod and

Regarding EU law, authors agree that Article 21(1) of the Charter of Fundamental is an open-ended provision. Moreover, it is important to specify that the scope of Article 21 is limited to the conditions and contained within the limits defined by the EU Treaties.[58] There are therefore limited chances for claims of discrimination on grounds of social condition to be considered and to be successful at EU level.

For the sake of convenience, I will refer to the ground of 'social condition' in the rest of the article even though, as mentioned above, there are many other grounds related to it to describe the socioeconomic situation of individuals.

National level

At domestic level, a few European States prohibit discrimination on the ground of social condition or any related grounds. As an example, the Belgian federal anti-discrimination Acts prohibit discrimination on the grounds of wealth and social origin.[59] This anti-discrimination provision is exhaustive, however. In the former Yugoslav Republic of Macedonia, the Law on Prevention and Protection against Discrimination contains an open-ended provision including the grounds of 'belonging to a marginalised group' and 'social origin'.[60] In other EU countries such as Bulgaria, Croatia, the Czech Republic, Hungary, Latvia, Lithuania, Romania and Slovakia, equality bodies also have an explicit legal mandate to combat discrimination based on socioeconomic status.[61]

At UK level, the exhaustive anti-discrimination provision of the Equality Act of 2010 does not enshrine any characteristic related to socioeconomic position.[62] Nevertheless, the Human Rights Act of 1998 partially incorporates the ECHR into domestic law, including Article 14, which therefore has quasi-constitutional force.[63] As underlined by Cousins, UK courts 'might be reluctant to extend recognition of an (undefined) notion of socio-economic disadvantage as a specific ground'.[64] However, he rightly adds that 'the fact that "social origin" is specifically mentioned as a ground in art.14 combined with the House of Lords' willingness to recognize a specific example of socio-economic disadvantage (i.e. homelessness) would suggest that it may be possible to have aspects of socio-economic disadvantage (if not the concept itself) recognized as a status for the purposes of art.14',[65] for instance illiteracy.

The Social Condition Ground and the Four Dimensions of Substantive Equality

It is important to consider the social condition status ground in discrimination law in the context of the debate on substantive equality, especially to fully grasp the difference between the recognition dimension of equality – which is in focus in this paper – and the other dimensions.

Sébastien Van Drooghenbroeck (eds), *Charte des droits fondamentaux de l'Union européenne, Commentaire article par article* (Bruylant 2017) 489–513.

[58] Article 51(1) of the EU Charter of Fundamental Rights.

[59] Federal Act of 10 May 2007 pertaining to fight certain forms of discrimination (*Loi tendant à lutter contre certaines formes de discrimination*), *M.B.* 30 May 2007.

[60] Law on Prevention and Protection against Discrimination, Official Gazette of the Republic of Macedonia No.50/10, 44/2014, Article 3. See Kotevska Biljana, 'Country Report on the Non-Discrimination Directives – Reporting Period 1 January 2015 – 31 December 2015: Former Yugoslav Republic of Macedonia' (2016) *European Equality Law Network* 12 (available online).

[61] Equinet, 'Addressing Poverty and Discrimination: Two Sides of the One Coin' (2010) 8 (available online).

[62] Aileen McColgan, 'Country Report Non-Discrimination, United Kingdom 2015' (2015) European Commission 25 (available online).

[63] Ibid 27.

[64] Cousins, 'The European Convention on Human Rights, Non-Discrimination and Social Security'(n 31) 127.

[65] Ibid.

Substantive equality considers the context in which people find themselves into account,[66] in contrast to formal equality which is limited to treating likes alike.[67] Taking this concept further, Sandra Fredman argues for a multidimensional concept of substantive equality rather than choosing between the various principles of equality of results, of opportunity and of dignity. She identifies four dimensions to making equality substantive. First, the redistributive dimension aims 'to correct the cycle of disadvantage associated with status or out-groups' and 'to redress disadvantage by removing obstacles to genuine choice'.[68] Second, the recognition dimension is related to the respect for dignity and combats stereotypes, stigma and humiliation on grounds of gender, race, disability, sexual orientation or other status.[69] Third, the transformative dimension of equality accommodates difference and structural change by 'removing the detriment but not the difference itself',[70] and concerns the structural harm, autonomy and the promotion of substantive freedoms.[71] Finally, the participative dimension mainly focuses on social inclusion and political voice.[72] This last dimension not only refers to political participation but also to 'the importance of community in the life of individuals' and concerns more specifically social exclusion.[73] In other words, this approach shows that equality and non-discrimination cannot be limited to formal equality (that like should be treated alike), and must encompass redistribution, recognition and participation.[74]

As I explained, this paper aims to demonstrate the added-value of the social condition ground in antidiscrimination law regarding the *recognition* dimension, even though this dimension can have an impact on the others, especially the redistributive one. Indeed, although discrimination on grounds of social condition is linked to the issue of misdistribution – which is the root of such discrimination – it is mainly related to the rationale of recognition.[75] Fredman insists on the primary role of the recognition of such a ground, which adds to the primary emphasis on redressing economic disadvantage within the welfare state. In this context, 'the role of anti-discrimination law would be to prohibit stigma and hostility, to affirm individual dignity and worth, and to redress disadvantage resulting from past prejudice and social exclusion'.[76]

Regarding the achievement of redistribution, Fredman claims that the social condition ground plays a limited role in preventing prejudiced action or requiring 'the removal of unjustifiable practices or conditions which disproportionately exclude members of disadvantaged status groups'.[77] She is right. Nonetheless, tackling the recognition issue can have an indirect impact on the issue of redistribution: considering that a landlord has discriminated against someone because based on prejudice and stigma regarding her socioeconomic situation will lead to more redistribution in the share of housing which cannot be reserved only to people in a socioeconomically privileged situation. This redistributive impact is however limited because it is individual, not structural. As a consequence, even though the social condition ground is primarily related to the recognition dimension of equality, it could indirectly and

[66] Lavrysen, 'Strengthening the Protection of Human Rights of Persons Living in Poverty under the ECHR' (n 56) 314.
[67] Sandra Fredman, *Discrimination Law* (Clarendon Law Series 2011) 8 and 25.
[68] Ibid 25–27.
[69] Ibid 28–29.
[70] Ibid 30.
[71] Shreya Atrey, 'The Intersectional Case of Poverty in Discrimination law' (2018) 18 Human Rights Law Review 411–440.
[72] Fredman, *Discrimination Law* (n 67) 31.
[73] Ibid 32.
[74] Atrey, 'The Intersectional Case of Poverty in Discrimination law'(n 71) 429.
[75] Diane Roman, 'La discrimination fondée sur la condition sociale, une catégorie manquante du droit français' (2013) *Recueil Dalloz* 1911.
[76] Fredman, 'Redistribution and Recognition: Reconciling Inequalities' (n 5) 229.
[77] Ibid 219.

simultaneously protect and promote substantive equality through the three other dimensions, especially the redistributive one.[78]

The Social Condition Ground and Economic and Social Rights

Discrimination on the grounds of a person's socioeconomic situation is closely linked to economic and social rights. They are all related to misdistribution.

However, claims based on discrimination on grounds of social condition should be distinguished from claims based on economic, social and cultural rights. While the former primarily pursues the aim of recognition, the latter pursue the aim of redistribution. Those claims might be closely linked, such as in the case of housing, when social assistance beneficiaries are systematically rejected because they are poor and regarded as not being reliable. That said, they might not be related to each other, as in cases of discrimination against people in precarious situations related to political and civil rights (such as the right to private and family life). Moreover, people are often discriminated against in their access to social and economic rights because of other characteristics than their precariousness.[79]

As a consequence, the social condition status ground should by no means be viewed as an alternative to the other economic and social rights for combating poverty and social exclusion.[80] It constitutes a complementary protection tool. In this respect, the *La Forest* Panel explains that '[l]itigation on this ground should not displace study, education and the need to look at other means to find solutions to the problems experienced by the people who are poor. The best way to combat poverty and disadvantage remains private and public activity aimed at improving the conditions of the socially and economically disadvantaged. Perhaps the addition of this ground will spark more of this activity'.[81] As explained above, the redistributive function of the social condition ground is therefore highly limited and should mainly been considered in its redistributive dimension.

The Underuse of the Social Condition Ground: Possible Explanations

The social condition ground (and all other related grounds) is one of the least invoked by applicants and least scrutinised by courts and human rights bodies when dealing with alleged discrimination. More specifically, there is little jurisprudence from the Strasbourg Court and the European Committee of Social Rights on this matter.[82] Even when an applicant claims to be the target of discrimination on the grounds of their socioeconomic situation under Article 14 ECHR, the ECtHR tends to consider that 'it does not raise separate issue'.[83] To my knowledge, the ECJ has not yet adopted a single decision in discrimination law on this ground under the Charter of Fundamental Rights. Even courts at national level rarely rely on it. Moreover, authors specialised in discrimination law seem to pay very little attention to this ground.[84] Why? Five main reasons could explain the underuse of this ground: legal and sociological.

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[78] Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 International Journal of Constitutional Law 1056; Lavrysen, 'Strengthening the Protection of Human Rights of Persons Living in Poverty under the ECHR' (56).

[79] ECtHR, *Vrountou v. Cyprus*, 13 October 2015.

[80] Although these other means have been unable to tackle the issue of redistribution so far, mainly at a global level, as argued by Samuel Moyn, according to whom human rights became a 'powerless companion of the explosion of inequality' and of market fundamentalism (Moyn, *Not Enough* (7) 176).

[81] Gérard La Forest and others, 'Report of the Canadian Human Rights Act Review Panel' (2000).

[82] See notably ECtHR, *Chabauty v. France*, 4 Octobre 2012; ECtHR, *Chassagnou and others v. France*, 29 April 1999.

[83] ECtHR, *Wallovà and Walla v. Czech Republic*, 26 October 2006, para 88; ECtHR, *Loncke v. Belgium*, 25 September 2007, para 59.

[84] Bamforth, Malik and O'Cinneide, *Discrimination Law: Theory and Context* (n 40); Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights' (n 44); Dagmar Schiek and

Vague Concept and Self-identification

The reluctance to invoke 'social condition' as a ground of discrimination can be explained by virtue of that fact that it is in itself a rather broad and vague concept.[85] It has so far only rarely been defined or applied at national, international and European level.

Furthermore, it seems difficult for applicants to identify themselves as being part of the group of poor, unemployed, undereducated, illiterate or otherwise socioeconomically disadvantaged.[86] Indeed, the category of socioeconomically underprivileged people is highly heterogeneous, culturally and socially speaking. It is therefore very difficult to identify as belonging a group with an 'identity' possessing this characteristic – if this sense of identity ever existed within the groups attached to traditional status grounds.[87]

In addition, people in precarious situations are often ashamed of their position and feel responsible for it.[88] The stereotypes and prejudice they are victims of reinforce the feeling of being inferior, worthless and lazy.[89] Therefore, poor people try to avoid being identified with such groups and are unlikely to request recognition of the rights they are entitled to ('non take-up phenomenon')[90] and to claim the discrimination they suffer from on account of their socioeconomic situation.

People who are socioeconomically disadvantaged also encounter financial and practical obstacles to bringing their cases before courts. In other words, '[p]overty and social exclusion contribute to the under-reporting of discrimination'.[91]

However, this is not all inevitable and irreversible. The more the courts deal with such cases by acknowledging discrimination on social condition grounds and specifying this concept, the more applicants and civil society will feel that they can legitimately launch claims before courts on these grounds. As will be shown in the following, a movement in that direction has slowly begun in Europe.

Human Rights and Multiple Discrimination

People who are disadvantaged or discriminated against because of their social condition usually bring their complaints under other human rights. Courts will take their socioeconomic situation into account indirectly in this context, as one element among others.[92] This is especially true under Article 14 ECHR, which has to be invoked in combination with another right enshrined in the Convention, which are

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Victoria Chege, *European Union Non-Discrimination Law, Comparative Perspectives on Multidimensional Equality Law* (Routledge-Cavendish 2009); Dagmar Schiek, Lisa Waddington and Mark Bell, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing 2007); Fredman, *Discrimination Law* (n 67).

[85] Cousins, 'The European Convention on Human Rights, Non-Discrimination and Social Security'(n 31).

