

**Combating discrimination on grounds of socio-economic disadvantage:
A tool in the fight against poverty**

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Combating discrimination on grounds of socio-economic disadvantage: A tool in the fight against poverty

Olivier De Schutter *

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Abstract

Discrimination against people in poverty is a major obstacle to the fight against poverty. It restricts access of people in poverty to employment, education, housing or social services. This paper takes seriously the idea that people should not be subject to adverse treatment because they are poor, and it examines the implications of the prohibition of discrimination on that ground. It recalls the reality of negative stereotyping of people in poverty, linking such stereotyping to poorly informed views about meritocracy: focusing on the example of employment, it shows how such negative stereotyping can become self-reinforcing in time. It presents the content of a comprehensive anti-discrimination framework, as well as the emergence of "socio-economic condition", or poverty, as a "quasi-suspect" ground of differential treatment. It also identifies the challenges that the implementation of this framework faces. The paper finally explores in greater depth the role of class-based affirmative action in the fight against poverty, as well as the importance of an intersectional approach to discrimination.

La discrimination envers les personnes en pauvreté est un obstacle majeur à la lutte contre la pauvreté. Elle fait obstacle à l'accès à l'emploi, à l'éducation, au logement ou aux services sociaux. Cette étude prend au sérieux l'idée que l'on ne peut imposer un traitement défavorable sur la base de l'état de pauvreté, et elle examine les implications de cette interdiction de discriminer. Elle rappelle la réalité des stéréotypes négatifs envers les personnes en pauvreté, en liant ces stéréotypes à une fausse idée de la méritocratie: au départ de l'exemple de l'emploi, elle montre comment ces stéréotypes peuvent se renforcer dans le temps. L'étude décrit le contenu d'un cadre réglementaire contre la discrimination, ainsi que l'émergence de la "condition socio-économique", ou de la pauvreté, comme motif "quasi-suspect" de différence de traitement. Elle identifie les défis auxquels fait face la mise en oeuvre de ce cadre. Enfin, elle examine le rôle de l'action positive fondée sur le statut de "classe" dans la lutte contre la pauvreté, ainsi que l'importance d'une approche intersectionnelle de la discrimination.

* * *

* This paper expands on the report presented by the author, in his official capacity as UN Special Rapporteur on extreme poverty and human rights, at the 77th session of the UN General Assembly (A/77/157). The author is grateful to Janna van Wermeskerken and Helena Placentino for their research assistance, and to Gideon Basson, Surya Deva, Paula Fernández-Wulff and Sandy Liebenberg for their comments.

People in poverty suffer from a lack of income. Yet, the focus on income alone, either in order to measure the extent of poverty or as a means to tackle the persistence of poverty, has long been recognized as insufficient. The ability of each person to "convert" income into the expansion of capabilities differs widely from individual to individual, depending on one's personal characteristics and needs.¹ Moreover, the level of incomes required to lead a decent life, allowing the individual not only to meet his or her basic needs but also to avoid social exclusion – the shame and stigma that result from one's inability to meet social expectations –, depends on which goods and services are allocated on the basis of one's ability to pay: in societies where education and healthcare are free, for instance, or where subsidized housing is available for low income-earners, lower incomes may nevertheless allow for the enjoyment of social rights, whereas in societies not providing such public goods, higher incomes will be necessary to meet the necessities of life.

This is why, since the mid-1990s, poverty is defined as a multidimensional phenomenon, including but not reducible to low incomes.² This multidimensional approach to poverty sees poverty as the both the cause and the outcome of a range of deprivations, covering the full range of human rights – whether civil, cultural, economic, political or social rights.³ People in poverty face numerous obstacles in having access to rights and entitlements (including education, housing, nutritious food, healthcare, and work, but also political participation⁴); they also are caught in a vicious cycle in which those deprivations themselves make it more difficult for them to escape poverty.

But that is not all. When people in poverty are asked about their experience of poverty, they spontaneously refer to the humiliation and negative stereotyping they face in a number of settings: in their search for a job or for an apartment; in their interaction with schoolteachers or healthcare providers; or, of course, in their encounters with social workers and administrations. The daily experience of discrimination and social and institutional maltreatment contributes to the vicious cycles in which they are trapped. Social discrimination was a major theme in the *Voices of the Poor* study of 2000,⁵ and "social maltreatment" is one of the "hidden dimensions of poverty" highlighted in the study conducted jointly by Oxford University and by ATD Fourth World using the "Merging of Knowledge" methodology involving people in poverty.⁶ In this latter study, "social maltreatment" is described as "the way in which people in poverty are typically treated within and by the community", often facing stereotyping, blame and stigma: "The process of othering is commonplace [where] people in poverty are thought to be different in kind and socially inferior, engaging in disreputable behaviour either as a cause or a result of

¹ Amartya K. Sen, *Commodities and Capabilities* (Oxford Univ. Press, 1999).

² On the notion of the multidimensional understanding of poverty and its value, see in particular Sabina Alkire, James. E. Foster, Suman Seth, Maria Emma Santos, Jose M. Roche, and Paola Ballon, *Multidimensional poverty measurement and analysis* (Oxford: Oxford University Press, 2015); and the report coordinated by Anthony Atkinson for the World Bank, *Monitoring global poverty. Report of the Commission on Global Poverty* (Washington DC: World Bank, 2017).

³ See the Programme of Action adopted at the 1995 World Summit for Social Development, para. 19; and Committee on Economic, Social and Cultural Rights, Statement on poverty adopted on 4 May 2001 (E/C.12/2001/10), para. 8.

⁴ Although the emphasis has generally been on economic, social and cultural rights in the discussion of poverty-reduction policies, the poor also face systematic violations of their civil and political rights, including as a result of police brutality, of excessive subjection to pretrial detention, or of a denial of voting rights (see Report of the Special Rapporteur on extreme poverty and human rights presented to the 72nd session of the General Assembly (A/72/502 (4 October 2017)).

