Poverty as Misrecognition: What Role for Antidiscrimination Law in Europe?

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ABSTRACT

It is widely agreed that victims of discrimination on traditional status grounds such as gender and race are overrepresented among the poor and undereducated. People living in poverty also face discrimination because of their socioeconomic situation. Many national, European and international antidiscrimination provisions prohibit discrimination on grounds that are related to a person’s socioeconomic situation. It is striking, however, that this is hardly applied in practice. 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 in the protection of disadvantaged people, especially regarding issues of misrecognition. Four reasons for this are considered: the role of the prohibition of discrimination on grounds of social condition in applying a direct scrutiny of the socioeconomic underprivileged situation of the applicants as well as in combating stereotypes and stigma against poor people, its important cross-cutting function in cases of multiple discrimination and its exclusive applicability in some occurrences of discrimination.

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 in the European Union.¹ Ten years on, it is hard to imagine that this objective has been fulfilled especially in the context of the pandemic, though the data are not yet all available at the time of writing. As shown by Eurostat, in 2019, 92.4 million people in the EU-27—21.1 per cent of the population—were still at risk of poverty or social exclusion,² only 11.3 million less than

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¹ Conclusions of the European Council, 17 June 2010, EU CO 13/10, CO EUR 9 CONCL 2 at 12.
A. The Relationship between Recognition, Redistribution and Poverty

In philosophical, political and critical legal studies, poverty essentially refers to the issue of ‘redistribution’, aiming to correct ‘economic injustices in terms of access of individuals to resources’. It is related to the economic and social inequalities regarded as ‘misdistribution’, traditionally addressed by the welfare state. In the legal sphere, the issue of redistribution has a strong link with economic and social rights since the effective implementation of these rights may require redistribution so as to mitigate socioeconomic inequalities. However, renowned scholars such as Sen rightly consider that poverty cannot be reduced to an issue of inequality. Moreover, 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’.

Beyond poverty and redistribution issues, 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 USA and Canada. In the EU context, the antidiscrimination directives on discrimination in employment and occupation, gender discrimination and race and ethnic discrimination play an increasingly important role in terms of equality. In philosophy, discrimination is usually attached to issues of ‘recognition’ arising ‘when cultural value patterns constitute some as inferior, excluded or invisible’. 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’. It is related to an issue of social status, which usually involves stigma, prejudice and

6 Fredman, supra n 5 at 214; Fraser and Honneth, supra n 5.
8 Moyn, Ibid. at 210.
12 Fredman, supra n 5 at 216.
13 Fraser and Honneth, supra n 5.
14 Ibid.
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

Against this background, it is widely recognised that ‘[d]iscrimination 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 socioeconomic disadvantage’.19 Poverty is in this sense that a consequence of the discrimination that vulnerable groups and minorities such as Roma, migrants, black 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, however. As Michael Ignatieff puts it, ‘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 law have mainly focused on the status equality of individuals based on traditional discrimination status grounds, rather than the ‘distributive equality of classes’ and tend to be blind to the issue of redistribution and socioeconomic inequalities.21 In short, it appears that antidiscrimination law and human rights law have been powerless to tackle recognition of the poor and redistribution effectively so far.

B. The Relationship between Antidiscrimination Law and Poverty

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, Atrey argues that ‘the intersectional nature of poverty can be appreciated in discrimination law through, for example, adopting a contextual approach to establishing

15 Fredman, supra n 5 at 216.
17 Fredman, supra n 5; Fraser and Honneth, supra n 5.
19 Fredman, supra n 5 at 214–15.
21 Moyn, supra n 7 at 205.
discrimination or by attaching a substantive equality interpretation to equality and non-discrimination guarantees. She considers it necessary to think beyond the perspective of poverty as a ground upon which inequality or discrimination are based. In other words, poverty needs to be tackled as inhering in the very ideas or discourses of inequality or discrimination more broadly. Atrey’s contextual perspective is essential. However, she does not address the critical issue as whether invoking the legal argument of discrimination on grounds of a person’s underprivileged socioeconomic status is likely to protect that person and drive towards greater equality.

As for the specific question of the added value of the poverty ground (or any related ground) in antidiscrimination law, speaking of formal equality—a ‘sameness’ 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’. 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’. Fineman’s standpoint is based on American law, which approaches antidiscrimination law differently from European legal systems: wealth is not considered by the American Supreme Court as a ‘suspect ground’, making any discrimination claim based on it hopeless. Moreover, she approaches this question and addresses this critique only under formal equality, while the ground of social condition or poverty in antidiscrimination can also concern other dimensions of equality, as I shall explain. Regarding the question of redistribution in a European context, Fredman also argues that antidiscrimination law cannot ‘address status inequalities which require resources to correct them’. In fact, Fineman’s and Fredman’s arguments both echo Moyn’s broader claim that human rights in general—and not only antidiscrimination 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 defending the view that antidiscrimination law can enable a much broader approach to socioeconomic inequalities than its critics would argue. For instance, 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.

22 Ibid. at 413.
23 Ibid. at 414.
25 Ibid. at 3.
27 Fredman, supra n 5 at 221.
28 Moyn, supra n 7 at 203.
Of course, Fineman and Fredman are right when they explain that antidiscrimination law 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 antidiscrimination law. However, as I will explain, antidiscrimination law is a particularly important tool in addressing the issue of recognition regarding socioeconomic status and discrimination on the ground of social condition: a middle ground between the various approaches currently found in the literature. In short, 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 status—especially when they are poor, yet not only—and in doing so, make them visible. I will suggest that there is scope in European, international and domestic antidiscrimination law to protect against this kind of status discrimination on the grounds of ‘socioeconomic situation’, ‘social origin’, ‘social condition’, ‘property’, ‘class’, etc. It is true that 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 article does not claim to be exhaustive. It aims to offer some key ideas to foster the debate about the social condition ground in antidiscrimination law. More specifically, the article will offer (1) a descriptive overview of the role of the ‘social condition’ ground (or any related ground) in existing international/regional human rights law and selected domestic and European courts; (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 antidiscrimination law and human rights law of increased use of this ground in the recognition of the poverty dimension.

I have adopted an integrated approach to antidiscrimination 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 on 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. However, the aim of the present paper is not to discuss the standard of review of each court, but whether and the conditions under which the social condition ground may be invoked in the various national and European legal orders. To this end, it would appear


very interesting to have a broad idea of the cases where various national and European courts have already ruled on this basis, or could have ruled on it.

I will first present some legal and theoretical explanations for the social condition ground in antidiscrimination law (see below at section 2). I will then argue that this ground can constitute an interesting complementary legal tool for protecting socioeconomically underprivileged people in human rights law more generally (see below at section 3) and in antidiscrimination law more specifically (see below at section 4).

1. LEGAL AND THEORETICAL PERSPECTIVES ON THE SOCIAL CONDITION 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 (see below at section 2.A). In the second part, I will attempt to explain why the social conditions ground is underused in practice (see below at section 2.B).

A. The Social Condition Ground in Antidiscrimination Law: Concept and Definition

(i) The social condition ground at international, European and national levels

The first question to answer 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. The answer is much more complex than ‘yes’ or ‘no’ and depends on many factors.

At United Nations (UN) level, Articles 2(1) and 26 of the Covenant on Civil and Political Rights expressly protect people against any discrimination (distinction) on grounds of ‘social origin […] or other status’. It also enshrines the grounds of property and birth. Article 2(2) of the Covenant of Economic, Social and Cultural Rights provides for similar protection. The social origin ground is also specified as a protected ground in the antidiscrimination provision of Article 14 ECHR and Article 1 of Protocol No 12—besides the ground of property. 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. Article E of the European Social Charter (ESC) also prohibits discrimination on grounds of social origin, birth or other status. Article 21 of the Charter of Fundamental Rights of the European Union forbids discrimination on ‘social origin’ grounds, as opposed to Article 19 of the Treaty on the Functioning of the European Union and the abovementioned antidiscrimination directives, which do not.

As a consequence, discrimination on the grounds of social origin or property is widely prohibited at international, European and national 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.” The Committee seems to attribute quite a broad meaning to ‘economic and social status’, since it considers that: [individuals 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.

However, the concept of social origin is limited to an inherited situation, like the ground of birth. Its scope is very narrow since it must encompass a ‘heritage / ancestry dimension’. Moreover, as for the ground of property, it is ‘a broad concept and includes real property (e.g. land ownership or tenure) and personal property (e.g. intellectual property, goods and chattels, and income), or the lack of it’. Nonetheless, it only refers to one’s material situation without taking into account other criteria such as professional status or education. This is why authors have argued for the acknowledgement of a broader concept, such as ‘social condition’ which does not require any inherited characteristic or which is not limited to wealth. 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. It encompasses many features of socioeconomic position and requires the victim of discrimination to be a member of a socially disadvantaged group, to prevent wealthy people from claiming that they have been discriminated against because of social policies which they do not benefit from.