[86] Sarah Ganty and Maxime Vanderstraeten, 'Actualités de la Lutte contre la discrimination dans les biens et les services, en ce compris l'enseignement' in Emmanuelle Bribosia, Isabelle Rorive and Sébastien Van Drooghenbroeck (eds), *Droit de la Non-discrimination. Avancées et enjeux* (Bruylant 2016) 199.

[87] Le défenseur des droits, 'Les refus de soins opposés aux bénéficiaires de La CMU-C, de l'ACS et de l'AME' (2014) 48 (available online); Jérémy Ianni, Bert Luyts and Bruno Tardieu, 'Discrimination et pauvreté. Livre Blanc: analyse, testings et recommandations' (2013) 15 and 35 (available online).

[88] Ibid 14.

[89] Ibid.

[90] Ianni, Luyts and Tardieu, 'Discrimination et Pauvreté. Livre Blanc: Analyse, Testings et Recommandations' (n 87); Le défenseur des droits, 'Les refus de soins opposés aux bénéficiaires de La CMU-C, de l'ACS et de l'AME' (n 87); Hans Dubois and Anna Ludwinek, 'Access to Social Benefits: Reducing Non-Take-Up' (2015) Publications Office of the European Union (available online).

[91] Equinet, 'Addressing Poverty and Discrimination: Two Sides of the One Coin' (n 61).

[92] See for example ECtHR, *Wallovà and Walla v. Czech Republic,* 26 October 2006; ECtHR, *Soares de Melo v. Portugal*, 16 February 2016; ECJ, C-579/13 *P&S*, EU:C:2015:369; ECJ, C-153/14 *K&A*, EU:C:2015:453. All these cases are discussed below.

mainly civic and political rights. As I will show in the next sections, this 'indirect' control is however incomplete.

Moreover, the ground of social origin is often likely to be invoked in addition to another protected ground such as disability, age, ethnic origin, nationality etc. It does not often stand as the only ground of discrimination in play. In other words, it is often one among several discriminations.[93] As explained by Fineman regarding the situation in the US '[p]overty, denial of dignity, and deprivation of basic social goods are "lack-of-opportunity categories" that the current framework of identity groups does not recognize; such disadvantage transcends group boundaries'.[94] The recognition of multiple discrimination is not widespread within European and national jurisdictions as such, however meaning that practitioners and judges continue to base their reasoning on one ground of discrimination only. Even if the current legal framework in Europe encompasses the 'lack-of-opportunity' categories in principle, it is not used and invoked in practice. Consciously or unconsciously, practitioners favour other grounds, more frequently employed than social condition, leaving open the risk that applicants could fall through the gaps (see below).

Element of Choice and Suspect Grounds

The social condition ground raises the philosophical question of whether it is a 'personal' characteristic 'in the sense of being immutable or innate to the person'[95] or whether the individual is responsible for her situation.[96] This question could have an important impact when discrimination on the basis of a person's socioeconomic position is raised.

In the previously mentioned UK case *R.J.M.*, the Court of Appeal judged that the fact of lacking accommodation cannot fairly be described as a 'personal characteristic' in the sense of Article 14 ECHR. Voluntarily acquired status is thought not automatically to be excluded from Article 14 but is less likely to be within Article 14 if it derived from a person's choice.[97] The House of Lords took another position on this point. Lord Neuberger considered that 'in some cases it may not be voluntary'. He carried on by asserting that '[i]gnoring the point that in some cases it may not be voluntary, I do not accept that the fact that a condition has been adopted by choice is of much, if any, significance in determining whether that condition is a status for the purposes of article 14. Of the specified grounds in the article, "language, religion, political or other opinion, [...] association with a national minority [or] property" are all frequently a matter of choice, and even "sex" can be'.[98] As mentioned above, the ECtHR adopts a similar liberal approach.

As a consequence, even when socioeconomic disadvantage is acknowledged, it is sometimes – not to say usually – viewed as an individual responsibility rather than having been caused by a structural situation. As rightly put by Sherya Atrey, '[v]iewed through this individualistic lens, poverty obviously fell beyond the purview of discrimination as concerned with structural disadvantage between groups rather than individual circumstances'.[99] This also echoes what Khiara M. Bridges has coined 'the moral

[93] Sarah Hannett, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination' (2003) 23 Oxford Journal of Legal Studies 65.
[94] Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (n 25) 4.
[95] ECtHR, *Bah v. The United Kingdom*, 27 September 2011, para 45.
[96] Sandra Fredman summarises this debate in relation to poverty and highlights how it is directly linked to the relationship between agency and structure. Fredman, 'The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty' (n 18) 579–580.
[97] *Court of Appeal, R (on the application of R.J.M.) v. Secretary of State for Work and Pensions* 28 June 2007 [2007] EWCA Civ 614, para 45.
[98] Speech of Lord Neuberger of Abbotsbury in House of Lords (opinion of the Lords of appeal), *R (on the application of R.J.M.) (FC) (Appellant) v. Secretary of State for Work and Pensions (Respondent)* 25 June 2008 [2008] UKHL 63, para 47.
[99] Atrey, 'The Intersectional Case of Poverty in Discrimination law'(n 71) 421.

construction of poverty', referring to the discourse according to which people are poor because there is something wrong with them, refusing to admit that people are poor because of structural reasons outside their control: they are responsible for their poverty.[100]

The question of whether a 'personal characteristic' derives from choice is essential to determining whether a ground is suspect. It therefore has an important impact in the scope and the nature of the Court's control. The ECtHR has judged that 'the nature of the status upon which differential treatment is based weighs heavily in determining the scope of the margin of appreciation to be accorded to Contracting States […] immigration status is not an inherent or immutable personal characteristic such as sex or race, but is subject to an element of choice […] Given the element of choice involved in immigration status, therefore, while differential treatment based on this ground must still be objectively and reasonably justifiable, the justification required will not be as weighty as in the case of a distinction based, for example, on nationality'.[101]

The question as to whether social condition and related grounds are considered as suspect grounds which require 'very weighty reasons' or which are unacceptable as a matter of principle has so far not been dealt with as such by the ECtHR. It is not an easy question to solve even though it is important, since the degree of scrutiny applied by the court depends on it.

In the aforementioned example of the British *R.J.M.* case, the House of Lords considered that the criterion of homelessness is not a suspect one. Lord Mance stated that the courts' scrutiny of the justification argued will not have the same intensity as when a core ground of discrimination is at play.[102] Lord Neuberger added that the difference in treatment between a 'rough sleeper' and someone with a home was justified, especially since the discrimination argued was not one of the express, or primary, grounds.[103]

At the European level, in *Chabauty v. France*[104] the Strasbourg Court judged that the ground of property ('*fortune foncière*') is not a suspect criterion. According to the Court, while this criterion can in some circumstances give rise to discrimination prohibited by the Convention, it does not feature among the criteria regarded by the Court either as unacceptable as a matter of principle, such as the criterion of race,[105] or as unacceptable in the absence of very weighty reasons, such as the criterion of sex.[106] In this context, as Cousins underlines, the potential development of a binary standard whereby some grounds receive strong protection and others very little might be problematic.[107] That said, this ruling by the Court should be nuanced since the property ground did not imply *in casu* a vulnerable situation leading to social exclusion. Interestingly, in the dissenting opinion in the ECtHR *Garib* case (before the Chamber), analysed below, which concerned a single mother relying on social benefits, Judges Lopez Guerra and Keller seem to consider that poverty calls for a strict scrutiny: 'the poor are a vulnerable group in and of themselves and […] restrictions applied to this group must ensure a "reasonable relationship of proportionality between the means employed and the aim sought to be realised" […]; the State's margin of appreciation must accordingly also be narrower in this context'.[108]

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[100] Kiara M. Bridges, *The Poverty of Privacy Rights*, Stanford University Press (2017), 38-64.
[101] ECtHR, *Bah v. The United Kingdom*, 27 September 2011, para 47.
[102] Speech of Lord Mance in House of Lords (opinion of the Lords of appeal), *R (on the application of R.J.M.) (FC) (Appellant) v. Secretary of State for Work and Pensions (Respondent)* 25 June 2008 [2008] UKHL 63, para 14.
[103] Speech of Lord Neuberger of Abbotsbury in House of Lords (opinion of the Lords of appeal), *R (on the application of R.J.M.) (FC) (Appellant) v. Secretary of State for Work and Pensions (Respondent)* 25 June 2008 [2008] UKHL 63, para 56.
[104] ECtHR, *Chabauty v. France*, 4 Octobre 2012, para 50.
[105] ECtHR, *D.H. and others v. The Czech Republic* (GC), 13 November 2007, para 176.
[106] ECtHR, *Konstantin Markin v. Russia* (GC), 22 March 2012, para 127.
[107] Cousins, 'The European Convention on Human Rights, Non-Discrimination and Social Security'(n 31) 135.
[108] Joint dissenting opinion of judges Lopez Guerra and Keller in ECtHR, *Garib v. The Netherlands*, 23 February 2016, para 14.

In any case, beyond the alternative approaches to the social conditions ground developed by legal scholars through the concept of vulnerability[109] or a contextual analysis[110] – which have resulted in a need for a more holistic approach to the discriminations which affect the poor – it seems essential that the social condition ground in antidiscrimination law should not be addressed at European level while framed within the question of whether it is an immutable characteristic. This approach does not make sense in the context of situations of socioeconomic disadvantage which in many cases could be improved through more redistributive policies, and fails to take into account the fact that such situations have a lot to do with structures over which individuals have no control. In my view, the fact that such a situation is due to a structural situation should call for heightened scrutiny.

Wide Margin of Appreciation

Regarding public policies, the social condition ground is often related to discrimination in areas where public authorities have a wide margin of appreciation (including housing, education, immigration and employment). According to the settled case law of the ECtHR, 'because of their direct knowledge of their society and its needs, national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds'. The Court will generally respect the legislature's policy choices unless it is 'manifestly without reasonable foundation'.[111] The ECJ adopts a similar position concerning social and employment measures.[112] The scrutiny of the courts in this matter is therefore lighter than in other areas. Nevertheless, despite the wide margin of appreciation of the states in these fields, the acknowledgement by courts of discrimination on social condition grounds is not inconceivable, especially when differences of treatment are related to particularly vulnerable excluded groups such as Roma or single mothers.

In any case, despite the abovementioned difficulties in applying the ground, some recent legal and political developments show a recent increasing awareness of its importance among scholars, judges and politicians. For instance, France adopted a law in 2016 which attempts to integrate the ground of 'vulnerability because of one's economic situation' into some of its anti-discrimination provisions.[113] Interestingly, the law is entitled 'law aiming at fighting discrimination on grounds of social precariousness'. In May 2015, a Belgian Court for the first time convicted a landlord for having discriminated against potential tenants on grounds of wealth because he had systematically refused to rent his flat to people who did not have an employment contract and did not meet a minimum income

[109] Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (n 25).
[110] Atrey, 'The Intersectional Case of Poverty in Discrimination law'(n 71).
[111] ECtHR, *Stec and Others v. the United Kingdom*, 12 April 2006, para 52; ECtHR, *Carson and others v. the United Kingdom*, 16 March 2010 ; ECtHR, *Bah v. The United Kingdom*, 27 September 2011, para 47.
[112] ECJ, C-499/08 *Ingeniørforeningen v. Denmark*, ECLI:EU:C:2010:600, para 33; ECJ, C-144/04 *Mangold*, ECLI:EU:C:2005:709, para 63.
[113] Loi n°2016-832 du 24 juin 2016 visant à lutter contre la discrimination à raison de la précarité sociale, *Journal officiel de la République française*, 25 juin 2016. See also the draft law: Proposition de loi visant à lutter contre la discrimination à raison de la précarité sociale, *Sénat Fr*., sess. ord. 2014 – 2015, n°378.

threshold.[114] Some equality and human rights bodies,[115] NGOs[116] and scholars[117] have also paid particular attention to this tool. They all argue for social condition to be enshrined in equality antidiscrimination acts and for the acknowledgement of this ground by courts. This can be explained by the value the social condition ground can add to the protection of socioeconomically disadvantaged people, not only regarding human rights and EU law but also discrimination law.