⁵ D. Narayan, R. Chambers, M. Shah & P. Petesch, *Voices of the poor: Crying out for change* (Oxford, Oxford Univ. Press, 2000).

⁶ Rachel Bray, Marianne de Laat, Xavier Godinot, A. Ugarte and Robert Walker, "Realising poverty in all its dimensions: A six-country participatory study", *World Development* 134 (2020).

their poverty".⁷ Social maltreatment in turn feeds institutional maltreatment or abuse, defined as "the common failure of public and private institutions to respond appropriately to the circumstances, needs and aspirations of people in poverty".⁸

The reality of this discrimination is increasingly acknowledged in the normative standards that guide the fight against poverty. The 2005 Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies thus describe poverty not only as multidimensional (linked to a range of deprivations), but also as a process in which the various deprivations are "mutually reinforcing", and associated with "stigma, discrimination, insecurity and social exclusion".⁹ The 2012 Guiding Principles on Extreme Poverty and Human Rights note that persons experiencing extreme poverty in particular "live in a vicious cycle of powerlessness, stigmatization, discrimination, exclusion and material deprivation, which all mutually reinforce one another".¹⁰

Discrimination is a major obstacle to the fight against poverty. It restricts access to employment, education, housing or social services. It may result in certain social goods or programs not reaching people in poverty, due to discriminatory treatment by officials, employers or landlords, or to the fear of maltreatment. It discourages people who experience poverty from applying for a job, or from claiming certain benefits: it is thus a major source of non-take-up of rights, a phenomenon in which people eligible for certain types of support do not claim them, in part due to the stigma attached to depending on benefits or in order to avoid negative experiences with social services.¹¹ Discrimination may also lead people in poverty to lower their aspirations, whether for themselves or for their children, as to what they can achieve, thus leading to a reduced investment in education.¹² It explains in part why people in poverty are disproportionately represented in the criminal justice system, as judges may be biased against them or base their sentencing on anti-poor stereotypes,¹³ significantly increasing the chances of households falling into poverty or facing homelessness,¹⁴ and hampering the future job prospects of the convictees.¹⁵

Discrimination against people in poverty takes a variety of forms. It can have its source in legislation, regulations or policies that treat people differently on the basis of income or wealth, or on the basis of proxies such as level of education or source of income, in order to exclude people in poverty. It can result from the behaviours of both public agents or private individuals. It can originate in the hiring practices of a firm, or in the policies of real estate agencies or

⁷ Id.

⁸ Id.

⁹ *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* (Office of the High Commissioner for Human Rights, Geneva, 2005), para. 15.

¹⁰ Guiding Principles on extreme poverty and human rights, para. 4. The Guiding Principles were adopted by consensus by the Human Rights Council on 27 September 2012 in resolution 21/11.

¹¹ See Report of the Special Rapporteur on extreme poverty and human rights, Olivier De Schutter, to the 50th session of the Human Rights Council (A/HRC/50/38 (2022)). On the role of stigma in explaining non-take-up, see also Robert Moffitt, "An Economic Model of Welfare Stigma", *American Economic Review* 73(5): 1023-35; Ben Baumberg, "The stigma of claiming benefits: a quantitative study," *Journal of Social Policy* 45(2)(2016): 181-199.

¹² The persistence of poverty: How real equality can break the vicious cycles. Report of the Special Rapporteur on extreme poverty and human rights, Olivier De Schutter, to the 76th session of the General Assembly (A/76/177 (2021), para. 32). See A. Appadurai, "The capacity to aspire: culture and the terms of recognition" in: *Culture and public action* (V. Rao & M. Walton, eds) (Stanford : Stanford University Press, 2004):59-84.

¹³ S.B. Starr, "The New Profiling: Why Punishing Based on Poverty and Identity Is Unconstitutional and Wrong", *Federal Sentencing Reporter* 27(4)(2015):229-236.

¹⁴ National Research Council, "The Consequences for Families", issue brief, *The Growth of Incarceration in the United States* (September 2014).

¹⁵ D. Pager, "The Mark of a Criminal Record," *American Journal of Sociology*, 108, No. 5 (2003): 937-975.

school boards. It can be conscious or unconscious: lawmakers or policymakers, just like employers or landlords, can be guided by what one scholar called "povertyism", negative stereotyping of people in poverty,¹⁶ whether they are aware or not of such prejudice.

This paper takes seriously the idea that people should not be subject to adverse treatment because they are poor. Living on low incomes is bad enough; being discriminated against because of such lack of income is even worse, and can make it even more difficult to escape from poverty. Indeed, taking seriously the need to fight against discrimination on grounds of socio-economic disadvantage is a way to ensure that effective enjoyment of socio-economic rights will not be made dependent on purchasing power, and that people in poverty will benefit from the general progress in the realization of such rights.¹⁷ As such, the prohibition of such discrimination is an indispensable tool in the fight against poverty.

The paper proceeds in six steps. It first recalls the reality of negative stereotyping of people in poverty, linking such stereotyping to poorly informed views about meritocracy: focusing on the example of employment, it shows how such negative stereotyping can become self-reinforcing in time (1.). Next, it presents the content of a comprehensive anti-discrimination framework: it described the emergence of "socio-economic condition", or poverty, as a "quasi-suspect" ground of prohibited discrimination in human rights law, and it lists the implications of this development for the lawmaker, for public officials, and for non-State actors (2.). It then identifies the challenges that the implementation of this framework faces: in doing so, it seeks to respond to some of the most frequently expressed arguments raised against the recognition of socio-economic disadvantage as a "quasi-suspect" ground (3.). It proceeds to explore in greater depth the role of class-based affirmative action in the fight against poverty (4.), as well as the importance of an intersectional approach to discrimination (5.). The final section provides a brief conclusion (6.).