Can an applicant claim to be a victim of discrimination on socioeconomic status or social condition grounds on the basis of the abovementioned international and European antidiscrimination provisions, despite these grounds not being enshrined in law as such? The answer would seem to be ‘yes’ for most since they are all ‘open-ended clauses’, meaning that criteria beyond those specified can be invoked. Therefore,

34 Ibid. para 35.
36 Committee on Economic, Social and Cultural Rights, supra n 34 at para 25.
38 MacKay and Kim, supra n 35 at 127.
39 Ibid. at 10.
discrimination can be challenged on grounds other than ‘social origin’ and, notably, on the
basis of social condition, socioeconomic status, poverty or any related ground. For
example, in its interpretative statement on Article 30 of the European Social Charter
(the right to protection against poverty and social exclusion), the ECSR insists on
‘the important impact of the non-discrimination clause (Article E), which obviously
includes non-discrimination on grounds of poverty’. One nuance should be pointed out regarding Article 14 ECHR, however. The
interpretation of the ‘open-ended character’ of this provision is not straightforward in
the case law of the ECtHR. Gerards explains that it is not consistent and coherent
and is sometimes very confusing. Nonetheless, it seems unlikely that the Court
would refuse to consider a claim of discrimination based on an applicant’s low level of
education, socioeconomic status, employment or wealth. Indeed, the Court has
already acknowledged the grounds of employment and wealth as being personal
characteristics in the sense of Article 14.

It is interesting to note that in the UK 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’. In
that regard, Lord Neuberger recalled that the ECtHR applies ‘a liberal approach to
“grounds” upon which discrimination is prohibited’ and it is ‘entirely in accor-
dance 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’. The case concerned a rule according to which persons without accom-
modation (‘rough sleepers’) who would have otherwise satisfied the requirements for
receipt of a disability premium were not entitled to that premium.

As a consequence, before the ECtHR and the ECSR, Article 14 ECHR and Article E
ESC are, respectively, applicable in cases of discrimination on the grounds of social
condition or socioeconomic status. In other words, applicants can rely on the substantive
vision of equality recently developed by the abovementioned bodies.

in Schiek, Waddington and Bell (eds), Cases, Materials and Text on National, Supranational and International Non-

41 MacKay and Kim, supra n 35 at 127.
42 European Committee of Social Rights, Conclusions 2013—Statement of interpretation—Article 30, 2013_163_06/Ob/EN.
43 Cousins, supra n 31 at 123. See notably Carson and others v the United Kingdom Application No 42184/05, Merits, 16
March 2010; Case relating to certain aspects of the laws on the use of languages in education in Belgium v Belgium Application No
Law Review 99. See also Arnardóttir, ‘The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the
45 B.S. v Spain Application No 47159/08, Merits and Just satisfaction, 24 July 2012.
46 Choubaty v France Application No 57412/08, Merits and Just Satisfaction, 4 October 2012; Chassagnou and others v France Application No 25088/94, 28,331/95, 28,443/95, Merits and Just Satisfaction, 29 April 1999.
47 Lord Neuberger, House of Lords, R (on the application of R.J.M.) (FC) v Secretary of State for Work and Pensions 25
48 Ibid.
49 Ibid. at para 6–12; Cousins, supra n 31 at 120.
Applicants can claim that they have been discriminated against on the ground of socioeconomic status or social condition before the ECtHR 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.\textsuperscript{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\textsuperscript{51} and couched in neutral terms.\textsuperscript{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’\textsuperscript{53} which can require positive measures.\textsuperscript{54} As a consequence, its case law is not limited to formal equality. Things are no different before the ECSR.\textsuperscript{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’.\textsuperscript{56} On this basis, the applicants can claim direct and indirect discrimination on grounds of their socioeconomic status, which can lead not only to negative 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, the Court and the Committee tend to have different approaches to recognising socioeconomic status or social condition as a prohibited ground of discrimination. As Benito Sánchez explains: ‘the European Court of Human Rights 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

\textsuperscript{50} D.H. and others v The Czech Republic: Application No 57325/00, Merits and Just Satisfaction, 3 November 2007, at para 175; Sampaioni and others v Greece: Application No 32526/05, Merits and Just Satisfaction, 5 June 2008, at para 68; Thimmeeno v Greece, Application No 34369/07, Merits and Just Satisfaction, 6 April 2000, at para 44; Horváth and Kiss v Hungary: Application No 11146/11, Merits, 29 January 2013, at para 101.

\textsuperscript{51} D.H. and others v The Czech Republic, Ibid. at para 175; Sampaioni and others v Greece, Ibid. at para 68; Hoogendijk v the Netherlands, Application No 57325/00, Merits and Just Satisfaction, 6 January 2005.

\textsuperscript{52} D.H. and others v The Czech Republic supra n 50 at para 184.

\textsuperscript{53} Horváth and Kiss v Hungary, supra n 50 at para 102; Orinó and Others v Croatia Application No 15766/03, Merits and Just Satisfaction, 16 March 2010, at paras 147–48.


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’.\(^\text{57}\)

Regarding EU law, authors agree that Article 21(1) of the EU Charter of Fundamental Rights is an open-ended provision.\(^\text{58}\) However, it is important to specify that the scope of Article 21 is limited to the field of application of Union law.\(^\text{59}\) There are, therefore, limited opportunities for claims of discrimination on grounds of socioeconomic status or social condition to be considered and to be successful at EU level.

Finally, at domestic level, about 20 European countries enshrine a ground related to socioeconomic status or social condition in their antidiscrimination legislations and many of them also use the grounds of social origin and/or property.\(^\text{60}\) As an example, the Belgian federal antidiscrimination Acts prohibit discrimination on grounds of property and social origin.\(^\text{61}\) In Northern Macedonia, the Law on Prevention and Protection against Discrimination contains an open-ended provision including the grounds of ‘belonging to a marginalised group’, ‘personal or social status’ and ‘social origin’.\(^\text{62}\) In other European countries such as Bulgaria, Croatia, Denmark, Estonia, Czech Republic, Greece, Hungary, Slovenia, Lithuania, Romania and Slovakia, equality bodies also have explicit legal mandate to combat discrimination based on socioeconomic status or related grounds.\(^\text{63}\)

In 2016, France adopted a law which attempts to integrate the ground of ‘vulnerability because of one’s economic situation’ into some of its antidiscrimination provisions.\(^\text{64}\) Interestingly, the law is entitled ‘law aiming at fighting discrimination on grounds of social precariousness’. At UK level, the exhaustive antidiscrimination provision of the Equality Act 2010 does not enshrine any characteristic related

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\(^{57}\) Benito Sánchez, supra n 29 at 12.


\(^{59}\) Article 51(1) of the EU Charter of Fundamental Rights.


to socioeconomic position.\textsuperscript{65} Nevertheless, the Human Rights Act of 1998 partially incorporates the ECHR into domestic law, including Article 14, which therefore has quasi-constitutional force.\textsuperscript{66} As underlined by Cousins, UK courts ‘might be reluctant to extend recognition of an (undefined) notion of socio-economic disadvantage as aspecific ground’.\textsuperscript{67} Alex Benn also speaks of a ‘big gap’ when it comes of discrimination on grounds of class in the UK.\textsuperscript{68} However, Cousins 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 recognise a specific example of socioeconomic disadvantage (i.e. homelessness) would suggest that it may be possible to have aspects of socioeconomic disadvantage (if not the concept itself) recognised as a status for the purposes of art. 14\textsuperscript{7}69 for instance illiteracy.

As a conclusion, whether at international, European or national level, it is submitted that there is room in the law for the prohibition of discrimination on grounds related to socioeconomic status. It is likely to cover different situations where socioeconomically disadvantaged people are potentially discriminated against because of their socioeconomic underprivileged situation, not only when it intersects with other criteria such as gender and race, but also when it involves:

- stigmatising and stereotyping of people in precarious circumstances—such as the poor family asked to leave the Orsay museum because of its smell;\textsuperscript{70}
- neutral treatment which indirectly affects such groups—such as the confinement measures during the COVID-19 pandemic\textsuperscript{71}, fines (especially when people are sanctioned by jail time in case of non-payment)\textsuperscript{72} or COVID-19 certificates;\textsuperscript{73}
- direct differences of treatment made on grounds of wealth or income—such as a residence permit conditioned by a certain threshold of income;\textsuperscript{74} or


\textsuperscript{66} Ibid. at 27.

\textsuperscript{67} Cousins, supra n 31 at 127.

\textsuperscript{68} Benn, supra n 37 at 37.

\textsuperscript{69} Ibid.

\textsuperscript{70} Rollot, ‘Une famille pauvre exclue du musée d’Orsay’, Le temps, 31 January 2013.


\textsuperscript{74} Garth v The Netherlands Application No 43494/09, Merits and Just Satisfaction, 6 November 2017; David and Ganty, ‘Strasbourg fails to protect the rights of people living in or at risk of poverty: the disappointing Grand Chamber judgment in Garth v the Netherlands’, Strasbourg Observers, Blog commenting on developments in the case law of the European Court of Human Rights, 16 November 2017, available at:
differentiated treatment on the basis of accent, name, non-aristocratic ancestry and reliance on the social system, which can all be justifiable reasons for not hiring a person in the UK for instance.\textsuperscript{75}

For the sake of convenience, I will refer to the ground of ‘social condition’ or the ‘socioeconomic status’ in the rest of this article even though there are other suitable grounds related to it to describe the socioeconomic situation of individuals, including class.\textsuperscript{76}

(ii) The social condition ground and the four dimensions of substantive equality

It is important to consider the social condition ground in antidiscrimination 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 article—and the other dimensions.