The fear of opening a Pandora's box

Another possible explanation for the sparse use made of socioeconomic discrimination by practitioners and courts and its neglect by scholars might be linked to what I will refer to as 'the fear of opening a Pandora's box'. This assumption is based on a number of discussions regarding the social condition ground in antidiscrimination law where scholars expressed a concern that using the social condition ground in antidiscrimination law would open the doors to challenging any inequality based on socioeconomic status. Fineman states that recognising that class bias 'would bring economic arrangement into question and, for that reason, would be incompatible with a formal equality analysis that ignores disparate underlying circumstances, including economic inequality'.[118] Calling socioeconomic inequalities and the absence of a ceiling to wealth and global redistribution into question is essential, as some researchers have already brilliantly and compellingly done.[119] However, the right not to be discriminated against based on socioeconomic status is not likely to fulfil this purpose for legal and technical reasons linked to antidiscrimination law as such. Differences in treatment or inequality cannot automatically ground an argument that the right not to be discriminated against has been violated, a principle which applies more generally in antidiscrimination law today in national and international law. Indeed, a proportionality test is usually applied which includes the following steps: proper purpose, rational connection, necessary means and a proportionality test *stricto sensu*.[120] This is why, as I

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[114] Civ. Namur, 5 May 2015, published on the website of the Interfederal Centre for Equal opportunity, <www.unia.be>; Nicolas Bernard, 'Le propriétaire face au choix de son locataire: sélectionner, oui... discriminer, Non!' (2015) *Justice-en-ligne* (available online).

[115] UNIA – Centre interfédéral pour l'égalité des chances, 'Evaluation de la loi du 10 mai 2007 modifiant la loi du 30 Juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie' (2016) 59–60 (available online); Human Rights Council United-Nations General Assembly, 'Final Draft of the Guiding Principles on Extreme Poverty and Human Rights (n 16); Le défenseur des droits, 'Les refus de soins opposés aux bénéficiaires de La CMU-C, de l'ACS et de l'AME' (n 87).

[116] Ianni, Luyts and Tardieu, 'Discrimination et pauvreté. Livre Blanc: analyse, testings et recommandations' (n 87).

[117] MacKay and Kim, 'Adding Social Condition to the Canadian Human Rights Act' (n 36); Roman, 'La discrimination fondée sur la condition sociale (n 75); Benito Sánchez, 'Towering Grenfell: Reflections around Socioeconomic Disadvantage in Antidiscrimination Law' (n 29); Ioannis Rodopoulos, 'L'absence de la précarité sociale parmi les motifs de discrimination reconnus par le droit français: un frein normatif à l'effectivité de la lutte contre les discriminations?' (2016) 9 La Revue des droits de l'homme; Fredman, 'The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty' (n 18); Cousins, 'The European Convention on Human Rights, Non-Discrimination and Social Security'(n 31).

[118] Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (n 25) 3.

[119] Milanovic, 'Global Inequality' (n 4); Moyn, *Not Enough* (7); Thomas Piketty, *Capital in the Twenty-first century* (Harvard University Press 2014).

[120] As Prof. Barack explains, proportionality is a legal construction. It is a methodological tool. It is made up of four components: proper purpose, rational connection, necessary means, and a proper relationship between the benefit obtained by realising the proper purpose of the measure and the harm caused to the constitutional right (the last component is also called 'proportionality *stricto sensu*' (balancing)). These four components are the core of the limitation clause. They are crucial to the understanding of proportionality. Aharon Barak, *Proportionality, Constitutional Rights and their Limitations* (Doron Kalir trans., Cambridge Univ. Press 2012) 131. See also Vicky C. Jackson, 'Proportionality and Equality', *in* Vicky C. Jackson and Mark Tushnet, *Proportionality and Equality in Proportionality, New Frontiers, New Challenges* (eds) 171, 175 (Cambridge Univ. Press 2017); Alec Stone Sweet and Jud Mathews call these four steps (1) the 'legitimacy' stage (2), the suitability stage (3) the necessity stage (4) and the 'balancing in the strict sense' (or 'proportionality in the narrow sense') stage. (Alec Stone Sweet

explained above, the social condition ground in antidiscrimination law is more commonly useful for claims linked to misrecognition – where an individual is stigmatised or stereotyped because of her socioeconomic situation – than for mal-redistribution, which needs to be tackled at a structural level. The fear of opening a Pandora's box is therefore ill-founded and should be dismissed as an argument for not using the social condition ground when vulnerable people are discriminated against because of their disadvantaged socioeconomic situation.

Value Added to Human Rights and EU Law

I argue that the social condition ground offers added-value in human rights law and EU law in the protection of socioeconomically disadvantaged people for two main reasons. First, it forces courts to address socioeconomic inequalities *directly* and prevents them from avoiding this sensitive issue (1). Secondly, it tackles the stereotypes, stigma and prejudice people experience because of their socioeconomically precarious situations (2).

Direct Scrutiny of Socioeconomic Inequalities

When scrutinising the violation of human rights or EU law, courts often simply avoid tackling the situation of applicants who are disadvantaged or excluded because of their socioeconomic background. Indeed, it is easy for courts to ignore or undermine this issue in their scrutiny of the violation of rights when discrimination is not invoked. This is regrettable, since it can be a very important feature of the case.

The example of the ECtHR judgment in *Garib v. The Netherlands* case is striking and shows that scrutiny through the social condition status ground in antidiscrimination law can be essential to protect people living in poverty. The case was about a policy of the city of Rotterdam according to which only people with a minimum income would be eligible for a housing permit to take up new residence in moderate-cost rented housing in the Rotterdam Metropolitan Region.[121] Only people residing in the Region for at least six years would be exempt from such a requirement. The aim of this policy is to reverse the 'concentrations of the "socioeconomically disadvantaged" in distressed inner-city areas'.[122]

Because of this measure, the applicant, a single mother of two on social benefits, was refused a housing permit to move to the Tarwewijk neighbourhood, a 'hotspot' area in Rotterdam, although she had found housing there which met her family's needs.[123] She claimed that her freedom to choose her residence (Article 2 of Protocol No. 4) had been violated but did not invoke Article 14 of the ECHR, and was dismissed by the Chamber at first instance. As for the recognition issue argued in this article, the disputed gentrification policy encompasses an important socioeconomic dimension regarding stigma and stereotypes: 'the applicant's experience suggests that, in practice, the contested regulation aggravates both the social hardship and the stigmatization of those who cannot meet the income criterion set by the Act' (see infra).[124] In their joint dissenting opinion before the Chamber of first instance, judges Lopez Huerra and Keller underlined that the necessity test under Article 14 of the Convention should have been applied in this case 'since the measure [was] linked to source of income and [was] thus

and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Colum. J. Transnat'l L.

[121] ECtHR, *Garib v. The Netherlands*, 23 February 2016, para 34.

[122] Ibid para 23.

[123] Ibid paras 127–128.

[124] Third party intervention in *Garib v. the Netherlands* (Application no. 43494/09), Written submission by the Human Rights Centre of Ghent University and the Equality Law Clinic of the Université Libre de Bruxelles pursuant to leave granted by the European Court of Human Rights in its letter of 17 November 2016 in accordance with rule 44(3) of the Rules of the Court.

implicitly connected to the social origin and gender of the persons concerned'.[125] Before the Grand Chamber, the Equality law clinic of the ULB and the human rights law clinic from the university of Ghent argued that Ms' Garib had been discriminated against because of her socioeconomic situation and called on the Court to seize the opportunity to develop standards in the field of discrimination on the grounds of poverty or 'social origin', as well as on their intersection with other prohibited grounds. The Grand Chamber dismissed the applicant without examining the case under Article 14, considering that it was not 'open to an applicant, in particular one who has been represented throughout, to change before the Grand Chamber the characterisation he or she gave to the facts complained of before the Chamber'.[126] According to the Grand Chamber, the discrimination complaint was 'a new one', raised neither in the original application nor later before the Chamber.[127] Beyond the fact that the Grand Chamber's reasoning appears inconsistent with the Court's own case law, several authors also argue that the *Garib* case is a missed opportunity for the Court to progress on the question of discrimination based on socioeconomic situations, especially in its recognition dimensions and its intersection with other grounds such as race and gender; 'a question particularly compelling in the present case, since the applicant was a single mother living on social welfare'.[128] As summarised by Lauren Lavrysen, '[p]oor individuals are pushed out of their boroughs and they are thereby rendered invisible, without addressing the roots of their socio-economic problems, allowing wealthier individuals to replace them'.[129] Indeed, the control '[did] not merely require the measure chosen to be suitable in principle for achievement of the aim sought'.[130] In other words, the Strasbourg court clearly '[failed] to acknowledge discrimination and stigmatization of persons living in poverty'.[131] In this context, scrutiny under Article 14 could have changed the outcome of the case since it would have directly tackled the disadvantages the applicant experienced because of her socioeconomic background. Dissenting Judges Pinto de Albuquerque and Vehabović also stressed the opportunity missed by the Grand Chamber to expressly include poverty among the discrimination criteria prohibited under Article 14.[132] The Court was probably not ready to make this step, which could explain why it avoided the question.

European and national courts have seemed in several cases to have *indirectly* scrutinised the impact that measures might have on socioeconomically disadvantaged applicants, regardless of antidiscrimination provisions. They did this through the proportionality test of freestanding human rights enshrined in the ECHR and EU law, for instance in recent cases relating to integration requirements imposed on migrants.

In a case brought before the Luxembourg Court involving the Netherlands, the applicants – *K&A* – challenged the burden imposed by the integration tests they had to comply with, regarding their level of education and their economic situation.[133] The preliminary ruling was about the compatibility of the

[125] Joint dissenting opinion of judges Lopez Guerra and Keller in ECtHR, *Garib v. The Netherlands*, 23 February 2016, para 14.
[126] ECtHR (GC), *Garib v. The Netherlands*, 6 November 2017, para 101.
[127] Ibid para 102.
[128] Valeska David and Sarah Ganty, 'Strasbourg fails to protect the rights of people living in or at risk of poverty: the disappointing Grand Chamber judgment in Garib v the Netherlands' (2017) Strasbourg Observers (available online).
[129] Laurens Lavrysen, 'Court Fails to Acknowledge Discrimination and Stigmatization of Persons Living in Poverty' (2016) Strasbourg Observers (available online).
[130] Ibid.
[131] Ibid.
[132] Dissenting opinion of Pinto de Albuquerque and Vehabović in ECtHR (GC), *Garib v. The Netherlands*, 6 November 2017, para 63.
[133] ECJ, C-579/13 *P&S*, EU:C:2015:369; C-153/14 *K&A*, EU:C:2015:453. See Sarah Ganty, 'Civic Integration Tests under the Control of the European Court of Justice: A Perilous Tightrope Walk between Margin of Appreciation of the Member States and Protection of Third Country Nationals' (2016) 1 European Journal of Human Rights 32.

Dutch civic integration tests with the EU Family Reunification Directive.[134] The Court ruled the Dutch civic integration requirements to be incompatible with the Directive, judging that 'specific individual circumstances, such as the age, illiteracy, level of education, economic situation or health of a sponsor's relevant family members must be taken into consideration in order to dispense those family members from the requirement to pass an examination',[135] which the Dutch rule failed to do. It also developed very comprehensive scrutiny regarding the impact of the tests for socioeconomically disadvantaged migrants. It is striking that the Court examined the issue in depth and exercised extended scrutiny regarding the socioeconomic situation of the applicants, even though the issue of discrimination had not been raised *in casu*.