1. Anti-poor prejudice

Stereotyping the poor as "lazy", as unable to keep their commitments, or otherwise as having to be blamed for their poverty,¹⁸ feeds prejudice against them. This picture of poverty as attributable to a failure of the individual appears particularly dominant in countries where the welfare system is less developed and protective.¹⁹ Indeed, the more people believe the society where they live to be based on merit, the more inequalities will be accepted as simply the result

¹⁶ Sheilagh Turkington, "A Proposal to Amend the Ontario Human Rights Code: Recognizing Povertyism", *Journal of Law and Social Policy*, vol. 9(1993): 134-191.

¹⁷ Sandra Liebenberg and Beth Goldblatt, "The Interrelationship between Equality and Socio-economic Rights under South Africa's Transformative Constitution", *South African Journal of Human Rights*, 23(2007): 335-361.

¹⁸ J.R. Kluegel and E.R. Smith, "Beliefs about Stratification", *Annual Review of Sociology*, 7(1981):29-56; J.R. Kluegel and E.R. Smith, *Beliefs about Inequality* (New York: Adeline de Gruyter, 1986). Joe Feagin documented the dominance of this discourse about poverty in the 1970s in the United States: J. Feagin, "When It Comes to Poverty, It's Still 'God Helps Those Who Help Themselves'", *Psychology Today*, vol. 6(1972): 101-129; J. Feagin, *Subordinating the Poor* (Englewood Cliffs, NJ: Prentice Hall, 1975). Media representations of the poor during the period 1980-2001 in particular portrayed women who received public assistance in the US as lazy, disinterested in education and promiscuous, leading to the stereotyped of a supposed "welfare queen" (Heather E. Bullock, Karen Fraser Wyche and Wendy R Williams, "Media Images of the Poor", *Journal of Social Issues*, 7(2001):230). For France, see S. Paugam and M. Selz, "La perception de la pauvreté en Europe depuis le milieu des années 1970. Analyse des variations structurelles et conjoncturelles", *Economie et Statistique*, n°383-385(2005):283-305.

¹⁹ C.A. Larsen and T.E. Deegaard, "The institutional logic of images of the poor and welfare recipients: A comparative study of British, Swedish and Danish newspapers", *Journal of European Social Policy*, 23(3)(2013):287-299 (finding that negative stories were more frequent in the UK, representing 43% of the media coverage, compared to 26-27% in Sweden and Denmark).

of how society rewards deserving people and sanctions the others.²⁰ Such discourse has been increasingly dominant since the 1970s. Although in times of severe crisis, explanations relating poverty to structural factors (attributing poverty to society's lack of inclusiveness) or to institutional factors (such as how schools or promotion systems within firms operate) may gain in popularity,²¹ anti-poor discourse may also serve, especially in times of economic insecurity, as a device for people to protect themselves from the fear of falling down the social ladder.²²

Such meritocratic views of society present poverty as the result of individuals making the wrong choices or failing to seize the opportunities they are presented with. They lead to assign people in poverty to a distinct group, separate from the rest of society: prejudice then becomes part of an identity formation process, in which "us" is opposed to "them" – in which people who "succeed" as opposed to those who "fail".²³ Although not the only reason for the discrimination people of poverty may be subjected to, this stereotyping of people in poverty is one major explanation both for their institutional and social ill-treatment, and for the failure to reform regulatory and policy frameworks that operate against them.

a) The systemic nature of anti-poor discrimination

Anti-poor prejudice corrodes different spheres of life. In France, a test relying on sending CVs to employers showed a 30% net discrimination rate against candidates presenting a CV with indicators of poverty (such an address in temporary housing shelter or previous employment in social enterprises).²⁴ In Canada, a survey conducted by the Ontario Human Rights Commission showed that people experiencing poverty received more negative evaluations than any other group: only 39% of those surveyed had "somewhat positive" feelings towards those receiving social assistance.²⁵ Research conducted in The Netherlands showed how, in comparison to their higher-income peers, low-income students receive lower quality advice from their teacher regarding the level of secondary education they should pursue, compared to the level of secondary education that is indicated by the standardized test at the end of primary school.²⁶

Discrimination against people in poverty thus affects low-income individuals across all the areas that matter the most for social cohesion. Schools tend to reproduce inequalities and reward the codes acquired in better-off households: children from poor families face exclusion at school due to their social origin,²⁷ and participatory studies have illustrated that the shame experienced by children in poverty is one of the key obstacles to successful schooling,²⁸ which compounds the disadvantage that children from lower socio-economic status face because they

²⁰ Michael Sandel, *Tyranny of Merit: What's Become of the Common Good?* (New York: Farrar, Strauss and Giroux, 2021).

²¹ L.B. Nilson, "Reconsidering Ideological Lines: Beliefs about Poverty in America", *Sociological Quarterly*, 22(1981):531-548.

²² Eric Maurin, *La peur du déclassement* (Paris: Seuil, 2009).

²³ See *The persistence of poverty: How real equality can break the vicious cycles*. Report of the Special Rapporteur on extreme poverty and human rights, Olivier De Schutter, to the 76th session of the General Assembly (A/76/177 (2021)), paras. 38-39, as well as H. Tajfel, "Experiments in Intergroup Discrimination", *Scientific American*, 223(5)(1970):96–102; H. Tajfel and J.C. Turner, "An Integrative Theory of Intergroup Conflict", in W. G. Austin & S. Worchel (eds.), *The Social Psychology of Intergroup Relations* (Monterey, CA: Brooks/Cole, 1979):33-47.

²⁴ 'France Bans Discrimination on the Grounds of Social Conditions' (*ATD Fourth World*, 2 August 2016).

²⁵ Elizabeth McIsaac, 'Discriminating against the poor is legal. That must change' (*Maytree*, 12 January 2018).