Substantive equality considers the context in which people find themselves,\textsuperscript{77} in contrast to formal equality which is limited to treating likes alike.\textsuperscript{78} Taking this concept further, 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’.\textsuperscript{79} 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.\textsuperscript{80} Third, the transformative dimension of equality accommodates difference and structural change by ‘removing the detriment but not the difference itself’\textsuperscript{81} and concerns the structural harm, autonomy and the promotion of substantive freedoms.\textsuperscript{82} Finally, the participative dimension mainly focuses on social inclusion and political voice.\textsuperscript{83} This last dimension not only refers to political

\textsuperscript{75} Benn, supra n 37.
\textsuperscript{76} Ibid. Benn considers that ‘class’ is more appropriate and detailed and defines it as ‘a status that depends on social, cultural and economic aspects of a person’s life’. As opposed to Benn, I do not think that the ground of class is more preferable than the one of ‘social condition’ or ‘socioeconomic situation’. I believe that depending on the situation, ‘social condition’ or ‘socioeconomic situation’ can be more suitable than class and vice versa. Indeed, in some instances, it might be impossible to determine and identify the class of someone being discriminated because of his or her socioeconomic situation, with the risk that the person might fall through the gaps. Moreover, other criteria related to class such as gender and race—according to Benn—can be grasped through an intersectional approach of the situation on the basis of other grounds as argued below (below, section 4.A).
\textsuperscript{77} Lavrysen, supra n 56 at 314.
\textsuperscript{78} Fredman, Discrimination Law (2011) at 8 and 25.
\textsuperscript{79} Ibid. at 25–7.
\textsuperscript{80} Ibid. at 28–9.
\textsuperscript{81} Ibid. at 30.
\textsuperscript{83} Fredman, supra n 78 at 31.
participation but also to ‘the importance of community in the life of individuals’ and concerns more specifically social exclusion. In other words, this approach shows that equality and prohibition of discrimination cannot be limited to formal equality (that like should be treated alike), and must encompass redistribution, recognition, transformation and participation.

This article aims to demonstrate the added value of the social condition ground in antidiscrimination law regarding the recognition dimension. 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. Fredman also 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’.

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’. 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 based on prejudice and stigma regarding her socioeconomic situation will lead to more redistribution in the share of housing, which cannot be reserved only for socioeconomically privileged people. 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 simultaneously protect and promote substantive equality through the other dimensions, especially the redistributive one.

(iii) The social condition ground and economic and social rights

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

However, they need to be distinguished from one another as they complement each other in the protection of socioeconomically underprivileged people. Several international and European legal instruments enshrine economic and social rights, including the International Covenant for Economic, Social and Cultural Rights (ICESCR) as well as the ESC. Nevertheless, their justiciability constitutes a major limit: social

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84 Ibid. at 32.
85 Atrey, supra n 82 at 429.
87 Fredman, ‘Redistribution and Recognition: Reconciling Inequalities’, supra n 5 at 229.
88 Ibid. at 219.
91 European Social Charter (revised), ETS No 163.
rights are the ‘poor parents’ of human rights, the ‘Cinderella’ of fundamental rights at the level of the United Nations and of the Council of Europe, not only because their formulation focuses primarily on obligations of means—through programmatic statements—more than obligations of result but also because of their ineffective system of implementation. For example, the ICESCR requires states to take appropriate measures to fulfil these socioeconomic guarantees, subject to the requirement of progressive realisation and in light of available resources. Furthermore, it is only since 2013 that the Committee can examine individual requests, while the Human Rights Committee has this prerogative since 1985 regarding the International Covenant for Civil and Political Rights. Moreover, the authority of the decisions of the Committee on Economic, Social and Cultural Rights on individual complaints is far from certain. As for the decisions of the ECSR, they are not binding. It has been shown that thenon-binding nature of the decisions of the quasi-judicial bodies does not, as such, have any significant consequences in terms of conformity to the decisions. Nonetheless, the judicial review of these bodies is qualified as ‘weak’ since they usually cannot engage in discussions regarding potential remedies and solutions to be provided when they conclude that rights have been violated. This is particularly the case for the ECSR under the collective complaints system in force since 1998. In addition, the very limited number of ratifications of the Additional Protocol providing for a system of collective complaints (only 15 Council of Europe member states) constitutes another limitation to the justiciability of social rights at Council of Europe level. Finally, at the European Union level, if the Charter of Fundamental Rights enshrines the protection of certain social rights, their justiciability is greatly limited due to the limitation of the scope of application enshrined in Article 51, and because redistribution policies remain essentially the competence of the Member States.

When it comes to the justiciability of fundamental rights more generally, the ECHR contrasts with and is often considered the most effective example in the world of supranational protection of fundamental rights, precisely because of its system of enforcement via the ECtHR. The ECHR mainly enshrines civil and political rights with

94 Article 2(1) ICESR. Leijten, ibid. at 26–8; Riedel, Giacca and Golay (eds.), Economic, Social, and Cultural Rights in International Law (2014) at 12–13.
96 International Covenant on Civil and Political Rights 1966, 999 UNTS 171.
97 The decisions of the Committee are usually seen as non-binding although there are some divergent views among authors and states. See for instance: Supreme Court of Spain, Judgment 1263/2018, 17 July 2018 at 23–8 where the Court stated that the decisions of UN treaty bodies are legally binding. See also: Riedel, Giacca and Golay, supra n 95 at 11 and Delas et al., ‘Quelques considérations entourant la portée des décisions du comité des droits de l’homme’ (2017) 30(2) Revue Québécoise de droit international 1.
99 Çali and Koch, supra n 98 at 57.
101 For instance Article 34.
102 Leijten, supra n 93 at 32.
the exception of the right to education and the right to property enshrined in Protocol 1. However, it does not exclude economic and social interests from its scope. Indeed, if economic and social rights are the most obvious when it comes to the situation of vulnerable populations because they directly affect redistributive issues, civil and political rights are also likely to be brought into play when dealing with problems of redistribution.

The Court has already ruled against certain members States under the right to property (Article 1 Protocol 1)\textsuperscript{103}, the prohibition of inhuman and degrading treatment (Article 3 ECHR)\textsuperscript{104}, the right to private and family life (Article 8 ECHR), the right to fair trial (Article 6 ECHR)\textsuperscript{105} and the prohibition of discrimination (Article 14 ECHR) read with Article 1 of Protocol 1\textsuperscript{106} because of measures or the lack of measures regarding people in a socioeconomically underprivileged situation. In this context, Judge Sajó even raised ‘the specter of unlimited human rights, transforming civil and political rights into social rights’.\textsuperscript{107}

Nevertheless, the violation of the right to property when it comes to social security and social assistance benefits is recognised in a few cases only if the measure in question, or the lack of a measure, is considered disproportionate to the objective pursued, in an area where the margin of appreciation of the state is usually wide.\textsuperscript{108} Moreover, the prohibition of inhuman and degrading treatment remains reserved to the most extreme cases, for instance when someone is in a situation of total material deprivation, without being able to meet her most basic needs: to eat, wash and find shelter.\textsuperscript{109} In addition, even when the Court recognises states positive obligations under the right to private and family life in light of the socioeconomic situation of the applicants, it leaves a very wide margin of appreciation of to the State, such as in the Hudorovic case, which concerns the supply of drinking water to illegal Roma settlements.\textsuperscript{110} Furthermore, these cases

\textsuperscript{103} See for example: \textit{Bilić v Hungary} Application No 53080/13, Merits and Just Satisfaction, 13 December 2016.

\textsuperscript{104} \textit{M.S.S. v Belgium and Greece} Application No 30696/09, Merits and Just Satisfaction, 20 January 2011, at para 253. See also \textit{Budina v Russia} Application No 45603/05, Admissibility, 18 June 2009.

\textsuperscript{105} Right to the assistance of a lawyer in matters of civil rights: \textit{Airy v Inland}, Application No 6289/73, 9 October 1979, at paras 27–8.

\textsuperscript{106} \textit{Ste and Others v the United Kingdom} Application No 65731/01 and No 65900/01, Merits, 12 April 2006; \textit{J.D. and A. v The United Kingdom} Applications Nos 32,949/17 and 34,614/17, Merits and Just Satisfaction, 24 October 2019.

\textsuperscript{107} Peroni and Timmer, supra n 89 at 1083; Partly concurring and partly dissenting opinion of Judge Sajó in \textit{M.S.S. v Belgium and Greece} supra n 104: ‘With the above formulation, the Court’s position regarding Article 3 of the Convention and the constitutional position of a Welfare State are getting even closer. […] There seems to be only a small step between the Court’s present position and that of a general and unconditional positive obligation of the State to provide shelter and other material services to satisfy the basic needs of the “vulnerable.”’

\textsuperscript{108} The Court judges that Article 1 Protocol 1 does not impose to put in place any form of social-security scheme or to choose the type or amount of benefits to provide under any such scheme. See for instance: \textit{Sukhanov and Ibranov v Ukraine}, Nos 68,385/10 and 71,378/10, Merits and Just Satisfaction, 26 June 2014, at paras 35–39. Neither the Court prevents states to change their social security system as for the conditions of eligibility of payment or as to the quantum of the benefit or pension.\textit{Carson and Others v the United Kingdom} supra n 43 at paras 85–89.

\textsuperscript{109} \textit{M.S.S. v Belgium and Greece} Application No 30696/09, Merits and Just Satisfaction, 20 January 2011, at paras 249–64.