A similar issue was at play in the British case *Ali and Bibi*.[136] It also involved the pre-entry integration tests that migrants have to pass to obtain a family reunion visa to join their spouses on British territory. The applicants were unable to comply with the test because of their illiteracy, their socioeconomic situation and their lack of computer skills. The High Court of Justice and, under appeal, the Court of Appeal[137] and the Supreme Court[138] dismissed the applicants. Notwithstanding that, at Supreme Court level, the Justices of the Supreme Court discussed the issue of the impracticability of the tests, particularly because of the applicants' socioeconomic situation. Lady Hale and Lord Neuberger were particularly concerned about the exclusion in the Guidance of '"[l]ack of or limited literacy or education" from the category of "exceptional circumstances", and the broad statement that "it is reasonable to expect that [applicants] (or their sponsor ...) will generally be able to afford reasonable costs incurred in making their application which could easily lead to inappropriate outcomes in individual cases'.[139] However, according to the Justices, 'even though there are likely to be a significant number of cases in which the present practice does not strike a fair balance as required by article 8',[140] '[t]his does not mean that the Rule itself has to be struck down'.[141] On this basis, Lady Hale suggested that the appropriate solution to avoid infringements in individual cases under Article 8 would be to recast the Guidance to grant exemptions in cases where compliance with the requirement is simply impracticable. The Court did not rule on the question whether the integration tests were discriminatory on the ground of social condition since the applicants did not raise it. It is striking however that at the first instance level, the High Court acknowledged a disparate impact against poor and undereducated people, yet concluded at the absence of discrimination on the other grounds raised meant that: '[i]n relation to the other categories [nationality and ethnic origin], I have concluded that, while the rule has a disparate impact on some, that disparate impact arises from personal circumstances such as financial means, education or knowledge of English, and does not amount to discrimination contrary to Article 14'.[142]

The two foregoing examples about integration tests show that on the basis of freestanding Convention rights or EU directives, European and national courts pay *some* attention to the fact that the challenged

[134] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, *OJ* L 251/12, 3 October 2003 (Family Reunification Directive).
[135] ECJ, C-153/14 *K&A*, EU:C:2015:453, para 58.
[136] High Court of Justice (administrative Court of Birmingham), *Chapti & Bibi v. Secretary of State for the Home Department*, 16 December 2011, [2011] EWHC 3370 (Admin), para 117, see also paras 122 and 125.
[137] Court of appeal (Civil Division), *Bibi & Ali v. Secretary of State for the Home Department*, 12 April 2013, [2013] EWCA Civ 322, para 43.
[138] Supreme Court of the United Kingdom, *R (on the application of Ali) (AP) (Appellant) v. Secretary of State for the Home Department (Respondent)* UKSC 2013/0266; *R (on the application of Bibi and Another) (FC) (Appellants) v. The Secretary of State for the Home Department (Respondent)*, 18 November 2015, UKSC 2013/0270.
[139] Ibid para 101.
[140] Ibid para 54.
[141] Ibid para 55.
[142] High Court of Justice (administrative Court of Birmingham), *Chapti & Bibi v. Secretary of State for the Home Department*, 16 December 2011, [2011] EWHC 3370 (Admin), paras 139 and 140.

measures are likely to disadvantage or exclude socioeconomically disadvantaged applicants, especially regarding a case's redistributive dimension. In those examples, they have achieved this outcome through the Article 8 ECHR proportionality test or EU immigration directives. In all these cases, the courts have tackled the issue of socioeconomic disadvantage *indirectly*. In other words, the disadvantage the applicants endure because of their socioeconomic background is considered as an element of a broader claim under a different right. Yet it is not the main question at stake. Scrutiny has been more-or-less extended to cover socioeconomic disadvantage and has yielded varying degrees of success for applicants, depending on the case and the will of the Court to address it. There is therefore a risk that the courts could easily undermine the equality-based reasoning regarding an applicant's socioeconomic situation or even omit it altogether. As a consequence, the proportionality test under freestanding rights or EU directives does not always appear sufficient to challenge a rule in cases where applicants face important issues because of their socioeconomic background, such as in *Ali and Bibi*.

In this respect, scrutiny of socioeconomic disadvantages on the basis of the right not to be discriminated against as a result of socioeconomic background is likely to be more complete and direct. In the context of the ECHR, Article 14 can be seen as a protection tool complementary to the freestanding Convention rights such as Article 8 ECHR. Indeed, the latter may not associate themselves with complete equality-based reasoning as easily as the former.[143] As we have seen, freestanding convention rights hardly ever directly address the differences of treatment and exclusion resulting from a socioeconomically disadvantaged situation and it is easy for the courts to avoid dealing with the question or to undermine it. This state of affairs notwithstanding, under Article 14 ECHR and the social condition status ground, difference in treatment and the exclusion of poor or undereducated people is the main question at stake and is unavoidable. Courts cannot choose whether to question the exclusion that the applicants suffer from because of their socioeconomic situation. For instance in *Ali and Bibi*, assuming that the Supreme Court considered that recasting the Guidance in light of the exemption could be a solution under article 8 ECHR, such a conclusion under the discrimination analysis of Article 14 would logically lead to the rule itself being struck down, since the authorities failed to take into account the situation of the particular group of socioeconomically underprivileged applicants such as illiterate individuals.

Scrutiny under Article 14 ECHR in the case of integration tests seems even more important since, as put by Judge Pinto Albuquerque in his concurring opinion in the *Biao v. Denmark* case, '[i]t is well known from experience that the most vulnerable family members, such as those who are ill, disabled, elderly, poorly educated, living in developing or conflict or post-conflict countries, have the greatest difficulty in meeting integration and knowledge-based requirements'.[144] This statement echoes the 2012 position paper of the Assembly of the Council of Europe on family reunification where the Assembly explicitly stated that 'a knowledge requirement (regarding for example the language or society of the host states) as a condition for family reunification is in itself discriminatory'.[145]

Moreover, tackling differences of treatment in antidiscrimination law has the advantage that the substance of the challenged policies does not have to be examined to verify whether human rights law has been violated. This is particularly important when it comes to differences in treatment in economic and social areas which are likely to be considered as being in compliance with freestanding rights given the wide margin of appreciation of the States. As the ECtHR recently stated on immigrations measures in the *Biao* case: 'the present case concerns compliance with Article 14 of the Convention read in conjunction with Article 8, with the result that immigration control measures, which may be found to be compatible with Article 8 § 2, including with the legitimate aim requirement, may nevertheless amount to unjustified discrimination in breach of Article 14 read in conjunction with Article 8'.[146]

[143] Peroni and Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (n 75) 1076.
[144] Concurring opinion of Judge Pinto Albuquerque in ECtHR, *Biao v. Denmark* (GC), 24 May 2016, para 118.
[145] Assembly of the Council of Europe, 'Position paper on family reunification' (2012) AS/Mig (2012) 01, para 14.
[146] ECtHR, *Biao v. Denmark* (GC), 24 May 2016, para 118.

One nuance should be pointed out in the context of EU law, however. Article 21(1) would in any case be limited to the conditions and within the limits defined by the Treaties.[147] Yet integration tests in immigration administration should be considered as being within the scope of the Treaties and, on this basis, could raise important discrimination questions – including discrimination on the grounds of race, as argued elsewhere.[148]

What is more, the general principles of equality and non-discrimination could also be alternative ways to combat discrimination on the grounds of social condition at EU level. In *Commission v. the Netherlands*[149] before the ECJ, the Advocate General Yves Bot interestingly indicated that 'the principle of non-discrimination seems to me to preclude the establishment of charges the amounts of which have a deterrent effect on third-country nationals who do not have sufficient financial resources'.[150] In this case, the applicants were challenging the excessive and disproportionate administrative charges that migrants have to pay to obtain long-term resident status. Unfortunately, as in *Ali and Bibi* and *K&A*, the Court did not examine the question under anti-discrimination law.[151] Nonetheless, the Advocate General's statement gives a first hint at the usefulness of the right to not be discriminated on account of a person's socioeconomic background according to the general principle of equality and non-discrimination.

Stereotyping and Stigma: an Issue of Misrecognition

Many examples show that beyond the disadvantages that the poor and undereducated endure, they are also victims of stereotyping and stigma, which can be defined as 'beliefs about the characteristics of groups of people' which are predominantly negative.[152] Stereotypes 'serve to maintain existing power relationships; they are control mechanisms. Stereotypes uphold a symbolic and real hierarchy between "us" and "them"'.[153] In 2014 the French NGO ATD Quart Monde showed that 97% of French people hold prejudice against poor people and poverty.[154] For instance, 63% think that people are discouraged from working when they receive social benefits. These stereotypes and stigma generate discrimination, leading to a vicious cycle. Indeed, stereotypes are both a cause and manifestation of the structural disadvantage and discrimination affecting certain groups, including the poor and undereducated.[155]

In the 2012 United Nation guiding principles on Extreme Poverty and Human Rights, the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona, underlined the following risk: 'Persons experiencing extreme poverty live in a vicious cycle of powerlessness, stigmatization, discrimination, exclusion and material deprivation, which all mutually reinforce one another […] Although persons living in extreme poverty cannot simply be reduced to a list of vulnerable groups, discrimination and exclusion are among the major causes and consequences of poverty'.[156] That vicious cycle exists not only for people living in extreme poverty but more broadly for all socioeconomically underprivileged people. There are many examples in Europe: a family asked to leave

[147] Article 53 para 2 of the EUCFR.
[148] Article 79 of the Treaty on the Functioning of the EU. Sarah Ganty, 'Le silence n'est pas (toujours) d'or, Affaire C-89/18 *A c. Udlændinge- og Integrationsministeriet*' (2019) 2 Revue des affaires européens 401 ; Sarah Ganty, *Intégration choisie. Droit européen de l'intégration des citoyens européens et des ressortissants des pays tiers: typologies et analyses critiques* (Larcier 2020) (forthcoming).
[149] ECJ, C-508/10 *Commission v. the Netherlands*, EU:C:2012:243.
[150] Opinion of the Advocate General Yves Bot delivered on 19 January 2012, C-508/10, EU:C:2012:25, para 69.
[151] ECJ, C-508/10 *Commission v. the Netherlands*, EU:C:2012:243.
[152] Alexandra Timmer, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' (2011) 11 Human Rights Law Review 714.
[153] Ibid 715.
[154] ATD Quart Monde, 'Les idées reçues sur les pauvres et la pauvreté' (2014) (available online).
[155] Timmer, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' (n 152) 708.
[156] Human Rights Council United-Nations General Assembly, 'Final Draft of the Guiding Principles on Extreme Poverty and Human Rights (n 16) 4–8.

a museum because of its 'unpleasant' smell,[157] homeless people who are regularly victims of violence,[158] deprivation of parental responsibility because of the material living conditions[159] or refusal of affordable housing to potential tenants who receive social benefits.[160]

The Kaltenbach report on the French draft law aiming to introduce a twenty-first ground for discrimination based on social precariousness in criminal law, the Labour Code and the General Anti-Discrimination Act insists on the issue of prejudice, stigma and stereotypes. According to the report, '*la pauvreté est ressentie comme une double peine: en sus de la précarité matérielle, cette situation se double d'une stigmatisation. Or, le sentiment d'humiliation entretient les phénomènes de discrimination*'.[161]

The 2012 UN Guiding Principles expressly state that there is a right to be protected from the negative stigma attached to conditions of poverty not only from individuals but also from public authorities. Moreover, authorities 'must take all appropriate measures to modify sociocultural patterns with a view to eliminating prejudices and stereotypes'.[162]

Stereotypes and stigma against poor and undereducated people are mainly an issue of misrecognition. As such, they can hardly be tackled and grasped through freestanding Convention rights. In this context, the social condition ground appears to be the most suitable tool to redress this misrecognition by acknowledging that in some cases, such stigma and prejudice against socioeconomically disadvantaged people are illegal and unconscionable. Timmer describes anti-stereotyping analysis in two steps: first, naming stereotypes and then challenging them.[163] As she rightly puts it, '[t]he goal of a stereotype-analysis is exposing and contesting the patterns that lead to structural discrimination. Such an analysis aims to render explicit and problematic what society experiences as "natural"'.[164] Such an acknowledgment is essential even when courts rule in favour of the applicant on other aspects of the case. Indeed, recognition is in some instances very symbolic but essential to fighting against structural discrimination and the applicant's feelings of humiliation, shame and unworthiness. It also creates a link with the other dimensions (distribution, participation and transformation) of the socioeconomic inequalities people suffer from and which are often the consequences of prejudice and stigma. In other words, denouncing such stigma and stereotypes constitutes a crucial step in tackling issues of misdistribution at a structural level.