²⁶ Nederlands Jeugdinstituut, 'Kind arme ouders krijgt vaak lager schooladvies' (*NJI*, 11 maart 2020).

²⁷ For example, one in ten children in European OECD countries lacks access to basic clothing (OECD, *Changing the Odds for Vulnerable Children: Building Opportunities and Resilience* (Paris: OECD, 2019), p. 61).

²⁸ ATD Quart Monde, *Nos ambitions pour l'école* (2017), p. 12.

are less well prepared for formal education.²⁹ People living on low incomes also cluster in certain neighborhoods where housing is affordable, but which are often less well connected to job opportunities and closer to sources of pollution.³⁰ The long-term unemployed and those who lack social connections experience the greatest difficulties in having access to employment, even when they have the right qualifications.³¹ Humiliating experiences with healthcare providers, combined with an inability to pay, may discourage people in poverty from seeking healthcare.³²

The instances of discrimination in various spheres of life are mutually reinforcing. If they live in impoverished and remote neighborhoods, people in poverty will face employers who will suspect that they are less reliable since they have to travel longer distances to work, and their health may deteriorate as a result of a lack of access to green areas, which may reduce their productivity at work, thus further confirming the negative stereotypes of the employer. Children who face bullying at school because they don't have the right clothes, or who are ashamed of their parents, will drop out earlier from school, especially if they have no role models to relate to and if they anticipate that they will face discrimination in employment. These are self-reinforcing mechanisms that call for structural solutions.

Anti-poor prejudice is also systemic in that it is widespread, and may lead actors prone to discriminate to rationalize their behaviour as a response to attitudes of others. The employer may anticipate that clients expect to be served by an employee who has a good presentation and uses the right cultural codes. The school direction may be under the pressure of parents insisting that the school remains socially homogenous.³³ Residents of a particular neighborhood may express the fear that the value of their property will fall if the neighborhood becomes more diverse, which in turn puts pressure on landlords to rent only tenants who will present the right "fit" within the community. Moreover, discrimination within an organisation means that few people from a low-income background will be in decision-making positions: the decisions made may therefore be systematically skewed against people in poverty, whose specific life experiences will be ignored; and selection processes within the organisation may be based on co-optation and therefore reduce the opportunities of individuals with a different background.

b) The case of employment

It has sometimes been argued that well-functioning markets will ultimately wipe out discrimination as an irrational and thus non-optimizing behaviour, that the forces of competition

²⁹ In France for example, the difference in the Programme for International Student Assessment (PISA) test outcomes between the richest and poorest students amounted to 115 points in the science performance, the equivalent of about three years of schooling (World Bank, *Learning to Realize Education's Promise* (2018), p.78).

³⁰ M. van Ham, L.Hedman, D. Manley, "Intergenerational transmission of neighbourhood poverty: An analysis of neighbourhood histories of individuals". *Transactions of the Institute of British Geographers* 39(3)(2014): 402–417.

³¹ On the role of social networks and acquaintances in the job searching process, see the classic study of Mark Granovetter, *Getting a Job* (Univ. of Chicago Press, 2nd ed. 1995); and more recently L.D.Loury, "Some contacts are fairer than others: informal networks, job tenures, and wages." *Journal of Labor Economics* 24(2)(2006): 299–318.

³² Laura Nyblade et al., "Stigma in health facilities: why it matters and how we can change it", *BMC Medicine*, 17(1)(2019): 25, doi: 10.1186/s12916-019-1256-2; K. Canvin, Chr. Jones, A. Marttila, B. Burström and M. Whitehead, "Can I risk using public services? Perceived consequences of seeking help and health care among households living in poverty: qualitative study", *Journal of Epidemiology and Community Health*, 61(2007):984–989, doi: [10.1136/jech.2006.058404](https://doi.org/10.1136/jech.2006.058404).

³³ See, e.g., Eur. Ct H.R. (1st sect.), *Lavida and Others v. Greece* (Appl. No. 7973/10), judgment of 30 May 2013.

would sooner or later eliminate.³⁴ In fact however, markets register social norms, and will reflect dominant prejudice: just like landlords will accept tenants whos "fit" is right (whom other residents will find congenial), employers will seek to recruit employees who have acquired the "right" codes, anticipating that this is what clients expect.³⁵

The employment sphere exemplifies instead how anti-poor prejudice can lead to self-reinforcing mechanisms entrenching discriminatory behaviour. Facing prejudice leads people of lower socio-economic status to invest less in the acquisition of qualifications that would allow them to have access to better-paid jobs: the more they confront discrimination in the field of employment, the less they have an incentive to build human capital. Discrimination also results in a situation where people in poverty lack role models to which they can relate and that would allow them to build confidence.³⁶

Indeed, even where people from a low-income background succeed in being employed, they will underperform if confronted with a manager who is biased against them, for example because the employer believes they are lazy,³⁷ thus reinforcing further the negative prejudices of that manager.³⁸ This will be the case especially if they face what is called the "stereotype threat" – the fear of being judged and confirming negative stereotypes, undermining self-confidence³⁹ –, which has been documented both with respect to ethnic minorities⁴⁰ and to castes: in an experiment led in the Indian state of Uttar Pradesh, it was shown that the performance of 321 low-caste junior high school students on a maze-solving exercise (compared to that of 321 high-caste peers) was significantly lower when caste was publicly revealed,⁴¹ in other terms, when the results of the test could be interpreted as confirming caste stereotypes.

As a result of these entrenched mechanisms, negative stereotypes about people in poverty will not disappear on their own; nor will they be wiped out by markets alone. Indeed, what may be initially anti-poor prejudice based on false assumptions about the ability and reliability of people with low-income backgrounds may gradually turn into becoming a form of "statistical discrimination": an economizing device, allowing for decisions to be made with less effort, based on generalisations about the relationship between poverty and ability.⁴² In the case of long-term unemployed people, this is further reinforced by "rational herding", i.e., the assumption by prospective employers that a job-seeker must have been assessed by other

³⁴ Gary S. Becker, *The Economics of Discrimination* (Chicago: University of Chicago Press, 1957); Richard A. Epstein, *Forbidden Grounds. The Case against Employment Discrimination Laws* (Harvard Univ. Press, 1995).