\textsuperscript{110} \textit{Hudorovic and others v Slovenia}, supra n 54 at para 116; David, ‘The Court’s First Ruling on Roma’s Access to Safe Water and Sanitation in Hudorovic et al. v. Slovenia: Reasons for Hope and Worry’, supra n 54.
and human rights more generally defend an idea of subsistence and not socioeconomic equality in itself, as powerfully demonstrated by Moyn.\textsuperscript{111}

In this context, claims based on discrimination on grounds of social condition should be distinguished from claims based on economic and social 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 the claimants are poor and regarded as unreliable. That said, they might not be related to each other, as in the cases of discrimination against people in precarious situations related to political and civil rights, such as the right to freedom of movement.\textsuperscript{112} Moreover, people are often discriminated against in their access to social and economic rights because of other characteristics than their precariousness.\textsuperscript{113}

In fact, economic and social rights are not able to address the issue of socioeconomic discrimination while the equality of status constitutes a privileged tool to fight against discrimination against precarious people: that is to say in situations in which socioeconomically disadvantaged people are treated differently directly or indirectly because of their precarious situation. In this context, antidiscrimination law appears to be a powerful tool to tackle head on the recognition problems encountered by vulnerable people, and which socioeconomic rights are unable to combat.

As a consequence, the social condition status ground in antidiscrimination law should by no means be viewed as an alternative to economic and social rights for combating poverty and social exclusion.\textsuperscript{114} It constitutes a complementary protection tool, especially in light of the aforementioned limits of economic and social rights. 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’.\textsuperscript{115} Indeed, as explained above, the redistributive function of the social condition ground is highly limited and this ground should mainly been considered in its recognition dimension.

B. 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 ECtHR and the ECSR on this matter.\textsuperscript{116} Even when an applicant claims to be the target of discrimination on the grounds of her socioeconomic situation under Article 14 ECHR, the ECtHR tends to consider that ‘it does not raise separate issue’.\textsuperscript{117} To my knowledge,

\begin{itemize}
  \item[111] Moyn, supra n 7.
  \item[112] Garth v The Netherlands supra n 74.
  \item[113] Vountou v Cyprus Application No 33631/06, Merits and Just Satisfaction, 13 October 2015.
  \item[114] Even though, as argued by Samuel Moyn, human rights became a ‘powerless companion of the explosion of inequality’ and of market fundamentalism (Moyn, supra n 7 at 176).
  \item[116] Chubutty v France supra n 46; Chazagonu and others v France supra n 46.
  \item[117] Willenás and Wida v Czech Republic Application No 23848/04, Merits and Just Satisfaction, 26 October 2006, at para 88; Lounke v Belgium Application No 20656/03, Merits and Just Satisfaction, 25 September 2007, at para 59.
\end{itemize}
the ECJ has not yet adopted a single decision in antidiscrimination law on this ground under the Charter of Fundamental Rights. Even courts at national level rarely rely on it. Moreover, authors specialised in antidiscrimination law seem to pay very little attention to this ground.\textsuperscript{118} Why? Five main reasons could explain the underuse of this ground, of two kinds: legal and sociological.

(i) Vague concept and self-identification
The reluctance to invoke ‘social condition’ as a discrimination ground can be explained by virtue of that fact that it is in itself a rather broad and vague concept.\textsuperscript{119} Indeed, it is not easy to identify classes among socioeconomically underprivileged people since they are far from being a homogeneous group: the category of socioeconomically underprivileged people is highly heterogeneous, culturally and socially speaking.\textsuperscript{120} In this vein, it would also appear complicated for applicants to identify themselves as being part of the group of poor, unemployed, undereducated, illiterate or otherwise socioeconomically disadvantaged.\textsuperscript{121} As a matter of fact, it is difficult to identify as belonging to a group with an ‘identity’ possessing one of several of these characteristics,\textsuperscript{122} if this sense of identity ever existed within the groups attached to traditional status grounds. In addition, people in precarious situations are often ashamed of their position and feel responsible for it.\textsuperscript{123} The stereotypes and prejudice they are victims of reinforce the feeling of being inferior, worthless and lazy.\textsuperscript{124} 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’)\textsuperscript{125} and to claim redress.


\textsuperscript{119} Cousins, supra n 31.

\textsuperscript{120} See this discussion of the Partly concurring and Partly dissenting opinion of Judge Sajó in \textit{M.S.S. v Belgium and Greece} supra n 104.

\textsuperscript{121} Ganty and Vanderstraeten, ‘Actualités de la Lutte contre la discrimination dans les biens et les services, en ce compris l’enseignement’ in Bribosia, Rorive and Van Droogenbroeck (eds), \textit{Droit de la Non-discrimination. Avancées et enjeux} (2016) 183 at 199.


\textsuperscript{123} Ianni, Luys and Tardieu, supra n 122 at 14.

\textsuperscript{124} Ibid.

for the discrimination they suffer from on account of their socioeconomic situation. Moreover, people who are socioeconomically disadvantaged also encounter financial and practical obstacles to claiming their rights and bringing their cases before courts. In other words, ‘[p]overty and social exclusion contribute to the under-reporting of discrimination’. However, this is not all inevitable and irreversible. The more the equality bodies and courts deal with such cases by acknowledging discrimination on social condition related grounds and specifying this concept as well as the different groups it encom-pases, 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 next sections, this ‘indirect’ control is however incomplete.

(ii) 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. This is especially true under Article 14 ECHR, which has to be invoked in combination with one of the other rights enshrined in the Convention, which are mainly civic and political rights. As I will show in the next sections, this ‘indirect’ control is however incomplete.

Moreover, the social condition-related grounds are 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. As explained by Fineman regarding the situation in the USA ‘[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’. 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. Indeed, multiple discrimination is recognised by only few antidiscrimination acts in Europe such as the UK Equality Act under which an individual can rely on two discrimination grounds in one claim or the Norwegian

Institute for the Study of Labor, IZA Discussion Papers No 1103 (2004) (claiming that stigma plays a role, but a more limited one).

126 Administrative costs involving long periods spent queuing, filling forms and obligations to report detailed information and provide extensive documentation to the welfare agencies appear to play an important role in non-take-up. Hernanz et al., Take-up of Welfare Benefits in OECD countries: a review of the evidence, OECD Social, Employment and Migration Working papers No 17 (2004). See the example of Austria and France: Fuchs et al., supra n 122; Chareyron and Domingues, ‘Take-Up of Social Assistance Benefits: the Case of the French Homeless’ (2018) 64 Review of Income and Wealth 170.

127 See for example, Wallotá and Walle v Czech Republic, supra n 119; Soares de Melo v Portugal Application No 72850/14, Merits and Just Satisfaction, 16 February 2016; C-579/13 P and 34 June 2015; C-153/14 K and A 9 July 2015. All these cases are discussed below.

128 See, for example, Wallotá and Walle v Czech Republic, supra n 119; Soares de Melo v Portugal Application No 72850/14, Merits and Just Satisfaction, 16 February 2016; C-579/13 P and 34 June 2015; C-153/14 K and A 9 July 2015. All these cases are discussed below.


130 Fineman, supra n 24 at 4.

antidiscrimination Act, which prohibits discrimination based on the combination of several grounds.\textsuperscript{132} In addition, when only one ground can be invoked, practitioners favour other grounds, more frequently employed than social condition, leaving open the risk that applicants could fall through the gaps (see below at section 4).

(iii) 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’\textsuperscript{133} or whether the individual is responsible for her situation.\textsuperscript{134} 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. A 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.\textsuperscript{135} 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]n 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’.\textsuperscript{136}

And the ECtHR has confirmed that discrimination can occur on the basis of grounds which are not an inherent or immutable personal characteristic.\textsuperscript{137} Against this background, socioeconomic disadvantage is sometimes—not to say usually—viewed as an individual responsibility rather than having been caused by a structural situation. As rightly put by 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’.\textsuperscript{138} This also echoes what Bridges has coined ‘the moral construction of poverty’, referring to the discourse according

\textsuperscript{132} Chapter 6, section 2 of the Equality and Anti-Discrimination Act, LOV-2017-06-16-51.
\textsuperscript{133} Bak v The United Kingdom Application No 56328/07, Merits and Just Satisfaction, 27 September 2011, at para 45; Malleson, supra n 65 at 611 and seq.
\textsuperscript{134} Fredman summarises this debate in relation to poverty and highlights how it is directly linked to the relationship between agency and structure, see Fredman, ‘The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty’ supra n 18 at 579–80.
\textsuperscript{137} Biao v Denmark Application No 38590/10, Merits and Just Satisfaction, 24 May 2016.
\textsuperscript{138} Atrey, supra n 82 at 421.
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.\textsuperscript{139}

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 ECtHR’s control. For instance, as for immigration status, 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.’\textsuperscript{140}

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 is not an easy one to solve even though it is important, since the degree of scrutiny applied by the court depends on it. In the R.J.M. case, the House of Lords considered that the criterion of homelessness was not a suspect one. Lord Mance stated that the court would not apply the same intensity of scrutiny to the justification argued as when a core ground of discrimination was at play.\textsuperscript{141} 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.\textsuperscript{142}

At the European level, in Chabauty v France,\textsuperscript{143} the ECtHR 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,\textsuperscript{144} or as unacceptable in the absence of very weighty reasons, such as the criterion of sex.\textsuperscript{145} In this context, as Cousins underlines, the potential development of a binary standard where some grounds receive strong protection and others very little might be problematic.\textsuperscript{146} That said, this ruling by the Court should be nuanced since the property ground did not

\textsuperscript{139} Bridges, The Poverty of Privacy Rights, Stanford University (2017) at 38–64.
\textsuperscript{140} Bah v The United Kingdom, supra n 133 at para 47.
\textsuperscript{142} Lord Neuberger, Ibid. at para 56.
\textsuperscript{143} Chabauty v France, supra n 46 at para 50.
\textsuperscript{144} D.H. and others v The Czech Republic, supra n 50 at para 176.
\textsuperscript{145} Konstantin Markin v Russia Application No 30078/06, Merits and Just Satisfaction, 22 March 2012, at para 127.
\textsuperscript{146} Cousins, supra n 31 at 135.
In any case, beyond the alternative approaches to the social condition ground developed by legal scholars through the concept of vulnerability or a contextual analysis — 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-related grounds 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.