[157] Catherine Rollot, 'Une famille pauvre exclue du musée d'Orsay' (2013) Le temps 3 (available online).
[158] Lucile Jamet and Christelle Thouilleux, 'Davantage de victimes de vol ou d'agression parmi les sans-domicile' (2012) Institut national de la statistique et des études économiques (available online).
[159] ECtHR, *Soares de Melo v. Portugal*, 16 February 2016; ECtHR, *Wallovà and Walla v. Czech Republic*, 26 October 2006.
[160] UNIA – Centre interfédéral pour l'égalité des chances, 'Baromètre de la diversité logement' (2014) (available online).
[161] Free translation: 'as a burden, poverty is twofold: in addition to material want, it comes hand-in-hand with stigmatisation; and humiliation does nothing but fuel discrimination'. Rapport fait au nom de la commission des lois constitutionnelles, de législation, du suffrage universel, du Règlement et d'administration générale (1) sur la proposition de loi de M. Yannick Vaugrenard et plusieurs de ses collègues visant à lutter contre la discrimination à raison de la précarité sociale par Philippe Kaltenbach, Sénat Fr., Sess. Ord., 2014 – 2015, n°507, 15 (Hereafter: Kaltenbach Report); Rodopoulos, 'L'absence de la précarité sociale parmi les motifs de discrimination reconnus par le droit français: un frein normatif à l'effectivité de la lutte contre les discriminations?' (n 117).
[162] Human Rights Council United-Nations General Assembly, 'Final Draft of the Guiding Principles on Extreme Poverty and Human Rights (n 16) 21.
[163] Timmer, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' (n 152) 718-719. Naming stereotypes implies taking into account the historical context and current impact as well as revealing the stereotypes, Ibid 720–722.
[164] Ibid 725.

As underlined by some reports about 'non-take-up'[165] of social benefits, aside from the question of capability, some socioeconomically disadvantaged people do not dare to claim their socioeconomic rights, including for reasons of fearing humiliation and stigmatisation.[166] The issue of 'non-take-up' of rights and services in France is so significant that an observatory in charge of tackling this issue has been established.[167] People in such circumstances tend to develop a very negative self-image and sense of shame and responsibility for their state,[168] and thus tend to exclude themselves further.[169] In this respect, stigma and prejudice could constitute real social barriers and have to be combated through the right to not be discriminated against based on socioeconomic position. The recognition dimension is very important in this regard.[170] Again in France, the recent draft legislation on medically-assisted procreation for women contained a proposal for provision according to which '*[t]oute femme seule souhaitant bénéficier d'une assistance médicale à la procréation doit pouvoir justifier d'un niveau de revenus lui permettant d'assurer sa subsistance et celle de son enfant à naitre*',[171] which was justified, based on the best interests of the child, in order to avoid causing her to live in a situation of precarity. This provision was ultimately not adopted. However, it does illustrate that stigma against people who are socioeconomically disadvantaged remain strong in the public and the private spheres. The best interest of children would not be respected if they were born and lived in precarity, placing responsibility for this state on the mother, without questioning the structural character of this precarious situation. This draft provision also echoes the case of 'forced adoption' in the UK where, under the Children Act 1989, many children have been forcibly separated from their parents on the basis of a risk of future harm on the sole basis of their precarious financial situation because 'adoption is cheaper'.[172] As explained by Alicia-Dorothy Mornington and Alexandrine Guyard-Nedelec '[s]truggling parents are not helped as they previously were through counselling for example; they are seen as risks', while the authors rightly argued, 'poverty *per se* should never constitute the basis for removing children from their parents',[173] as ruled by the ECtHR, and as I will show.

Some case law – including some of the cases mentioned above – seem worth developing here to strengthen the arguments presented.

The first example concerns parents deprived of parental custody for being unable to provide their children with adequate material living conditions – as in the aforementioned UK 'forced adoption'. In *Wallova and Walla v. Czech Republic* before the ECtHR, the applicants, parents of five children, were deprived of parental responsibility because they were unable to provide their children with adequate and stable housing because of their situation of poverty. There were no other circumstances raised by the authorities to justify the measure. The applicants argued before the Strasbourg Court that the authorities

[165] Eurofound, Access to social benefits: Reducing non-take-up, (2015) Publications Office of the European Union (available online); Ianni, Luyts and Tardieu, 'Discrimination et pauvreté. Livre Blanc: analyse, testings et recommandations' (n 87) 15.
[166] Ianni, Luyts and Tardieu, 'Discrimination et pauvreté. Livre Blanc: analyse, testings et recommandations' (n 87) 17–18.
[167] Observatoire des non-recours aux droits et services – ODENORE: <https://odenore.msh-alpes.fr/>.
[168] Ianni, Luyts and Tardieu, 'Discrimination et pauvreté. Livre Blanc: analyse, testings et recommandations' (n 87) 15.
[169] Kaltenbach Report (n 161) 15.
[170] Ianni, Luyts and Tardieu, 'Discrimination et pauvreté. Livre Blanc: analyse, testings et recommandations' (n 87) 18.
[171] Amendement n°1745 déposé par Madame Piron, Bioéthique n°2187, assemblée nationale 5 septembre 2019. Author's translation: '[E]very single woman wishing to benefit from medically assisted procreation must be able to justify a level of income allowing her to ensure her subsistence and that of her unborn child'.
[172] Alicia-Dorothy Mornington, Alexandrine Guyard-Nedelec, 'Is Poverty Eroding Parental Rights in Britain? The Case of Child Protection in the Early Twenty-First Century' in Nicolás Brando and Gottfried Schweiger, *Philosophy and Child Poverty Reflections on the Ethics and Politics of Poor Children and their Families* (Springer 2019) 347.
[173] Ibid 347 and 341 and seq.

had breached their rights to private and family life (Article 8)[174] and not to be discriminated against because of their social origin and poverty (Article 14).[175]

The Court ruled in favour of the applicants under Article 8: the placement measure was too radical given the reasons argued by the authorities. In other words, unsatisfactory living conditions or material deprivation cannot constitute the sole ground to justify the placement of children in care.[176] It is worth noting that the United Nations General Assembly and the Parliamentary assembly of the Council of Europe have expressed similar opinions.[177]

Moreover, the Strasbourg Court insisted on the positive obligations on authorities, which have a duty to make efforts to support applicants to overcome material difficulties. The authorities should have addressed the material problems found by other means than the separation of the family.[178] The Court accepted a similar argument in a recent case involving a woman, the mother of ten children, noting that the applicant's vulnerable situation and obliged the State to provide her with enhanced protection.[179]

In *Wallova and Walla* the Court decided that Article 14 did not raise a separate issue.[180] The ruling on this point is regrettable. Assessment under Article 14 would have allowed the issue of the stigmas and stereotypes the applicants experienced to be considered. The assumption according to which poor parents are not able to look after their children and which portrays them as lazy, irresponsible or neglectful of their children also deserves scrutiny under the right to equality and non-discrimination.[181] Importantly, the applicants in that case insisted on the fact that the authorities adopted a very disdainful attitude towards them.[182]

The Parliamentary Assembly of the Council of Europe has already expressed its concerns about removal decisions based on vicious circles of self-reinforcing stereotypes and prejudice leading to discrimination, especially concerning already discriminated and vulnerable groups such as Roma and migrants.[183] As Valeska David underlines, 'the removal of children from poor or otherwise "deviant" families is frequently the result of decisions based on stereotypes constitutive of discrimination [….] Besides violating human rights, such stereotypes sustain existing inequalities'.[184] In *Wallace and Walla*, the Court clearly missed an opportunity to tackle this issue and seemed even reluctant to engage in this scrutiny.[185] As a consequence, despite the Court having already tackled stereotypes based on gender[186] and ethnic origin[187] through the lens of the right to not be discriminated against, it still seems reluctant

[174] ECtHR, *Wallovà and Walla v. Czech Republic*, 26 October 2006, para 47.
[175] Ibid para 86.
[176] Ibid paras 72, 74 and 78. Valeska David, 'ECtHR Condemns the Punishment of Women Living in Poverty and the "Rescuing" of Their Children' (2016) *Strasbourg Observers* (available online).
[177] Resolution 2010 A/RES/64/142 Guidelines for the Alternative Care of Children (2010) Parliamentary assembly of the Council of Europe: 'financial and material poverty, or conditions directly and uniquely imputable to such poverty, should never be the only justification for the removal of a child from parental care [...] but should be seen as a signal for the need to provide appropriate support to the family'; Human Rights Council United-Nations General Assembly, 'Final Draft of the Guiding Principles on Extreme Poverty and Human Rights (n 16) 11.
[178] ECtHR, *Wallovà and Walla v. Czech Republic*, 26 October 2006, para 73.
[179] ECtHR, *Soares de Melo v. Portugal*, 16 February 2016; David, 'ECtHR Condemns the Punishment of Women Living in Poverty and the "Rescuing" of Their Children' (n 176).
[180] ECtHR, *Wallovà and Walla v. Czech Republic*, 26 October 2006, para 88.
[181] David, 'ECtHR Condemns the Punishment of Women Living in Poverty and the "Rescuing" of Their Children' (n 176).
[182] ECtHR, *Soares de Melo v. Portugal*, para 65.
[183] Parliamentary Assembly of the Council of Europe, Social services in Europe: legislation and practice of the removal of children from their families in Council of Europe member States (2015), paras 54, 57 and 85.
[184] David, 'ECtHR Condemns the Punishment of Women Living in Poverty and the "Rescuing" of Their Children' (n 176)
[185] Ibid.
[186] ECtHR, *Konstantin Markin v. Russia* (GC), 22 March 2012, para 127.
[187] ECtHR, *Biao v. Denmark* (GC), 24 May 2016, para 118.

to do so for other vulnerable and stigmatised groups such as poor people or persons with disabilities. In *Kocherov and Sergeyeva v. Russia*[188] relating to the restriction of the parental authority of a father with a mental disability, the Court considered it was not necessary to examine the applicant's complaint under Article 14 ECHR, despite the strong stereotyped assumptions the applicants had endured.[189] In a well-argued dissenting opinion, Judge Keller criticised the Court's decision for not having adequately addressed the discriminatory nature of the measure based on a strong stereotype linked to the applicant's disability.[190] As a consequence, it is essential for the ECtHR to recognise and address stereotyping as a structural cause of discrimination against all vulnerable groups, including the poor and undereducated.[191]

Discrimination against migrants is rarely dealt with by the courts,[192] and when it is, the argument is usually dismissed since immigration law by definition gives rise to differences in treatment. Moreover, states have a wide margin of appreciation in this field.[193] The issue of discrimination against migrants, especially discrimination on the basis of socioeconomic background, could therefore appear difficult to challenge. Despite it being a tough question, it seems essential to tackle it from a discrimination law perspective because of the strong stereotypes migrants suffer from.