³⁵ Cass R. Sunstein, "Why Markets Don't Stop Discrimination", *Social Philosophy & Policy*, 8(1991):22-37.

³⁶ Penelope Lockwood and Ziva Kunda, "Superstars and Me: Predicting the Impact of Role Models on the Self", *Journal of Personality and Social Psychology*, 73(1)(1997): 91-103.

³⁷ Empirical studies show that discrimination against job-seekers who are long-term unemployed is primarily to be explained by the employer's belief that long-term unemployment betrays a lack of motivation: Eva Van Belle, Valentina Di Stasio, Ralf Caers, Marijke De Couck and Stijn Baert, "Why Are Employers Put Off by Long Spells of Unemployment?", *European Sociological Review*, 34(6)(2018): 694–710.

³⁸ Dylan Glover, Amanda Pallais and William Pariente, "Discrimination as a Self-fulfilling Prophecy: Evidence from French Grocery Stores", *The Quarterly Journal of Economics* (2017): 1219–1260.

³⁹ Maria Cadinu, Anne Maass, Alessandra Rosabianca and Jeff Kiesner, "Why Do Women Underperform under Stereotype Threat?", *Psychological Science*, 16(7)(2005): 572–578.

⁴⁰ Claude M. Steele and Joshua Aronson, "Stereotype Threat and the Intellectual Test Performance of African Americans", *Journal of Personality and Social Psychology*, 69(5)(1995):797–811.

⁴¹ Karla Hoff and Priyanka Pandey, "Discrimination, Social Identity, and Durable Inequalities", *American Economic Review*, 96(2)(2006):206–2011.

⁴² Edmund S. Phelps, "The Statistical Theory of Racism and Sexism", *American Economic Review*, 62(4)(1972):659–661; Kenneth J. Arrow, "The Theory of Discrimination", *Discrimination in Labor Markets*, 3(10)(1973):3–33. See also Dennis J. Aigner and Glen G. Cain, "Statistical Theories of Discrimination in Labor Markets", *Industrial and Labor Relations Review* 30(2)(1977):175–187.

employers and that there must have been a reason why the candidate was not hired.⁴³ The law must intervene to ban such discrimination, as a major barrier to ensuring equal opportunities for people in poverty.

2. Equal treatment and anti-discrimination: a comprehensive framework

Protecting people in poverty from discrimination requires that two conditions be fulfilled. First, it requires that socio-economic disadvantage is recognized as a "quasi-suspect" ground in anti-discrimination law, ensuring that differences of treatment on that ground can only be justified under narrow circumstances. The recognition of socio-economic disadvantage as a quasi-suspect ground equips courts to address situations where people in poverty face discrimination. Increasingly however, courts have relied on open-ended lists of prohibited grounds of discrimination to provide that protection. Second, ensuring such protection from discrimination requires that States build a comprehensive anti-discrimination framework, addressing different actors: lawmakers and policymakers; public officials interacting with people in poverty; and private actors. The following paragraphs consider these conditions in turn, identifying the particular challenges associated with the various components of the anti-discrimination framework.

a) Socio-economic disadvantage as a "quasi-suspect" ground in anti-discrimination law

Both in international law and in domestic legislation, the prohibition of discrimination has generally focused on status-based discrimination, prohibiting discrimination on grounds such as sex, race or ethnicity, religion, age, disability or sexual orientation. These grounds are deemed particularly "suspect" because they are largely inherited and immutable, making any difference of treatment based on such characteristics particularly unacceptable. Moreover, the categories of persons protected by such prohibitions have traditionally been subjected to prejudice, which calls for legal protection.

These traditional non-discrimination requirements play a major role in the fight against *horizontal* inequalities, i.e., those that emerge between different groups of society. Recognizing horizontal inequalities is essential in the fight against poverty, since victims of discrimination on the grounds of status are disproportionately represented among people living in poverty.⁴⁴ Yet, traditional status-based anti-discrimination norms are less effective to address *vertical* inequalities, which exist between different percentiles of the population ranked by income or by wealth. This is the case especially in societies where the correlation is relatively weaker between membership in a group defined by certain characteristics, such as sex, ethnicity or religion, on the one hand, and socio-economic condition on the other hand.⁴⁵ Existing frameworks are ill-equipped to address socio-economic disadvantage as such, when it does not square neatly with status-based disadvantage. Discrimination on the grounds of socio-economic background should be treated as a specific "quasi-suspect" ground in anti-discrimination frameworks.

⁴³ Felix Oberholzer-Gee, "Nonemployment stigma as rational herding: A field experiment", *Journal of Economic Behavior & Organization*, 65(1)(2008):30-40.

⁴⁴ Sandra Fredman, "The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty", *Stellenbosch Law Review*, 22(3)(2011):566-590, 567.

⁴⁵ Rodrigo Uprimny Yepes and Sergio Chaparro Hernández, "Inequality, Human Rights, and Social Rights: Tensions and Complementarities", *Humanity*, 10(2019):376-394; Sarah Ganty, "Poverty as Misrecognition: What Role for Anti-discrimination Law in Europe?", *Human Rights Law Review*, 21(2021):962-1007.