(iv) 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'. The ECJ adopts a similar position concerning social and employment measures. The scrutiny of the courts in this matter is therefore lighter than in other areas. Nevertheless, despite the states' wide margin of appreciation in these fields, the acknowledgement of discrimination on grounds of social condition by the courts is not inconceivable, especially when differences of treatment are related to particularly vulnerable excluded groups such as Roma or single mothers.

147 Joint dissenting opinion of judges Lopez Guerra and Keller in Garib v The Netherlands Application No 43494/09, Merits and Just Satisfaction, 23 February 2016, at para 14.
148 Fineman, supra n 24; Peroni and Timmer, supra n 89 at 1056.
149 Atrey, supra n 82.
150 Stec and Others v the United Kingdom, supra n 106 at para 52; Carson and others v the United Kingdom supra n 43; Bah v The United Kingdom, supra n 133 at para 47; J.D. and A. v The United Kingdom supra n 106 at paras 77 and 89; Hudorovic and others v Slovenia, supra n 54 at paras 141, 144 and 148.
151 C-499/08 Ingenioforeningen v Denmark 12 October 2010, at para 33; C-144/04 Mangold v Helm 22 November 2005, at para 63.
(v) The fear of opening the floodgates

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 ‘opening the floodgates’. 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. Echoing these views, Fineman states 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’.152

Calling socioeconomic inequalities and the absence of a ceiling to wealth and global redistribution into question is essential, as some researchers have already compellingly done.153 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 discrimination law today in national, European 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*.154 This is why the social condition ground in antidiscrimination law is more commonly useful for claims linked to misrecognition—where an individual is stigmatised, stereotyped or considered as inferior or worth less because of her socioeconomic situation—than for mal-redistribution—which has successfully been argued in human rights law so far only when the human dignity of a person in extreme vulnerability is at stake. The fear of opening the floodgates 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.

In any case, despite the abovementioned difficulties in applying the ground, some recent legal and political developments show an increasing awareness of its importance among scholars, judges and politicians. For instance, 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.

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152 Fineman, supra n 24 at 3.
153 Milanovic, supra note 4; Myn supra n 7; Piketty, *Capital in the Twenty-first century* (2014).
154 As Aharon Barak 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. Barak, *Proportionality, Constitutional Rights and their Limitations* (2012) at 131. See also Jackson, ‘Proportionality and Equality’ in Jackson and Tushnet (eds), *Proportionality and Equality in Proportionality, New Frontiers, New Challenges* (2017) 171 at 175.
threshold.\textsuperscript{155} Some equality and human rights bodies,\textsuperscript{156} NGOs,\textsuperscript{157} Networks\textsuperscript{158} and scholars,\textsuperscript{159} 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 in general but also antidiscrimination law more specifically.

2. 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 disadvantages and their consequences directly and prevents them from avoiding this sensitive issue (see below at section A). Secondly, it tackles the stereotypes, stigma and prejudice people experience because of their socioeconomically precarious situations (see below at section B).

A. Direct Scrutiny of Socioeconomic Disadvantages

(i) Lack of direct scrutiny of socioeconomic disadvantages

Recently, in the seminal \textit{Lášťný} case,\textsuperscript{160} the ECtHR convicted Switzerland for a general prohibition of begging in public, sanctioned by a fine and even jail time if the applicant cannot pay the fine, although the Court did not exclude that some forms of begging might be sanctioned. In its decision, the Court directly addressed the underprivileged socioeconomic situation of the applicant under Article 8 ECHR, because the law precisely concerned the poor and their lifestyle—begging. The Court considered that begging was a means of survival for the applicant and was part of her inherent human dignity: the general prohibition was not proportionate to the aim of combating organised crime or protecting the rights of bystanders, residents and business owners. In the same vein, in other cases, as in \textit{M.S.S.}, the Court also observed that the responsibility of a State may be engaged for ill-treatment within the meaning of Article 3 ECHR, when an applicant, who is in a situation of total dependence on state support, found herself confronted with official indifference in a situation of serious deprivation or of need incompatible with human dignity.\textsuperscript{161}


\textsuperscript{157} Ianni, Luys and Tardieu, supra n 122.

\textsuperscript{158} Equinet, supra n 63.

\textsuperscript{159} MacKay and Kim, supra n 35; Roman, supra n 86; Benito Sánchez, supra n 29; 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 \textit{La Revue des droits de l’homme}; Fredman, supra n 18; Cousins, supra n 31.

\textsuperscript{160} \textit{Lášťný v Switzerland} Application No 14065/15, Merits and Just Satisfaction, 19 January 2021.

\textsuperscript{161} \textit{M.S.S. v Belgium and Greece}, supra n 104. For more examples where the ECtHR tackled poverty, see Lavrysen supra n 56.
However, when poor people have their fundamental rights affected, it is often by neutral measures, which are not always challenged by practitioners and examined by judges from the perspective of their socioeconomic situation. Indeed, when scrutinising the violation of human rights or EU law, courts sometimes 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. Moreover, in many instances when people are sanctioned for their socioeconomic situation through state action or inaction, they are in a critical situation but not always in a situation where their survival itself is called into question, affecting their inherent human dignity as in the Lačiņš case, or which would likely be viewed as inhuman and/or degrading treatment, as in M.S.S. The example of the ECtHR judgment in Garib v The Netherlands case is striking and shows that scrutiny through the social condition ground in antidiscrimination law can be essential to protect people living in poverty. The case concerned the policy of the city of Rotterdam according to which only people with a minimum incomewere eligible for a housing permit to take up new residence in moderate-cost rented housing in the Rotterdam Metropolitan Region. Only people residing in the Region for at least six years were exempt from such a requirement. The aim of this policy was to reverse the ‘concentrations of the “socioeconomically disadvantaged”’ in distressedinner-city areas. Because of this measure, the applicant, a single mother of two on social benefits, was refused a housing permit to move to the Tarwegewijk neighbourhood, a ‘hotspot’ area in Rotterdam, although she had found housing there which met her family’s needs. 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. Her claim 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 stigmatisation of those who cannot meet the income criterion set by the Act’. In their joint dissenting opinion before the Chamber, Judges Lopez Huerra and Kellerunderlined 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 implicitly connected to the social origin and gender of the persons concerned’. Before the Grand Chamber, the third party interveners argued that she 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.

162 Garib v The Netherlands Application No 43494/09, Merits and Just Satisfaction, 23 February 2016, at para 34.
163 Ibid. at para 23.
164 Ibid. at paras 127–8.
165 Third party intervention in Garib v the Netherlands, 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 ECtHR in its letter of 17 November 2016 in accordance with rule 44(3) of the Rules of the Court.
166 Joint dissenting opinion of judges Lopez Guerra and Keller supra n 147 at para 14.
167 The Equality law clinic of the Université Libre de Bruxelles and the human rights law clinic from Ghent University, supra n 165.
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’. According to the Grand Chamber, the discrimination complaint was ‘a new one’, raised neither in the original application nor later before the Chamber.

Beyond the fact that the Grand Chamber’s reasoning appears inconsistent with the Court’s own case law as for the question of the characterisation that the applicant gives to the facts, 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 status, especially in its recognition dimension 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’. As summarised by 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’. In this context, the Court clearly ‘[f]ailed to acknowledge discrimination and stigmatization of persons living in poverty’.

It is striking that 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. The Court was probably not ready to make this step, which could explain why it avoided the question.

(ii) Incomplete indirect scrutiny of socioeconomic disadvantages
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 cases relating to integration requirements imposed on migrants. In a case brought before the CJEU involving the Netherlands, the applicants—Kand A—challenged the burden imposed by the integration tests they had to comply with, in relations to their level of education and their economic situation. The preliminary ruling was about the compatibility of the Dutch civic integration tests

168 Garib v The Netherlands, supra n 74 at para 101.
169 Ibid. at para 102.
170 David and Ganty, supra n 74.
172 Ibid.
173 Dissenting opinion of judges Pinto de Albuquerque and Vehabović in Garib v The Netherlands supra n 74, 6 November 2017, at para 63.
with the EU Family Reunification Directive.175 The Court ruled that the Dutch civic integration requirements were 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’,176 which the Dutch rule failed to do. It also developed 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 UK case Ali and Bibi.177 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, the Court of Appeal178 and the Supreme Court179 dismissed the applicants. 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.’180

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’,181 ‘[t]his does not mean that the Rule itself has to be struck down’.182 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

177 High Court of Justice, Chapti & Bibi v Secretary of State for the Home Department, 16 December 2011, [2011] EWHC 3370 (Admin), at paras 117, 122 and 125.
178 Court of Appeal (Civil Division), Bibi & Ali v Secretary of State for the Home Department, 12 April 2013, [2013] EWCA Civ 322, at para 43.
179 Supreme Court of the United Kingdom, R (Ali) (AP) v Secretary of State for the Home Department, UKSC 2013/0266; R (Bibi and Another) (FC) v The Secretary of State for the Home Department, 18 November 2015, UKSC 2013/0270.
180 Ibid. at para 101.
181 Ibid. at para 54.
182 Ibid. at para 55.
poor and undereducated people, yet concluded at the absence of discrimination on the other grounds raised: ‘[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.’