States usually distrust poorer and undereducated migrants because they do not want this group to take advantage of their social systems. There is a great deal of prejudice and stereotyping surrounding poor immigrants and welfare use, not only in Europe but also in the US.[194] Welfare use is one of the main reasons why income requirements for migrants have been introduced by most Western states as a condition for obtaining a visa: prospective migrants are expected not become a burden on a state's finances.[195] Many migrants struggle to meet this requirement. Those who do not meet it are excluded and are likely to be stigmatised as potential burdens on the system. European courts have considered in many instances that such requirements are proportionate to the aim sought, but they have never addressed the related stereotypes as such.[196]

Regarding the socioeconomic situation of migrants, the aforementioned instance of integration requirements is distinct from that of income requirements: the aim pursued is related to social cohesion and not to the protection of the welfare state. As Lady Hale explained in *Bibi and Ali* '[i]t is one thing to expect that people coming here will not be dependent upon public funds for their support. It is quite another thing to make it a condition of coming here that the applicant or sponsor expend what for him or her may be unaffordable sums in achieving and demonstrating a very basic level of English'.[197] As I

[188] ECtHR, *Kocherov and Sergeyeva v. Russia*, 29 March 2016.
[189] *Contr*a ECtHR, *Kiss v. Hungary*, 20 May 2010 where the Court explicitly refers for the first time to the stereotypes which people with intellectual disabilities experience; Timmer, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' (n 152) 713.
[190] Dissenting opinion of judge Keller in ECtHR, *Kocherov and Sergeyeva v. Russia*, 29 March 2016; Corina Heri, 'Silence as Acquiescence: On the Need to Address Disability Stereotyping in Kocherov and Sergeyeva v. Russia' (2016) *Strasbourg Observers* (available online).
[191] Timmer, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' (n 152) 715.
[192] Marie-Bénédicte Dembour, 'Still Silencing the Racism Suffered by Migrants... The Limits of Current Developments under Article 14 ECHR' (2009) 11 European Journal of Migration and Law 221.
[193] ECtHR, *Biao v. Denmark* (GC), 24 May 2016, para 118.
[194] Peter Burns and James G Gimpel, 'Economic Insecurity, Prejudicial Stereotypes, and Public Opinion on Immigration Policy' (2000) 115 Political Science Quarterly 201.
[195] ECJ, C-540/03 *Parliament v. Council*, EU:C:2006:429; Family Reunion Directive; Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, *OJ* L 16 23 January 2007.
[196] ECJ, C-540/03 *Parliament v. Council* EU:C:2006:429; England and Wales Court of Appeal (Civil Division) Decisions, *MM & Ors, R (On the Application Of) v. Secretary of State for the Home Department (Rev 1)* [2014] EWCA Civ 985 (11 July 2014).
[197] Supreme Court of the United Kingdom, *R (on the application of Ali) (AP) (Appellant) v. Secretary of State for the Home Department (Respondent)* UKSC 2013/0266; *R (on the application of Bibi and Another) (FC) (Appellants) v. The Secretary of State for the Home Department (Respondent)*, 18 November 2015, UKSC 2013/0270, para 54.

have shown, the UK integration test system disadvantages the poor and undereducated because it is very difficult for them to comply with its requirements and they cannot benefit from the hardship clause, as in other states such as the Netherlands.[198] Such requirements are likely to stereotype and stigmatise these categories of migrants as not being able to integrate in the host society because of their socioeconomic background. The authorities do not expressly state this, but migrants are implicitly considered not to be able to integrate society because of their socioeconomic condition. This is stigmatising since it implies that only the wealthy and educated could meet the aim of integration – if this concept ever makes sense –, especially in the current unfavourable climate for migrants in the EU. I argue that important issues of misrecognition transformative and participative equality are at play. They are likely to lead to structural discrimination requiring specific restorative measures to achieve equality in all its dimensions.[199]

However, it should be pointed out that stereotypes can also work in reverse for migrants. Educated migrants can be refused protection for not being sufficiently 'vulnerable'. This is the conclusion that the ECtHR reached in the highly controversial *Sow against Belgium*, concerning the risk of becoming the victim of genital mutilation for a second time, where the court observed that the applicant had received an education and was herself opposed to the practice of genital mutilation, meaning that she could not be regarded as a particularly vulnerable woman.[200]

The previously mentioned *Garib* case about housing policy of the city of Rotterdam also raises an important issue relating to prejudice, stigma and stereotypes. The authority justified measures taken to 'gentrify' a distressed neighbourhood on the basis that conditions in those areas had 'serious effects on quality of life owing to unemployment, poverty and social exclusion […] together with antisocial behaviour, the influx of illegal immigrants and crime'.[201] Such measures inherently strongly stereotype poor people. The dissenters criticised these stereotypes: the 'poor do not *per se* pose a threat to public security, nor are they systematically the cause of crime'. Such a stereotype is likely to lead to discrimination especially since 'the need to reverse the decline of impoverished inner-city areas […] can be achieved through other policy measures not tied to personal characteristics'.[202] Moreover, as pointed out by Lavrysen, such policies also stigmatise because their paternalist character denies the agency of the persons concerned. Indeed, they assume that people living in poverty are unable to improve their living circumstances themselves and therefore require 'gentrification policies that ultimately serve middle class interests, making poor individuals invisible, thereby discarding of the need to improve their socio-economic position'.[203]

Finally, the social condition ground could also be mobilised to protect Roma from the harsh stereotyping, stigma and prejudice they experience. As will be explained in the next section, when acknowledging discrimination against Roma on the basis of recognition issues – i.e. prejudice and stereotyping – courts usually base their reasoning on the ethnic origin ground.[204] However, the

[198] Karin De Vries, *Integration at the Border. The Dutch Act on integration Abroad and International immigration Law* (Oxford and Portland (Oregon), Hart Publishing 2013); Sarah Ganty, *Intégration choisie* (n 148).
[199] Timmer, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' (n 152) 712.
[200] ECtHR, *Sow v. Belgium*, 19 January 2019, para 68.
[201] ECtHR, *Garib v. The Netherlands*, 23 February 2016, para 23.
[202] Joint dissenting opinion of judges Lopez Guerra and Keller in ECtHR, *Garib v. The Netherlands*, 23 February 2016, para 18.
[203] Lavrysen, 'Court Fails to Acknowledge Discrimination and Stigmatization of Persons Living in Poverty' (n 129).
[204] See for example, the ECJ *CHEZ* case, concerning the discriminatory character of the practice of installing electricity meters at a higher pace in districts where most of the inhabitants were of Roma origin. In its decision, the Court considered discrimination against Roma only on ethnic origin grounds. Regarding stereotyping and stigmatisation of Roma, the Court says that it 'could in fact suggest that the practice at issue is based on ethnic stereotypes or prejudices, the racial grounds thus combining *with other grounds*' (para 82). What does the Court mean by 'other grounds'? Does the Court distinguish ethnic and racial criteria or does it imply that stereotypes and stigmas are likely to be related to other grounds than those of race and ethnic origin? I would suggest the former, since the Court did not consider socioeconomic condition in the case at all. This is unsurprising, since EU anti-

socioeconomic situation of this minority also plays an important role in shaping prejudices against them. In this context, it seems important to address the issue of misrecognition through the socioeconomic background of victims of discrimination.

To conclude, poor people widely experience stereotyping, stigma and prejudice. MacKay and Kim recall that '[a] key function of human rights codes is to educate and remedy actions based on discriminatory beliefs or stereotypes. This is true for all grounds of discrimination, including for social condition where stereotypes may attach to someone based on their occupation, level or source of income, or other personal characteristics'.[205] The social condition ground in discrimination law appears to be a suitable means to challenge them. Policymakers, lawyers, organisations and judges would do better to consider and use it to protect the most vulnerable groups of our modern societies.

Value-Add to Discrimination Law *per se*

In addition to human rights law and secondary EU law, the social condition ground also adds value to discrimination law itself. First, it is often part of intersectional and multiple discrimination (1). Second, it sometimes stands alone as the sole ground for discrimination, or at least as the main one in cases of additive discrimination. It is therefore unavoidable when a claimant argues discrimination (2).

Intersectional and Multiple Discrimination

To combat all aspects of socioeconomic hardship related to discrimination, discriminatory situations must also be taken into account as a whole, when status grounds intersect or are multiple, including the status ground of social condition. It is a way to recognise that 'privilege and disadvantage migrate across identity categories'.[206]

Over the last few years, the legal literature has paid more attention to intersectional and multiple discrimination, even though it is still not widespread in Europe. Nevertheless, the social condition ground is often neglected in the analysis.[207] This is regrettable, since 'the "fit" of social condition with other prohibited grounds is not only appropriate, but also vital in recognizing and achieving the ameliorative purposes of human rights'.[208] Accordingly, failing to carry out an intersectional analysis could result in disadvantaged individuals falling through the cracks of human rights protection. Indeed, when an applicant alleges multiple counts of discrimination and one of the grounds is unprotected or not invoked, this can affect the success of the overall discrimination claim.[209] In an extensive report about poverty, ATD Quart monde explained that before the introduction of the economic precariousness ground in French antidiscrimination law, it was very difficult to obtain a comprehensive understanding of the phenomenon of multiple discrimination and to find adequate responses to it in the absence of the social condition ground in French anti-discrimination provisions.[210] Shreya Atrey also rightly

discrimination directives do not prohibit discrimination on the ground of social condition. ECJ, C-83/14, *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*, ECLI:EU:C:2015:480.

[205] MacKay and Kim, 'Adding Social Condition to the Canadian Human Rights Act' (n 36) 39.

[206] Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (n 25) 21.

[207] Hannett, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination' (n 93); Dagmar Schiek and Anna Lawson, *European Union Non-Discrimination Law and Intersectionality. Investigating the Triangle of Racial, Gender and Disability Discrimination* (Ashgate Publishing Limited 2011); Lutte Contre La Discrimination Multiple : Pratiques, Politiques et Lois (2007) (available online).

[208] MacKay and Kim, 'Adding Social Condition to the Canadian Human Rights Act' (n 36) 81.

[209] Hannett, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination' (n 93) 72.

[210] Ianni, Luyts and Tardieu, 'Discrimination et pauvreté. Livre Blanc: analyse, testings et recommandations' (n 87) 55.

emphasises the fact that the dominant framework in discrimination law is 'too fixated on grounds or status groups considered independently and in isolation of the poverty which exists within them'.[211]

Some examples in European and national case law illustrate the need to consider intersectional and multiple discrimination through the lens of social condition in addition to the other grounds.

The case *B.S. v. Spain*[212] before the ECtHR concerns a female Nigerian national and legal resident of Spain carrying out outdoor sex work who was repeatedly stopped by the police for alleged identification purposes and was verbally and physically abused. Interestingly, in this case the third-party interveners[213] argued that the applicant had been a victim of intersectional discrimination on the basis of her race, gender and social origin. They showed that 'an analysis of the facts taking account of only one of the grounds was approximate and failed to reflect the reality of the situation'.[214] They explained that the relevant factors – race, gender and employment – could not be considered separately, but should rather be taken into account together along with their mutual interactions.

The Strasbourg Court ruled in favour of the applicant and significantly found a violation of the right to effective investigation in conjunction with the prohibition of discrimination stating that 'the decisions made by the domestic courts failed to take account of the applicant's particular *vulnerability* inherent in her position *as an African woman working as a prostitute*. The authorities thus failed to comply with their duty under Article 14 of the Convention taken in conjunction with Article 3 to take all possible steps to ascertain whether or not a discriminatory attitude might have played a role in the events'.[215] To our knowledge, this is one of the first times that the Strasbourg Court has adopted an intersectional interpretation of discrimination based on the indivisible combination of the factors in question. In other words, the discrimination experienced arose from 'the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone'. Sarah Hannett speaks of 'intersectional discrimination'.[216] This form of multiple discrimination differs from 'additive discrimination', 'where an individual "belongs to two different groups, both of which are affected by [discriminatory] practices"'.[217] In *B.S.* however the Court used the term 'vulnerability' instead of 'intersectionality'. It is regrettable that it did not acknowledge the intersectional character of the discrimination as such. However, it is striking that the Court ruled that discrimination on the basis of the applicant's social condition of the applicant was at issue, *in casu* her employment, as an essential component of the overall discrimination.