Article 2(2) of the International Covenant on Economic, Social and Cultural Rights mentions "social origin" and "property" (in French: "fortune"; in Spanish: "posición económica") among the prohibited grounds of discrimination, alongside, *inter alia*, race, colour, sex, language or religion. The Committee on Economic, Social and Cultural Rights notes that "[d]iscrimination may cause poverty, just as poverty may cause discrimination",⁴⁶ and it insists that such grounds should be included in the anti-discrimination framework adopted by the States parties to the Covenant.⁴⁷

In its General Comment No. 20, on non-discrimination, the Committee reiterated 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".⁴⁸

While article 2(2) of the International Covenant on Economic, Social and Cultural Rights speaks of "social origin", the Committee refers more broadly to "a person's social and economic situation". Indeed, this expression (which also appears in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (art. 1)), or that of "socio-economic disadvantage", is clearer because "social origin" is generally interpreted as referring to a person's "inherited social status",⁴⁹ thus strongly overlapping with "birth" (which the Committee on Economic, Social and Cultural Rights interprets as including "descent, especially on the basis of caste and analogous systems of inherited status").⁵⁰ "Socio-economic disadvantage" is also preferable to the reference to "property" or to "social condition", since "socio-economic disadvantage" is asymmetric: it protects people in poverty or on low incomes from discrimination, without discouraging measures that would seek to remedy existing inequalities by imposing particular disadvantages or burdens on high-income or wealthy individuals.

"Social origin" or "fortune", the two grounds that are explicitly listed in article 2(2) of the International Covenant on Economic, Social and Cultural Rights, also appear in a number of

⁴⁶ Committee on Economic, Social and Cultural Rights, Statement on poverty adopted on 4 May 2001 (E/C.12/2001/10), para. 11.

⁴⁷ See, e.g., E/C.12/CAN/CO/6, para. 17.

⁴⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights (E/C.12/GC/20 (2 July 2009)) (hereinafter referred to as "CESCR General Comment on non-discrimination"), para. 35. As regards the homeless in particular, the Special Rapporteur on the right to adequate housing remarked that: "Discrimination is both a cause and a consequence of homelessness. Those who face discrimination on the grounds of race, ethnicity, place of origin, socioeconomic status, family status, gender, mental or physical disability, health condition, sexual orientation and/or gender identity and age are more likely to become homeless and, once homeless, experience additional discrimination" (Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context to the thirty-first session of the Human Rights Council (A/HRC/31/54 (30 Dec. 2015)), para. 39).

⁴⁹ CESCR General Comment on non-discrimination, para. 24. See also Martha Jackman, "Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination under the Canadian Charter and Human Rights Law", *Review of Constitutional Studies* 2(1)(1994):76-122, 76; and Fredman, "The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty", cited above, p. 582.

⁵⁰ CESCR General Comment on non-discrimination, para. 26. See further T. Kadar, *An analysis of the introduction of socio-economic status as a discrimination ground* (Equality and Rights Alliance, 2016).

international human rights instruments, though the expressions "social condition" or "economic status" may also be used.⁵¹

Domestic legal orders have followed suit. A review conducted in November 2020 found that, globally, 66 constitutions make explicit reference to economic disparities; another 41 refer to social disparities or a related concept in their constitutional equality or non-discrimination clauses.⁵² Indeed, there is a noticeable trend towards such references becoming more frequent. In Canada, the Quebec Charter of Human Rights and Freedoms now includes "social condition" as one of the prohibited grounds of discrimination. The Quebec Human Rights Commission has defined this prohibition as "referring to a rank, a social position, or a class attributed to someone mainly on the basis of their level of income, their occupation, and their education".⁵³ On this basis, employers making adverse decisions on grounds that a person receives social aid or on their type of residential tenure, or landlords refusing to rent an apartment to a person depending on social assistance due to that person's presumed inability to pay, have been considered to be committing discrimination.⁵⁴

In France, a reference to "social precarity" ("précarité sociale") was introduced in the anti-discrimination framework in 2016, following the societal debate launched after a family in poverty was expelled from a museum by security guards who considered that their odour might be disturbing other visitors. Discrimination on grounds of poverty (defined as economic vulnerability ("la particulière vulnérabilité résultant de sa situation économique, apparente ou connue de son auteur")) is now defined as a criminal offence and prohibited in the Labour Code.⁵⁵ This legislative amendment was adopted in part because the stigma facing people in poverty explains a high level of non-take-up of rights, and as a response to the phenomenon of "povertyism".⁵⁶ It allowed the French Ombudsman (Défenseur des droits) to condemn providing children in a school canteen with a meal different from that served to other children, when their parents hadn't paid the school meals fee,⁵⁷ or a mayor's refusal to allow children to register for school because they were living in an informal settlement from which they had to be expelled.⁵⁸

In South Africa, the Equality Clause of the 1996 post-apartheid Constitution's Bill of Rights includes a specific anti-discrimination provision, which lists "social origin" among the suspect grounds of differential treatment, an expression that has been interpreted to include class⁵⁹;

⁵¹ The African Charter on Human and Peoples' Rights prohibits discrimination in the enjoyment of the rights and freedoms of the Charter, inter alia, on grounds of "social origin" and "fortune". Article 1.1 of the American Convention on Human Rights provides for the right to equality and nondiscrimination on the basis *inter alia* of "social origin", "economic status", and "any other social condition". In Europe, both the EU Charter of Fundamental Rights and the European Convention of Human Rights refer to "property" as well as "social origin" in their respective anti-discrimination provisions. The Arab Charter on Human Rights refers to "social origin" and "wealth".

⁵² The text of constitutions was analysed via the English translations that are available at <https://www.constituteproject.org/?lang=en>.

⁵³ Commission des droits de la personne et des droits de la jeunesse du Québec, *Lignes directrices sur la condition sociale* (Cat 2.120.8.4, 1994), p. 6.

⁵⁴ Juan Carlos Benito Sanchez, "Towering Grenfell: Reflections Around Socioeconomic Disadvantage in Antidiscrimination Law", *Queen Mary Human Rights Review* 5(2)(2019):1-19, 13.

⁵⁵ Loi n° 2016-832 du 24 juin 2016 visant à lutter contre la discrimination à raison de la précarité sociale, JORF n° 147 of 24 June 2016.