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 measures are likely to disadvantage or exclude socioeconomically disadvantaged applicants. 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. 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 Biao v

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183 Chapli & Bibi v Secretary of State for the Home Department, supra n 177 at paras 139–40.
184 Peroni and Timmer, supra n 89 at 1076.
Denmark, '[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'. 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’. Moreover, tackling differences of treatment in antidiscrimination law has the advantage that the substance of the challenged policies does not have to violate other human rights. This is particularly important when it comes to differences 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. One nuance should be pointed out in the context of EU law, however. Article 21(1) would in any case be limited to the field of application of EU law. Yet integration tests in immigration administration should be considered as being within the field of application of EU law and, on this basis, could raise important discrimination questions—including discrimination on the grounds of social condition, gender, ethnic origin or race, as argued elsewhere.

What is more, the general principles of equality and non-discrimination could also be alternative ways to combat discrimination on the ground of social condition at EU level. In Commission v the Netherlands, 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’. 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 K and A, the Court did not examine the question under antidiscrimination law. 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.

B. Stereotyping and Stigma: An Issue of Misrecognition

(i) Stereotypes

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

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185 Concurring opinion of Judge Pinto Albuquerque in Biao v Denmark supra n 137.
187 Biao v Denmark, supra n 137 at para 118.
188 Article 53(2) EU Charter of Fundamental Rights.
190 C-508/10 Commission v. the Netherlands, 26 April 2012.
192 C-508/10 Commission v. the Netherlands, 26 April 2012.
about the characteristics of groups of people’ which are predominantly negative.193 Stereotypes ‘serve to maintain existing power relationships; they are control mechanisms. Stereotypes uphold a symbolic and real hierarchy between “us” and “them”.194 In 2014, the French NGO ATD Quart Monde showed that 97 per cent of French people hold prejudice against poor people and poverty.195 For instance, 63 per cent think that people are discouraged from working when they receive social benefits. And these stigma are multiple, as powerfully put by Hershkoff and Cohen regarding the situation of the poor in the USA: ‘Society stigmatizes the poor in several ways. Most obviously, the poor experience economic stigma because they lack the status that property conveys in our society. The poor lead lives of great material deprivation; they are hungry and live in squalor and danger. The poor also experience cultural stigma: the popular imagination demonizes them, and the media portray them as crazy and dangerous. Finally, the poor experience spatial stigma. They live in inner-city areas with extremely high concentrations of poverty and new industry primarily develop in areas to which they have no access. Poor children most often attend school in which the majority of the student population is also poor. When poor people attempt to move beyond these boundaries, they face fierce resistance’.196

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.197 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’.198

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:

194 Ibid. at 715.
197 Timmer, supra n 193 at 708.
a family asked to leave a museum because of its ‘unpleasant’ smell,\textsuperscript{199} homeless people who
are regularly victims of violence,\textsuperscript{200} deprivation of parental responsibility because of the
material living conditions\textsuperscript{201} or refusal of affordable housing to potential tenants who
receive social benefits.\textsuperscript{202}

The Kaltenbach report on the French legislative proposal aiming to introduce a 21
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 entretiennent les
phénomènes de discrimination’.\textsuperscript{203} The 2012 UNGuiding Principles expressly state that there is a
right to be protected from the negativestigma attached to conditions of poverty not
only from individuals but also frompublic authorities. Moreover, authorities ‘must take
all appropriate measures to modify sociocultural patterns with a view to eliminating
prejudices and stereotypes’.\textsuperscript{204}

\[(ii)\] Misrecognition

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.\textsuperscript{205} 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”’.\textsuperscript{206} Such an acknowledgment is essential even when courtsrule
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 (especially the redistributive one) of the socioeconomicinequalities
people suffer from and which are often the consequences of prejudice and

\textsuperscript{199} Rollot, supra n 70.
\textsuperscript{200} Jamet and Thouilleux, ‘Davantage de victimes de vol ou d’agression parmi les sans-domicile’ (2012) \textit{Institut national de la statistique et des études économiques}.
\textsuperscript{201} Suave de Melo v Portugal, supra n 128; Waller and Walla v Czech Republic, supra n 117.
\textsuperscript{202} Centre interfédéral pour l’égalité des chances, \textit{Baromètre de la diversité logement}, (2014) available at: www.u
nia.be/files/Documenten/Publicaties_docx/barometre_de_la_diversite_logement.pdf. [last accessed 7
February 2021].
\textsuperscript{203} Own translation from: ‘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 com-
mission des lois constitutionnelles, de législation, du suffrage universel, du Règlement et d’administration générale (1) sur la
proposition de loi de M. Yannick Vaugenard 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 at 15 (Hereafter: Kaltenbach Report); Rodopoulos, supra n 159.
\textsuperscript{204} Human Rights Council, supra n 16 at 21.
\textsuperscript{205} Timmer, supra n 193 at 718–19. Naming stereotypes implies taking into account the historical context and
current impact as well as revealing the stereotypes, Ibid. at 720–2.
\textsuperscript{206} Ibid. at 725.
stigma. In other words, denouncing such stigma and stereotypes constitutes a crucial step in tackling issues of misdistribution at a structural level.

For instance, as underlined by some reports about ‘non-take-up’ 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. People in such circumstances tend to develop a very negative self-image and sense of shame and responsibility for their state, and thus tend to exclude themselves further. 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 status. The recognition dimension is very important in this regard. Again in France, the draft legislation on medically assisted procreation for women contained a proposal for provision according to which ‘toute 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 naître’ 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’. As explained by Mornington and Guyard-Nedelec ‘struggling 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’, as ruled by the ECtHR, and as I will show.

207 Dubois and Ludwinek, supra n 125; Ianni, Luys and Tardieu, supra n 122 at 15.
209 Ianni, Luys and Tardieu, supra n 122 at 17–18. 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: Observatoire des non-recours aux droits et services (ODENORE). See: www.odenore.msh-alpes.fr/ [last accessed 7 February 2021]. See also the literature supra n 125 and 126.
210 Ianni, Luys and Tardieu, supra n 122 at 15.
211 Kaltenbach Report, supra n 203 at 15.
212 Ianni, Luys and Tardieu, supra n 122 at 18.
213 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.’
215 Ibid. at 347 and 341 and seq.
(iii) Missed opportunities in the ECtHR case law

Some case law strengthens 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 Wallava 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 ECtHR that the authorities had breached their rights to private and family life (Article 8 ECHR) and not to be discriminated against because of their social origin and poverty (Article 14 ECHR). The Court ruled in favour of the applicants under Article 8 only: 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.

Moreover, the ECtHR 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. The Court accepted a similar argument in a case involving a woman, the mother of 10 children, noting the applicant’s vulnerable situation and obliged the State to provide her with enhanced protection. In Wallova and Wallava, the Court decided that Article 14 did not raise a separate issue. The ruling on this point is regrettable. Assessment under Article 14 would have allowed the issue of the stigma and stereotypes the applicants experienced to be considered. Indeed, 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. Importantly, the applicants in that case insisted that the authorities had adopted a very disdainful attitude towards them.

The Parliamentary Assembly of the Council of Europe has already expressed its concerns about removal decisions based on vicious circles of self-reinforcing stereo-

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216 Wallova and Wallava v Czech Republic, supra n 117 at para 47.
217 Ibid. at para 86.
218 Ibid. at paras 72, 74 and 78. David, ‘ECtHR Condemns the Punishment of Women Living in Poverty and the “Rescuing” of Their Children’, Strasbourg Observer, Blog commenting on developments in the case law of the ECtHR, 17 March 2016, available at: www.strasbourgobservers.com/2016/03/17/ecthr-condemns-the-punishment-of-women-living-in-poverty-and-the-rescuing-of-their-children/ [last accessed 7 February 2021]. It is worth noting that the United Nations General Assembly and the Parliamentary Assembly of the Council of Europe have expressed similar opinions. Parliamentary assembly of the Council of Europe, Resolution 2010 A/RES/64/142 Guidelines for the Alternative Care of Children, 2010: ‘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, supra n 16 at 11.
219 Wallova and Wallava v Czech Republic, supra n 117 at para 73.
220 Soares de Melo v Portugal, supra n 128; David, supra n 218.
221 Wallova and Wallava v Czech Republic, supra n 128 at para 88.
222 David, supra n 218.
223 Soares de Melo v Portugal, supra n 128 at para 65.
types and prejudice leading to discrimination, especially concerning already discriminated and vulnerable groups such as Roma and migrants. As David underlines, ‘the removal of children from poor or otherwise “deviant” families is frequently the result of decisions based on stereotypes constitutive of discrimination’.[224] Besides violating human rights, such stereotypes sustain existing inequalities.[225] In Wallace and Walla, the Court clearly missed an opportunity to tackle this issue and seemed even reluctant to engage in this scrutiny.[226] As a consequence, despite the Court having already tackled stereotypes based on gender[227] and ethnic origin[228] through the lens of the right to not be discriminated against, it still seems reluctant to do so for other vulnerable and stigmatised groups such as poor people or persons with disabilities. In Kachorov and Sergeyeva v Russia,[229] 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.[230] 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.[231]