Other cases before the ECtHR involving social housing and women living in poverty, likely to raise questions of intersectional discrimination in the light of socioeconomic disadvantage, were much less successful – such as *Garib v. The Netherlands* commented on above or the more recent *Yeshtla v. The Netherlands*. The latter case concerned a complaint brought by a naturalised Dutch national of Ethiopian origin on the basis of Articles 8 and 14 ECHR: her means-tested housing benefit had been terminated because her son, who was a young adult and did not have a residence permit, had been living with her (he was taking care of her because she has some health issues). The Court dismissed Mrs Yeshtla's complaints based on Article 8 ECHR because the 'decision challenged by the applicant was solely taken on the basis of a statutory scheme set up for the purpose of ensuring proper enforcement of immigration controls'[218] and rejected as inadmissible the complaint based on Article 14 ECHR because it had already

[211] Atrey, 'The Intersectional Case of Poverty in Discrimination law'(n 71) 424.
[212] ECtHR, *B.S. v. Spain*, 24 July 2012.
[213] European Social Research Unit (ESRH) at the Research Group on Exclusion and Social Control (GRECS) at the University of Barcelona, AIRE Center, paras 56–57.
[214] ECtHR, *B.S. v. Spain*, para 56
[215] Ibid para 62.
[216] Hannett, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination' (n 93) 68.
[217] Ibid.
[218] ECtHR, 15 January 2019, *Emabet Yeshtla v. The Netherlands*, para 34.

been examined by the domestic courts.[219] There is a lot of scope for criticism of this decision, especially the 'domestic courts' arguments. We can regret that the court again missed an opportunity to decide on the sensitive question of discrimination based on an accumulation of inseparable characteristics: directly differentiated treatment based on the possession of a residence permit combined with indirectly differentiated treatment based on gender and social condition (on top of the applicant's health issues). Single parents (or formerly single parents) like the applicant are usually women and more likely to be poor, and mothers who do not rely on social housing would not have to choose between, 'on the one hand, expelling a son from [their] […] home and, on the other, losing entitlement to housing benefit entailing serious financial difficulties'.[220] The Court seems reluctant to rule on the issue of discrimination when considering cases involving social benefits claimed by vulnerable people – especially when this includes irregular migration – which is highly regrettable given the importance of the question in those contexts. As for social disadvantage more specifically, Fulvia Staiano rightly explains that '[i]n the case under review, Ms Yeshtla's situation was one of undeniable social disadvantage. It is debatable whether, on account of her health condition, she could have been qualified as part of a vulnerable group. In any case, this circumstance together with her precarious economic situation and the fact that she relied on her cohabiting son's care and assistance suggested at the very least that the withdrawal of housing benefits could have caused excessive hardship on her on accounts of her vulnerable position. This aspect deserved closer attention in the light of the ECtHR's case law on discrimination'.[221]

The social condition ground also plays an important role in 'additive discrimination', which implies that the grounds cumulate but can be considered separately, as opposed to intersectional discrimination. The 2015 Belgian housing monitoring report shows that the 'wealth' ground is the most common status ground argued in discrimination in housing, after ethnic origin.[222] In this context, the wealth ground often contributes to other grounds, since the applicant would usually belong to variously disadvantaged groups.[223] On 5 May 2015 a Belgian court – the Court of First Instance of Namur – convicted a landlord for the first time for discriminating against a potential tenant on grounds of wealth.[224] The applicant benefited from social benefits for persons with disabilities. According to the Court, it is 'normal' for landlords to verify the solvency of a potential tenant. However, the former cannot exclude as a matter of course potential tenants in receipt of social benefits and who are not actively employed. In other words, landlords cannot take into account the nature of the income but only its amount and must appreciate it *in concreto*.[225] It is striking that the Court in this case concluded that discrimination had occurred not only on grounds wealth but also on grounds of disability. Therefore, the Court acknowledged the existence of additive discrimination where social condition played a decisive role.

Roma and travellers[226] also appear to be relevant to multiple discrimination. The European Commission against Racism and Intolerance has stressed many times that Roma suffer from a specific form of racism – 'anti-gypsyism' – which is an 'ideology founded on racial superiority, a form of dehumanisation and institutional racism nurtured by historical discrimination, which is expressed, among others, by violence,

[219] Ibid para 40
[220] Ibid para 28.
[221] Fulvia Staiano, 'Yeshtla v. the Netherlands: a missed opportunity to reflect on the discriminatory effects of States' social policy choices' (2019) *Strasbourg Observers* (available online).
[222] UNIA – Centre interfédéral pour l'égalité des chances, 'Baromètre de la diversité logement' 25 and 215.
[223] Ibid 29.
[224] Civ. Namur, 5 mai 2015, available on <www.unia.be/en>.
[225] Ganty and Vanderstraeten, 'Actualités de la Lutte contre la discrimination dans les biens et les services, en ce compris l'enseignement' (n 86) 195–197; Erik Van Den Haute, 'Le bail et la législation anti-discrimination ou lorsque le juge devient funambule' (2015) 37 Journal des Tribunaux 769.
[226] It is worth noting that the terms Roma and travellers refer to different realities in terms of ethnic origin, status and way of life: Commission nationale consultative des droits de l'homme, 'Avis sur le respect des droits des "gens du voyage" et des Roms migrants au regard des réponses récentes de La France aux instances internationales' (2012) paras 6–8 (available online).

hate speech, exploitation, stigmatization and the most blatant kind of discrimination'.[227] Courts usually acknowledge discrimination against Roma and travellers on grounds of ethnic origin and race.[228] They pay special attention to this ground because '[r]acial discrimination is a particularly invidious kind of discrimination'.[229] Ethnic and racial discrimination is undoubtedly the main form of discrimination that Roma and travellers experience. In some cases however, it does not stand alone. Discrimination against this minority is also related to their lifestyle, their socioeconomic situation and more broadly to their social condition.[230] Discrimination on grounds of the socioeconomic situation of Roma often intersects with – or cumulates with – their ethnic origin. The failure of states to consider the specifics of the socioeconomic position of Roma is common,[231] but rarely addressed by the courts. This is unfortunate. As underlined by the Parliamentary Assembly of the Council of Europe, 'Roma form a special minority group, in so far as they have a double minority status. They are an ethnic community and most of them belong to the socially disadvantaged groups of society'.[232]

D.H. v. Czech Republic[233] is well known as a landmark case which enshrined 'indirect discrimination' based on ethnic origin in the case law of the Strasbourg Court. It concerns Roma children who were systematically placed in special schools on the basis of tests. The case had a clear socioeconomic dimension. Several NGOs underlined to the Court that minority children and those from vulnerable families are overrepresented in special education in Central and Eastern Europe because of an array of factors, not least because of the unconscious racial bias on the part of school authorities and the large resource inequalities.[234] The Court did not consider the issue of socioeconomic disadvantage as such, however. It dealt with it indirectly in the question of the waiver of the right not to be discriminated.[235] The Court adopted a very questionable and paternalist approach to that question: '[i]n the circumstances of the present case, the Court is not satisfied that the parents of the Roma children, who were members of a disadvantaged community and often poorly educated, were capable of weighing up all the aspects

[227] ECRI, 'General Policy Recommandation n°13 on Combating Anti-Gypsyism and Discrimination Against Roma' (2011) 3.
[228] ECtHR, *Timishev v. Russia*, 13 December 2005, para 56; ECtHR, *D.H. and others v. The Czech Republic* (GC), 13 November 2007, para 176; ECtHR, paras 68 and 84; ECtHR, *Oršuš and others v. Croatia* (GC), 16 March 2010, paras 149; E.S.C., *Médecins du Monde – International v. France*, 11 September 2012 (67/2011).
[229] ECtHR, *Timishev v. Russia*, 13 December 2005, paras 56 and 58; E.S.C., *Médecins du Monde – International v. France*, 11 September 2012 (67/2011) para 39.
[230] Collectif National Droits de l'Homme Romeurope, 'Les Roms, boucs-émissaires d'une politique sécuritaire qui cible les migrants et les pauvres. Rapport 2010 – 2011' (2012) (available online) ; Commission nationale consultative des droits de l'homme, 'Avis sur le respect des droits des "gens du voyage" et des Roms migrants au regard des réponses récentes de La France aux instances internationales' (n 226) 29.
[231] For example before the ESC, *Médecins du Monde – International v. France*, 11 September 2012 (67/2011): the Committee mainly acknowledged discrimination on grounds of ethnic origin. However, when considering Article E taken in conjunction with Article 11(1) (access to healthcare), the Committee seemed to implicitly acknowledge the discrimination resulting from the Roma's living conditions. Indeed, it considered that the state had failed to meet its positive obligation to ensure that migrant Roma, including children, whatever their residence status, enjoy adequate access to healthcare, in particular by failing to take reasonable steps to address the specific problems faced by Roma communities stemming from their often unhealthy living conditions and difficult access to healthcare services (para 144). The Committee therefore held that there was a violation of Article E in conjunction with Article 11(1) (para 145).
[232] Parliamentary Assembly of the Council of Europe, 'Recommendation N°1557 on the legal situation of Roma in Europe', (2002).
[233] ECtHR, *D.H. and others v. Czech Republic* (GC), 13 November 2007.
[234] International Step-by-Step Association, Roma Education Fund and European Early Childhood Education Research Association, para 169.
[235] *D.H. and others v. Czech Republic*, para 202.

of the situation and the consequences of giving their consent'.[236] The Court applied similarly paternalist reasoning in *Sampanis v. Greece* and *Orsus v. Croatia*.[237]

It is striking that the analysis of this discrimination on the basis of the social condition ground would have offered the Court the opportunity to tackle this issue without needing to adopt a paternalist approach on the question of the waiver. The Court could have acknowledged that the state had failed, in light of the applicants' disadvantaged socioeconomic situation, to inform and support them sufficiently to enable them to grant full and informed consent in procedures concerning their children's education. It could have led to an acknowledgement that the applicants had been discriminated against because of their socioeconomic position. In terms of equality, such an outcome would have encompassed not only a recognition dimension but also an important *participative* dimension, which would have redressed the disadvantage by removing the obstacles to the Roma parents' making genuine choices for their children.[238]

In *Orsus* the Court also stated that the poor school attendance and high drop-out rate of Roma called for positive measures 'in order, inter alia, to raise awareness of the importance of education among the Roma population and to assist the applicants with any difficulties they encountered in following the school curriculum'.[239] It is striking that this issue of the drop-out rate of Roma is linked to social condition more than ethnic origin[240] and would have been better addressed under the former ground.

Finally, in the case *Horváth and Kiss v. Hungary*, also related to the placement of Roma in special schools, the Strasbourg Court briefly addressed the link between socioeconomic advantage and cultural differences. Without offering any conclusions, it referred to the European Commission against Intolerance and Racism (ECRI) report according to which the vast majority of children diagnosed with mild learning disabilities could easily be integrated into mainstream schools since many were misdiagnosed 'because of socio-economic disadvantage or cultural differences'.[241] According to the Court, '[t]hese children are unlikely to break out of this system of inferior education, resulting in their lower educational achievement and poorer prospects of employment'.[242] In that case, the applicants also argued that '[s]ocial deprivation was in great part linked to the concept of familial disability'[243] and '[t]he definition of mental disability as comprising social deprivation and/or having a minority culture amounted to bias and prejudice'.[244] Therefore, the criteria of ethnic origin – referring to cultural differences – and social condition – referring to socioeconomic disadvantage – added to each other. However, this situation was not tackled by the Court as such in its discrimination analysis.

A lot of the 'groups' – such as Roma and travellers, single mothers and prostitutes – recognised as 'vulnerable' by the ECtHR often live in precarious socioeconomic situations and are characterised by a number of other status grounds in conjunction. However, the Court has not yet explicitly recognised the

[236] Ibid para 203.
[237] ECtHR, *Sampanis and others v. Greece*, 5 June 2008, para 94: 'Dans les circonstances de l'espèce, la Cour n'est pas convaincue que les requérants, en tant que membres d'une communauté défavorisée et souvent sans instruction, fussent capables d'évaluer tous les aspects de la situation et les conséquences de leur consentement. Il paraît en outre évident que certains au moins des requérants se sont trouvés à cette occasion confrontés à un dilemme. Comme le premier requérant l'a indiqué dans son témoignage sous serment du 31 mai 2007 devant le tribunal de paix d'Elefsina, il lui fallait choisir entre la scolarisation de ses enfants dans les classes ordinaires, avec le risque de voir leur intégrité mise en péril par des personnes non roms « furieuses », et leur scolarisation dans l'« l'école ghetto »'. See also: ECtHR, *Oršuš and others v. Croatia* (GC), 16 March 2010.
[238] Fredman, *Discrimination Law* (n 67) 27.
[239] ECtHR, *Oršuš and others v. Croatia* (GC), 16 March 2010, para 177.
[240] Ibid paras 176 – 177.
[241] ECtHR, *Horváth and Kiss v. Hungary*, 29 January 2013, para 115.
[242] Ibid para 115
[243] Ibid para 91.
[244] Ibid

links between poverty and vulnerability, even though it sometimes implicitly does so.[245] In some cases, such as *B.S.*, the acknowledgment of discrimination against a vulnerable group seems to be a 'derivative' of multiple discrimination. Despite the many advantages of the 'vulnerable groups'[246] concept, it could be useful if the Court explicitly acknowledged the multiplicity of the status grounds when Article 14 is invoked, mainly for 'recognition' reasons. As for stereotypes, it is very important that the courts should explicitly name the grounds of discrimination which identify the source and the nature of the inequality experienced. Indeed, as Timmer says '[y]ou cannot change a reality without naming it'.[247]

Another argument in favour of acknowledging multiple discrimination when the social condition ground is in play is related to damages. According to some authors, additive or intersectional discrimination could yield higher awards of damages. This would be only possible in jurisdictions where damages are determined *ex aequo et bono* and do not constitute fixed amounts.[248] To our knowledge, European courts[249] have not yet explicitly ruled on that question.