⁵⁶ Senate (France), Report (No. 507) of Mr Philippe Kaltenbach, 10 June 2015.

⁵⁷ Défenseur des droits, Decision n°2018-063, 22 Feb. 2018.

⁵⁸ Défenseur des droits, Decision n°2021-001, 21 Jan. 2021.

⁵⁹ *Mahlangu v Minister of Labour* 2021 2 SA 54 (CC), para. 18. See C. Albertyn & B. Goldblatt, "Equality", in S. Woolman & M. Chaskalson (eds), *Constitutional Law of South Africa*, 2 ed (2002), pp. 35-63.

indeed, since the list of protected grounds is open,⁶⁰ class-based differences of treatment might also be used in a discrimination claim by people in poverty, even unrelated to descent or birth as the expression "social origin" may imply. Indeed, the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA), which gives effect to section 9 of the Constitution, extends the prohibition of discrimination, in addition to more traditional "suspect" grounds related to status, to "any other ground where discrimination based on that other ground (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a [traditional status] ground".⁶¹ The PEPUDA also contains a "Directive Principle" that requires the Minister to give special consideration to the inclusion of, *inter alia*, "socio-economic status" in the list of prohibited grounds,⁶² which the Act defines as "social or economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status or lack of or low-level educational qualifications".⁶³ While this remains to be implemented by the Executive, the Act expressly provides that in the interim nothing prevents a court from determining that "socio-economic status" constitutes an unlisted ground of discrimination or that it falls within the definition of any of the expressly listed grounds in s 1 of the Act.⁶⁴ In *Social Justice Coalition v Minister of Police*, where complainants alleged that the resources dedicated to policing poor areas with a high level of crime were insufficient, a Western Cape Province High Court found that "poverty" qualified as such a ground, based on the consideration that poverty "causes or perpetuates systemic disadvantage, undermines human dignity, or adversely affects the equal enjoyment of the rights and freedoms".⁶⁵

As these cases illustrate, the prohibition of discrimination on grounds of socio-economic disadvantage empowers courts to contribute to the fight against poverty. In Colombia, the Constitutional Court deemed it discriminatory to provide inferior health benefits for people with lower incomes: it declared that a "precarious economic situation" should not lead to discrimination regarding access to a service as fundamental as healthcare.⁶⁶ In Chile, a civil court in Santiago found discrimination on grounds of "socio-economic condition" (a suspect ground under Chilean law) in a case where the municipality had refused to allow a group of families living in the informal settlements (*pobladores*) to purchase land, due to pressure from people living in a nearby private housing condominium, who claimed that they did not want to bring "drug dealers or criminals" into their neighborhoods.⁶⁷ An Argentinian Federal Court noted that a lack of access to telephone or Internet services in poor areas diminishes the "market competitiveness" of people living in "risk zones", ultimately reproducing the conditions of poverty.⁶⁸ And the Argentinian Supreme Court found that reduced train services in disadvantaged areas, as compared to wealthier areas, was in violation of the duty of public service providers to provide "dignified treatment" to all users and consumers pursuant to Article 42 of the National Constitution.⁶⁹ In South Africa, the Constitutional Court found that exclusion

⁶⁰ *Harksen v Lane* (CCT9/97) [1997] ZACC 12, para 49.

⁶¹ Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA), Act No. 4 of 2000, section 1(1)(xxii)(b).

⁶² PEPUDA, section 34.

⁶³ PEPUDA, section 1(1)(xxvi).

⁶⁴ PEPUDA, section 34(2). See Gideon B. Basson, *Poverty as a ground of unfair discrimination in post-apartheid South Africa* (LL.M. thesis, Stellenbosch University, March 2022), pp. 107-110.

⁶⁵ 2019 4 SA 82 (WCC), paras 61-65. See Delano Cole van der Linde, "Poverty as a Ground of Indirect Discrimination in the Allocation of Police Resources - A Discussion of Social Justice Coalition v Minister of Police 2019 4 SA 82 (WCC)", *Potchefstroom Electronic Law Journal* 23(1)(2020): 1-28.

⁶⁶ Constitutional Court of Colombia, case T-760/2008, section 4.4.3.

⁶⁷ Second Civil Court of Santiago de Chile, *Comité de Allegados La Isla / Ilustre Municipalidad de Maipo*, 2016.

⁶⁸ Federal Civil and Commercial Court of Argentina, case n10 101 (2012), 5.a.3.

⁶⁹ Supreme Court of Justice of the Nation of Argentina, *Unión de Usuarios y Consumidores v Sec. Transporte*, 104/01, 2014.

of domestic workers from occupational injury and diseases compensation legislation constituted not only a violation of their right to social security, but also intersectional discrimination on the grounds of race, class and gender.⁷⁰ Such cases illustrate how the requirement of non-discrimination on grounds of socio-economic disadvantage can contribute to the effective enjoyment of rights to healthcare, housing, or work, allowing to move beyond the obligation to guarantee the minimum essential content of such rights.⁷¹

Where socio-economic disadvantage is not explicitly listed among the suspect grounds of discrimination, courts may still be able to extend the protection against discrimination on the basis of that ground where the list of prohibited grounds of discrimination is open-ended. The interpretation given to article 14 of the Indian Constitution provides an illustration. This provision guarantees equality before the law in general terms, without any specific reference to socio-economic disadvantage. In the case of *State of Maharashtra v Indian Hotel and Restaurants Association (Dance Bars)*,⁷² however, the Indian Supreme Court struck down amendments to the 1951 Bombay Police Act, which prohibited "bar dancing" in establishments on the grounds that this dance was obscene and served as a pretext for prostitution rackets and criminal activities, while allowing three-star hotels and Government associated places of entertainment to hold dance performances. This, the Court considered, violates article 14 the Constitution of India as it is based on an unacceptable presumption that the so-called elite (the rich and the famous) have higher standards of decency, morality or strength of character than their counterparts who have to content themselves with lesser facilities of inferior quality in dance bars; the Court also noted that the ban left women from "socially and economically lower caste and class" in a precarious situation to earn their livelihood.