Finally, the Garib case, concerning the 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’[232] together with antisocial behaviour, the influx of illegal immigrants and crime. 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 stereotypes is likely to lead to discrimination especially since ‘the need to reverse the decline of impoverished inner-city areas’[233] can be achieved through other policy measures not tied to personal characteristics.[234] 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

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224 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, at paras 54, 57 and 85.
225 David, supra n 218.
226 Ibid.
227 Konstantin Markin v Russia Application No 30078/06, Merits and Just Satisfaction, 22 March 2012, at para 127.
228 Biak v Denmark supra n 137 at para 118.
229 Kachorov and Sergeyeva v Russia Application 16,899/13, Merits and Just Satisfaction, 29 March 2016.
230 Contra Algus Kiss v Hungary Application No 38832/06, Merits and Just Satisfaction, 20 May 2010, at para 42 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’, supra n 193 at 713.
232 Timmer, supra n 193 at 715.
233 Garib v The Netherlands supra n 162 at para 23.
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’.234

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. 235

(iv) Stereotypes and stigmas against poor migrants and Roma

Discrimination against migrants is rarely dealt with by the courts, 236 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. 237 The issue of discrimination against migrants, especially discrimination on the basis of socioeconomic status, could therefore appear difficult to challenge. However, it seems essential to tackle it from a discrimination law perspective because of the strong stereotyping of 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 migrants and welfare use, not only in Europe but also in the USA. 238 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 to become a burden on a state’s finances. 239 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 disproportionate to the aim sought, but they have never addressed the related stereotypes as such. 240

Regarding the socioeconomic situation of migrants, the aforementioned integration requirements are 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...

234 Joint dissenting opinion of Judges Lopez Guerra and Keller supra n 147 at para 18.
235 Lavrysen, ‘Court Fails to Acknowledge Discrimination and Stigmatization of Persons Living in Poverty’ supra n 171.
237 Biao v Denmark, supra n 137 at para 118.
240 C-540/03 Parliament v Council 27 June 2006; 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 I) [2014] EWCA Civ 985 (11 July 2014).
The social condition ground in discrimination law appears to be a suitable means to challenge remedy important on the ethnic origin ground. In the next section, when acknowledging discrimination against Roma on the basis 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 can ever make sense—especially in the current unfavourable climate for migrants in Europe. I argue that important issues of misrecognition are at play. They are likely to lead to structural discrimination requiring specific restorative measures to achieve equality. Nonetheless, 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 v Belgium case, 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.

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. However, the 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’. 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

241 See supra n 179 at para 54.
242 De Vries, Integration at the Border. The Dutch Act on integration Abroad and International immigration Law (2013); Ganty, supra n 189.
243 Timmer, supra n 193 at 712.
244 Sow v Belgium Application No 27081/13, Merits and Just Satisfaction, 19 January 2019, at para 68.
245 See for example, C-83/14, CHEZ Razgedokonin Bulgaria ad v Komisia za zaštita od diskriminacii, 16 July 2015 and D.H. and others v The Czech Republic Application supra n 50.
246 MacKay and Kim, supra n 35 at 39.
consider and use it to protect the most vulnerable groups at the margin of our modern societies.

3. VALUE ADDED TO ANTIDISCRIMINATION LAW _Per Se_

Although prohibition of discrimination based on other grounds than those related to the socioeconomic situation, such as gender and race, has already been successfully mobilised to protect the poor,\(^{247}\) such situations are limited to instances where socioeconomic interests are at stake such as social housing or benefits. These other grounds are not likely to systematically protect the poor discriminated against because of their socioeconomic situation. In other words, the social condition ground also adds value to antidiscrimination law itself. First, it is often part of intersectional and additive discriminations (see below at section A). 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 (see below at section B).

A. 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 additive, including the status ground of social condition. It is a way to recognise that ‘privilege and disadvantage migrate across identity categories’.\(^{248}\) Over the last few years, the legal literature has paid more attention to multiple discrimination (intersectional and additive), even though it is still not widespread in Europe. Nevertheless, the social condition ground is often neglected in the analysis.\(^{249}\) 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.\(^{250}\) Accordingly, failing to carry out an intersectional or additive analysis could result in disadvantaged individuals falling through the gaps 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.\(^{251}\) 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 discriminations and to find adequate responses to it in the absence of the social condition ground in French antidiscrimination provisions.\(^{252}\) Atrey also rightly emphasises the fact that the dominant framework in antidiscrimination law is ‘too

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\(^{247}\) _Stec and Others v the United Kingdom_ Application, supra n 106; _J.D. and A. v. The United Kingdom_ supra n 106.

\(^{248}\) Fineman, supra n 24 at 21.

\(^{249}\) Hannett, supra n 129; Schick and Lawson, _European Union Non-Discrimination Law and Intersectionality. Investigating the Triangle of Racial, Gender and Disability Discrimination_ (2011).

\(^{250}\) MacKay and Kim, supra n 35 at 81.

\(^{251}\) Hannett, supra n 129 at 72.

\(^{252}\) Ianni, Luyts and Tardieu supra n 122 at 55.
fixated on grounds or status groups considered independently and in isolation of the poverty which exists within them.\footnote{253}

(i) Multiple discriminations through the lens of the ground of social condition

Some examples in European and national case law illustrate the need to consider intersectional and additive discriminations through the lens of social condition in addition to the other grounds. The case \textit{B.S. v Spain},\footnote{254} before the ECtHR, concerned 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\footnote{255} 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 fact-taking account of only one of the grounds was approximate and failed to reflect the reality of the situation’.\footnote{256} 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 ECtHR 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.\footnote{257} To our knowledge, this is one of the first times that the 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’. Hannett speaks of ‘intersectional discrimination’.\footnote{258} This form of multiple discriminations differs from ‘additive discrimination’, ‘where an individual “belongs to two different groups, both of which are affected by [discriminatory] practices”’.\footnote{259} In \textit{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 was at issue, \textit{in casu} her employment, as an essential component of the overall discrimination.

\footnotetext{253}{Atrey, supra n 82 at 424.}
\footnotetext{254}{\textit{B.S. v Spain} supra n 45.}
\footnotetext{255}{European Social Research Unit (ESRH) at the Research Group on Exclusion and Social Control (GRECS) at the University of Barcelona, AIRE Center, at paras 56–57.}
\footnotetext{256}{\textit{B.S. v Spain} supra n 45 at para 56.}
\footnotetext{257}{Emphasis added. Ibid. at para 62.}
\footnotetext{258}{Hannett, supra n 129 at 68. Kimberley Crenshaw coined the term of ‘intersectionality’: Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) \textit{University of Chicago Legal Forum} 1.}
\footnotetext{259}{Hannett, Ibid.}
Other cases before the ECtHR involving social housing and women living in poverty—which are likely to raise questions of intersectional discrimination in the light of socioeconomic disadvantage—were much less successful: for instance in Garib v The Netherlands, commented on above, or the more recent Yeshlta 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 had some health issues). The Court dismissed Mrs Yeshlta’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’ and rejected as inadmissible the complaint based on Article 14 ECHR because it had already been examined by the domestic courts. 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’.

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 these contexts. As for social disadvantage more specifically, Staiano rightly explains that: ‘[i]n the case under review, Ms Yeshlta’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 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 account of her vulnerable position. This aspect deserved closer attention in the light of the ECtHR’s case law on discrimination’.  

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261 Ibid. at para 34.
262 Ibid. at para 40.
263 Ibid. at para 28.
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.265 In this context, the wealth ground often contributes to other grounds, since the applicant would usually belong to variously disadvantaged groups.266 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.267 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.268 It is striking that the Court in this case concluded that discrimination had occurred not only on grounds of wealth but also on grounds of disability. Therefore, the Court acknowledged the existence of additive discrimination where social condition played a decisive role.

(ii) Roma and travellers

Roma and travellers also appear to be the victims of multiple discriminations. 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, hate speech, exploitation, stigmatization and the most blatant kind of discrimination’.269 Courts usually acknowledge discrimination against Roma and travellers on grounds of ethnic origin and race.270 They pay special attention to this ground because ‘[r]acial discrimination is a particularly invidious kind of discrimination’.271 Ethnic and racial discrimination is 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.272 Discrimination on grounds of the socioeconomic status of

265 Centre interféderal pour l’égalité des chances, supra n 202 at 25 and 215.
266 Ibid. at 29.
270 Timishev v Russia Application No 55762/00 and No 55974/00, Merits and Just Satisfaction, 13 December 2005, at para 56; D.H. and others v The Czech Republic supra n 50 at para 176; Or’iz’s and Others v Croatia, supra n 53 at para 149; Médecins du Monde—International v France Collective complaint No 67/2011, Decision on the merits, 11 September 2012.
Roma often intersects with their ethnic origin. The failure of states to consider the specifics of the socioeconomic position of Roma is common 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’.