It is striking that given the violations found in *B.S.*, the Court awarded the sum claimed by the applicants, EUR 30000, on the basis of Article 41. Requesting higher damages for multiple discrimination could be an interesting avenue that practitioners could explore.[250]

Sole Ground or Main Ground

Apart from instances of intersectional and additive discrimination, the social condition ground sometimes stands alone in discriminatory situations. Indeed, in some cases a person can be discriminated against solely because of her socioeconomic status, which is often linked to an issue of recognition.

Where this is the case, the ground seems indispensable in the courts' examination of a discrimination claim.

There are some interesting examples in domestic case law. In Belgium the Constitutional Court judged that not providing socioeconomically disadvantaged people with judicial assistance in the appointment of a medical expert when that is required in court proceedings results in discrimination on wealth grounds.[251] In *Redmond v. Minister for the Environment* before the Irish High Court,[252] Justice Thomas Redmond concluded that the deposit required for national parliamentary elections and European elections discriminated against an applicant who was unemployed and had no financial resources: 'on the evidence it did have the effect of discriminating against citizens of the State, such as the plaintiff, whose misfortune it was to exist in unusually improvised circumstances'.[253] The case law developed in housing is also of note since the relationship between social condition and accommodation is particularly important. Belgian[254] courts have found that the refusal to rent accommodation simply because someone benefits from social assistance is discriminatory. In the previously mentioned *R.J.M.* case decided by

[245] Lavrysen, 'Strengthening the Protection of Human Rights of Persons Living in Poverty under the ECHR' (n56) 320.
[246] Peroni and Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (n 75).
[247] Alexandra Timmer, 'Judging Stereotypes: What the European Court of Human Rights Can Borrow from American and Canadian Equal Protection Law' (2015) 63 American Journal of Comparative Law 239.
[248] Laurence Markey, 'Discriminations multiples – Commentaire de la Cour Trav. Bruxelles', 13 Novembre 2012' (2014) 6 Chroniques de Droit Social 281.
[249] Ibid 281–282.
[250] Katrin Wladasch, 'The Sanctions Regime in Discrimination Cases and Its Effects' (2015) *Equinet* 33 (available online).
[251] Belgian Constitutional Court, case n° 160/2005, 26 Octobre 2005, para B6.
[252] Irish High Court, *Redmond v. Minister for the Environment & Ors* [2004] IEHC 24 (13 February 2004).
[253] Ibid.
[254] Civ. Namur, 5 mai 2015, available at <www.unia.be/en>; Ganty and Vanderstraeten, 'Actualités de la Lutte contre la discrimination dans les biens et les services, en ce compris l'enseignement' (n 86) 195.

the House of Lords,[255] while the applicant's claim ultimately failed because the difference in treatment was found to be 'justified', discrimination on grounds of 'homelessness' was the only claim which the Court considered arguable.

Agafiţei before the ECJ also constitutes a relevant example where the social condition ground stood alone. The case concerned a group of Romanian judges who sought compensation for damages resulting from discrimination in their remuneration on account of the status accorded in this regard to certain prosecutors:[256] those from the National Anti-Corruption Directorate and Directorate for Investigating Organised Crime and Terrorism prosecutors.[257] The Bacău District Court found that the applicants had been discriminated against on grounds of socio-professional category and place of work. Those criteria correspond to that of 'social class' in Romanian discrimination law[258] and are therefore related to the social condition ground. The ECJ ruled that the preliminary ruling was inadmissible. Without entering into the details, one of the main reasons for this set out by the Court is that the ground in question is not listed in the antidiscrimination Directives 2000/78 and 2000/43:[259] 'it is apparent from the order for reference that the discrimination at issue in the main proceedings is not based on any of the grounds thus listed in those directives, but operates instead on the basis of the socio-professional category, within the meaning of national legislation, to which the persons concerned belong, or their place of work'.[260] The Court concluded that '[i]t follows that a situation such as that at issue in the main proceedings falls outside the general frameworks established by Directives 2000/43 and 2000/78 respectively for combating certain forms of discrimination'.[261] This case shows the importance of enshrining discrimination on social condition grounds in statute, otherwise the applicants are not likely to be protected.

Beyond the existing case law, national laws such as the criminalisation of begging in Switzerland could also be challenged as being discriminatory on social condition grounds.[262] Social condition grounds seem most suitable to dispute such laws under Article 14 ECHR.

Furthermore, even in the case of additive discrimination, the social condition ground can sometimes operate as the main grounds for discrimination and therefore appear as the best and only means to address discrimination. This is the case when the discrimination on other grounds is difficult or impossible to prove. The discriminations that many socioeconomically disadvantaged people encounter in access to healthcare is a striking example. The European Union Agency for Fundamental Rights underlines that '[r]esearch conducted in recent decades to unravel the determinants of health inequalities has shown that these are mainly caused by the higher exposure of lower socio-economic groups to a wide range of unfavourable material, psychosocial and behavioural risk factors'.[263] A recent French report also shows that the discrimination people experience in France is due to economic precariousness as a result of administrative difficulties,[264] the economic prejudice of doctors who do not wish to look

[255] Speech of Lord Neuberger of Abbotsbury in House of Lords (opinion of the Lords of appeal), *R (on the application of R.J.M.) (FC) (Appellant) v. Secretary of State for Work and Pensions (Respondent)* 25 June 2008 [2008] UKHL 63.
[256] ECJ, C-310/10 *Ministerul Justiţiei i Libertăţilor Cetăţeneti v. Agafiţei*, ECLI:EU:C:2011:467, para 17.
[257] Ibid, para 15.
[258] Ibid, para 18.
[259] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin *OJ* L 180, 19 July 2000, 22–26; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation *OJ* L 303 2 December 2000 16–22.
[260] ECJ, C-310/10 *Ministerul Justiţiei i Libertăţilor Cetăţeneti v. Agafiţei*, ECLI:EU:C:2011:467, para 32.
[261] Ibid, para 33.
[262] Maya Hertig Randall and Olivia Le Fort, 'L'interdiction de la mendicité revisitée' (2012) 30 *Plaidoyer* 24, 38 (available online); ATD Quart Monde, 'Les arrêtés anti-mendicité sont-ils légaux?' 3 (available online).
[263] FRA, 'Inequalities and Multiple Discrimination in Access to and Quality of Healthcare' (2013) 31–32 (available online).
[264] Le défenseur des droits, 'Les refus de soins opposés aux bénéficiaires de La CMU-C, de l'ACS et de l'AME'

after poor people,[265] the stereotyping and prejudice attached to socioeconomic disadvantage[266] etc. Studies show that people affected by socioeconomic disadvantage are also discriminated against for other characteristics such as race and disability[267] and therefore suffer from multiple and intersectional discrimination. However, some of these other grounds, especially ethnic origin and disability, appear much more difficult to prove.[268] According to the European Union Agency for Fundamental Rights, 'no data are available on individual nationality or country of birth, while ethnicity is almost never collected and data on disability are not always adequately collected'.[269] Moreover, in some European countries, such as France and Belgium, data collection on the basis of ethnic origin is very restricted.[270] Therefore, in some areas, such as healthcare, the social condition ground can appear as the only means to protect vulnerable people subject to discrimination, even multiple discrimination, when the other grounds are hardly provable.[271]

One interesting case before the European Committee of Social Rights is worth mentioning.[272] It concerns the failure of some Belgian federated entities to recognise caravans – the housing of traveller families – as dwellings, when applying housing quality standards relating to health, safety and living conditions, which caravans cannot meet. The Committee stated that 'the caravan lifestyle of Traveller families calls for differentiated treatment'[273] and concluded that this amounted to a violation of Article E (non-discrimination) in combination with Article 16 (the right of the family to social, legal and economic protection). The Committee did not refer to the ethnic origin of the travellers but only to their 'lifestyle', which I would argue is closely connected to the social condition ground. As a consequence, social condition was an important part of the case and ethnic origin did not seem to play an important role. That said, it is worth noting that the Committee is not always consistent in its approach to the status grounds taken into account when finding discrimination, since Article E is an open-ended provision. This is regrettable since, as stated above, it is important to name inequalities in order to identify their source and nature.[274]

Conclusions

I have shown in this article that the social condition ground appears to be a suitable tool to bridge the gap in the protection of socioeconomically disadvantage in human rights law, EU law and discrimination law, especially but not exclusively regarding the recognition dimension of equality. Indeed, today little protection is provided to people who are discriminated against because of their precarious socioeconomic situation, especially regarding the stereotyping and stigma linked to their situation of poverty. In other words, practitioners, scholars, policymakers and judges barely tackle the issue of

(n 87) 14.
[265] Ibid 17.
[266] Ibid 18.
[267] FRA, 'Inequalities and Multiple Discrimination in Access to and Quality of Healthcare'(n 263) 62.
[268] Ibid 32.
[269] Ibid 45.
[270]Julie Ringelheim, 'Collecting Racial or Ethnic Data for Antidiscrimination Policies: A U.S.-Europe Comparison' (2009) 10 Rutgers Race and the Law Review 39.
[271] However, in case of intersectional discrimination where the grounds cumulate, the applicant does not have the option of proving them individually. In that case, 'the claim might even fail, because discrimination on any of the single grounds claimed cannot be proven'. See, FRA, 'Inequalities and Multiple Discrimination in Access to and Quality of Healthcare'(n 263) 85.
[272] ECSR, *International Federation of Human Rights (FIDH) v. Belgium*, 21 March 2012 (no. 62/2010). For more cases regarding housing, see the ones explained in Benito Sánchez, 'Towering Grenfell: Reflections around Socioeconomic Disadvantage in Antidiscrimination Law' (n 29).
[273] ECSR, *International Federation of Human Rights (FIDH) v. Belgium*, para 82. See also, ECSR *European Roma Rights Centre (ERRC) v. Portugal*, 30 June 2011 (61/2010), para 20.
[274] Timmer, 'Judging Stereotypes: What the European Court of Human Rights Can Borrow from American and Canadian Equal Protection Law' (n 247).

misdistribution leading to misrecognition. As a consequence, people who are disadvantaged because of their socioeconomic situation are likely to fall through the gaps in protection and are not made visible.

I have put forward four main arguments for the importance of developing the social condition ground. I have argued that this ground adds value not only to discrimination law but also to human rights and EU law. First, the claim of discrimination on grounds of socioeconomic position forces courts to deal with this issue directly, which therefore becomes unavoidable. Second, it is the only efficient way to combat the numerous examples of prejudice, stereotyping and stigma which affect socioeconomically disadvantaged people. Third, the social condition ground is often a part of multiple discrimination and is needed to consider a discriminatory situation as a whole. Otherwise, applicants might fall through the gaps. Finally, social condition is sometimes the only ground or the main ground in play in a discrimination claim. In that case, the social condition status ground is essential for the discrimination which occurred to be acknowledged.

The enshrinement and application of the social condition ground in practice raises some issues and cannot be taken for granted. More specifically, courts are often reluctant to rule on this ground and often find against applicants who claim they have been discriminated against because of their socioeconomically disadvantaged situation. Nevertheless, even in cases where chances of this argument being rejected by the courts are high, practitioners should not underestimate the impact of a lawsuit where discrimination on social condition grounds is invoked even indirectly.

Making socioeconomically disadvantaged people visible therefore also implies challenging such situations through strategic litigation, despite the risk of failure in the courts. It appears very important to raise awareness of such situations in judges and politicians. Hopefully, this might in the future lead to wider recognition of the many prejudices people experience because of their precarious socioeconomic positions, though it will take time.

Finally, the legal recognition of such precarious situations should not lead to their 'normalisation'.[275] It should not become an excuse not to fight precariousness itself through positive measures and through the economic and social rights guaranteed by the welfare state. The right not to be discriminated against on socioeconomic grounds should by no means replace positive steps and measures to raise people from their disadvantaged situations. Economic and social rights and discrimination on social condition grounds should be regarded as complementary rather than competing.

[275] Rodopoulos, 'L'absence de la précarité sociale parmi les motifs de discrimination reconnus par le droit français: un frein normatif à l'effectivité de la lutte contre les discriminations?' (n 117) 23.