*D.H. v Czech Republic* is well known as a landmark case which enshrined ‘indirect discrimination’ based on ethnic origin in the case law of the ECtHR. It concerned 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 were 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. The Court did not consider the issue of socioeconomic disadvantages such, however. It dealt with it indirectly in considering the question of the waiver of the right not to be discriminated. The Court adopted a 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 of the situation and the consequences of giving their consent”. The Court applied similarly paternalist reasoning in *Sampanis and Others v Greece and Or’su’s and Others v Croatia*. Indeed, considering that the applicants were not able to consent because of their lack of education amounts to deny their agency to make informed decisions regarding the education of their children, as powerfully denounced by Judge Borrego in its dissenting opinion in *D.H.*


For instance, *Medecins du Monde—International v France* supra n 271: 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 145). The Committee therefore held that there was a violation of Article E in conjunction with Article 11(1) (at para 145).

Parliamentary Assembly of the Council of Europe, Recommendation No 1557 on the legal situation of Roma in Europe (2002).

*D.H. and others v The Czech Republic* supra n 50.


*D.H. and others v The Czech Republic* supra n 50 at para 202.

Ibid. at para 203.

*Sampanis and others v Greece* supra n 50 at para 93. See also: *Or’su’s and Others v Croatia*, supra n 53.

Dissenting opinion of Judge Borrego in *D.H. and others v The Czech Republic* supra n 50; Peroni and Timmer, supra n 89 at 1073.
It is striking that the analysis of this discrimination on the basis of the social condi-
tion 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 status. 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.281

In Orsul, 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’.282 As a
consequence, the issue of the drop-out rate of Roma would have been better addressed
under the ground of social condition together with the one of ethnic origin since it
encompasses an important socioeconomic dimension.283

In the case Horváth and Kiss v Hungary, also related to the placement of Roma in special
schools, the ECtHR 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’.284 According to the Court, ‘[t]hese children are
unlikely to break out of this system of inferior education, resulting in their lower educa-
tional achievement and poorer prospects of employment’.285 In that case, the applicants
also argued that ‘[s]ocial deprivation was in great part linked to the concept of familial
disability’286 and '[t]he definition of mental disability as comprising social deprivation
and/or having a minority culture amounted to bias and prejudice’.287 Therefore, the
criteria of ethnic origin—referring to cultural differences—and social condition—
referring to socioeconomic disadvantage—intersected. However, this situation was not
tackled by the Court as such in its discrimination analysis.

In Lalkut, considered above, concerning the blanket ban of begging in public spaces in
Geneva, the applicant, besides being poor and a woman, also belonged to the Roma
community. Although the applicant raised a violation of Article 14 ECHR, the Court
judged that it was not necessary to examine the question from that angle since it had
already concluded that Article 8 ECHR had been violated. It is regrettable and can be
qualified as ‘a partial denial of justice’ as Judge Ravarani powerfully wrote in his

281 Fredman, supra n 78 at 27.
282 Orsul’s and Others v Croatia, supra n 53 at para 177.
283 Ibid. at paras 176–177.
284 Horváth and Kiss v Hungary, supra n 50 at para 115.
285 Ibid.
286 Ibid. at para 91.
287 Ibid.
partly concurring and partly dissenting opinion.\textsuperscript{288} Indeed, tackling the case under this provision would have highlighted the important connection between poverty, gender and ethnic discrimination, which cannot be separated from each other and all take part of a vicious circle in which the most vulnerable people are trapped. An analysis under the socioeconomic status is even more important for the situation of Roma and travellers in the context of the ongoing pandemic since they are part of vulnerable groups which have been hit much more severely than the rest of the population.\textsuperscript{289}

Finally, another argument in favour of acknowledging multiple discriminations 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 \textit{ex aequo et bono} and do not constitute fixed amounts.\textsuperscript{290} To our knowledge, European courts\textsuperscript{291} 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 30,000—on the basis of Article 41 ECHR. Requesting higher damages for multiple acts of discrimination could be an interesting avenue for practitioners to explore.\textsuperscript{292}

To conclude, a lot of the ‘groups’—such as Roma and travellers, single mothers and sex workers—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 links between poverty and vulnerability, even though it sometimes implicitly does so.\textsuperscript{293} In some cases, such as B.S., the acknowledgment of discrimination against a vulnerable person seems to be a ‘derivative’ of multiple discrimination. Despite the many advantages of the concept of vulnerability,\textsuperscript{294} it could be useful if the Court and the European States explicitly acknowledged the multiplicity of the status grounds when Article 14 ECHR is invoked, mainly for ‘recognition’ reasons, which should not be a problem to recognised when the discrimination clauses are open-ended. Like 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’.\textsuperscript{295}

\textsuperscript{288} Partly concurring and partly dissenting opinion of Judge Ravarani in \textit{Lisätty v Switzerland} Application No 14065/15, Merits and Just Satisfaction, 19 January 2021 at para 16.

\textsuperscript{289} Ganty, supra n 72. See also the pending case in front of the European Committee for Social Rights against Belgium: \textit{European Roma Rights Centre (ERRC) v Belgium Collective Complaint No. 195/2020 (pending)}.


\textsuperscript{291} Ibid. at 281–2.


\textsuperscript{293} Lavrysen, supra n 56 at 320.

\textsuperscript{294} Peroni and Timmer, supra n 89.

B. Sole Ground or Main Ground at Stake

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.296 In Redmond v Minister for the Environment297 before the Irish High Court,298 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’.299 In the previously mentioned R.J.M. case decided by the House of Lords299 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.

Agafi, tei 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:300 those from the National Anti-Corruption Directorate and Directorate for Investigating Organised Crime and Terrorism prosecutors.301 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 law302 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 2000/43.303 ‘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’.304 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

298 Ibid.
299 Supra n 136.
300 C-310 / 10 Ministerul Justiției i Libertăților Cetățenesti a Agafi, 7 July 2011, at para 17.
301 Ibid. at para 15.
302 Ibid. at para 18.
303 Supra n 9 and 11.
304 C-310 / 10 Ministerul Justiției i Libertăților Cetățenesti a Agafi, 7 July 2011, at para 32.
certain forms of discrimination”. This case shows the importance of prohibiting discrimination on the basis of social condition-related grounds in legislation, especially when the list of grounds in a closed one; otherwise, the applicants are not likely to be protected. Beyond the existing case law, national laws such as the criminalisation of begging could also be challenged as being discriminatory on social condition grounds. Social condition grounds seem particularly suitable to dispute such laws under Article 14 ECHR as explained above concerning the Ledra case.

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 are 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.” A French report also shows that the discrimination people experience in France is due to economic precariousness as a result of administrative difficulties, the economic prejudice of doctors who do not wish to look after poor people, the stereotyping and prejudice attached to socioeconomic disadvantage, etc. Studies show that people affected by socioeconomic disadvantage are also discriminated against for other characteristics such as race and disability and, therefore, suffer from multiple discrimination. However, some of these other grounds, especially ethnic origin and disability, appear much more difficult to prove. 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’. Moreover, in some European countries, such as France and Belgium, data collection on the basis of ethnic origin is restricted. 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 discriminations, when the other grounds are hardly provable.

305 Ibid. at para 33.
307 Le défenseur des droits, supra n 122 at 14.
308 Ibid. at 17.
309 Ibid. at 18.
310 European Union Agency for Fundamental Rights, supra n 306 at 62
311 Ibid. 32.
312 Ibid. 45.
314 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 European Union Agency for Fundamental Rights, supra n 306 at 85.
One interesting case before the ECSR is worth mentioning.\(^{315}\) 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’\(^{316}\) and concluded that this amounted to a violation of Article E ESC (non-discrimination) in combination with Article 16 ESC (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. 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.\(^{317}\)

**CONCLUSIONS**

I have suggested in this article that the social condition-related grounds appear to be a suitable tool to bridge the gap in the protection of socioeconomically underprivileged people in human rights law, EU law and antidiscrimination 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 precariousness. In other words, practitioners, scholars, policymakers, equality bodies and judges barely tackle the issue of misrecognition which is anchored in misdistribution. 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 in antidiscrimination law. I have argued that this ground adds value not only to antidiscrimination law but also to human rights and EU law. First, the claim of discrimination on grounds of socioeconomic status 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 discriminations 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.

\(^{315}\) International Federation of Human Rights (FIDH) v Belgium Complaint No 62 / 2010, Decision on the merits, 21 March 2012. For more cases regarding housing, see the ones explained in Benito Sánchez supra n 29.

\(^{316}\) Ibid. at para 82. See European Roma Rights Centre (ERRC) v Portugal, Complaint No 61 / 2010, Decision on merits, 30 June 2011, at para 20.

\(^{317}\) Timmer, supra n 193.
The enshrinement and application of the social condition-related grounds 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 the 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.

Making socioeconomically disadvantaged people visible, therefore, also implies challenging such situations through strategic litigation. 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 status, though it will take time.

Finally, the legal recognition of such precarious situations should not lead to their ‘normalisation’. It should not become an excuse not to fight precariousness itself through positive measures and through the economic and social rights. 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 situation. Economic and social rights and discrimination on social condition-related grounds should be regarded as complementary rather than competing.

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Rodopoulos, supra n 159 at 23.