Similarly, in *Senior Divisional Commercial Manager v SCR Caterers, Dry Fruits, Fruit Juice Stalls Welfare Association*,⁷³ which concerned the cancellation of licenses of small cart business owners at railway stations after the adoption of a new policy promoting competition, the Supreme Court interpreted article 14 based on the concept of "social justice" in the Indian Constitution – the idea that law "is a tool to engineer a peaceful 'civil revolution', one of the components of which is a fair deal to the weaker human sector like the working class".⁷⁴ It emphasized the vulnerable position of those with few or no other employment opportunities and the risk of them becoming even poorer, thus making poverty and its impact central to determining a violation of the Equality Clause.⁷⁵

⁷⁰ *Mahlangu v Minister of Labour* 2021 2 SA 54 (CC).

⁷¹ Alberto Coddou McManus, *A Transformative Approach to Anti-Discrimination Law in Latin America* (University College London, 2018) 239.

⁷² 2013 SC 2582.

⁷³ Supreme Court of India, *Senior Divisional Commercial Manager v SCR Caterers, Dry Fruits, Fruit Juice Stalls Welfare Association (SCR Caterers)*, 2013 3 SCC 582.

⁷⁴ Supreme Court of India, *The Life Insurance Corporation Of... vs D. J. Bahadur & Others*, (1981) SCR (1)1083 (Krishna Iyer, J.).

⁷⁵ Shreya Atrey, "The Intersectional Case of Poverty in Discrimination Law" *Human Rights Law Review* 18(3)(2018): 411–440, 435. Other judgments are less praiseworthy. In *Rajbala v State of Haryana* (2016 1 SCC 463), the Indian Supreme Court upheld eligibility criteria to be able to contest in a certain type of local elections, which included requirements that candidates possess a minimum level of education and have a functioning toilet in their home. In finding that such requirements were consistent with the right to equality, the Court ignores the fact that lack of education is strongly related to socioeconomic status and that classification based on functional toilets implies strong stereotypes against people living in poverty.

b) A comprehensive anti-discrimination framework

Equal treatment and the protection from discrimination can be decomposed in four separate norms.⁷⁶

First, States should guarantee *equality before the law*, ensuring that the regulatory and policy frameworks do not discriminate against people in poverty. This norm is addressed to the Legislator, or to the policy-maker: it requires that courts, constitutional courts in particular, assess whether general norms are not discriminatory against people living on low incomes.

Secondly, States should guarantee the *equal protection of the law*, ensuring that State agents do not commit such discrimination. This norm is addressed to the public servants responsible for enforcing or applying general rules: no discrimination should be allowed in law enforcement or law application. This norm should include a duty imposed on public bodies to proactively assess the impact on inequalities and poverty of their decisions: in the United Kingdom for instance, the Fairer Scotland Duty places a legal responsibility on public bodies in Scotland to "pay due regard" to how they can reduce inequalities of outcome caused by socioeconomic disadvantage when making strategic decisions;⁷⁷ and in South Africa, the 2021 Promotion of Equality and Prevention of Unfair Discrimination Amendment Bill proposes to strengthen section 24 of the PEPUDA to impose on the State and public bodies a duty to "eliminate discrimination and to promote and achieve equality".⁷⁸

Third, States should *regulate private actors*, such as employers and private educational institutions, to prohibit discrimination against people in poverty. This third norm is again addressed to the Legislator, but in order to ensure that it discharges its duty to protect people in poverty from the kind of discrimination that occurs in inter-individual relationships, for instance in the employment relationships or more generally in the market sphere : it is this form of discrimination by private actors that is referred to as "social maltreatment" in the "Hidden dimensions of poverty" project referred to above.

Finally, the fourth norm is that States should guarantee to all persons *equal and effective protection against discrimination*, by combating instances of structural or systemic discrimination, through affirmative action.

For the implementation of the three first norms outlined, legal provisions prohibiting discrimination on grounds of socio-economic disadvantage should address not only direct discrimination (the adoption of adverse decisions on grounds of low income or wealth), but also indirect discrimination, where reference to seemingly neutral criteria or procedures deliberately or unconsciously affects people in poverty disproportionately. This is the case for criteria such

⁷⁶ See International Covenant on Civil and Political Rights, art. 26.

⁷⁷ See <https://www.legislation.gov.uk/sdsi/2018/9780111038086/body>.

⁷⁸ This would imply a duty to "take reasonable measures, within available resources, to make provision in their budgets for funds to implement measures aimed at eliminating discrimination and promoting equality...". The same Bill aims to introduce a duty on public bodies to adopt action plans to promote and achieve equality (new section 26A).

as literacy, unemployment,⁷⁹ houselessness,⁸⁰ place of residence (in disadvantaged neighborhoods), or, as seen above, source of revenue (such as reliance on social assistance) or being in precarious forms of employment.⁸¹ Procedures that are informal, and leave a large room for subjective assessments by the decision-maker, may be as problematic as the use of formalized criteria, because they may lead to the disadvantaging of people in poverty based on prejudice, including unconscious prejudice: a landlord, an employer, or a schoolteacher, for instance, may be influenced by the accent, the clothing, the way of speaking or non-verbal attitudes, all of which may betray a person's low-income background.

In addition, a failure to provide reasonable accommodation to consider the specific individual situation of a person experiencing poverty should be treated as discriminatory. A measure that does not directly discriminate against people in poverty, and that does not result in an indirect discrimination *in general*, may still fail to account for the *individual* circumstances faced by people in poverty and their particular vulnerability. In the case of *Lorne Walters v. Belgium*, the Committee on Economic, Social and Cultural Rights thus found a violation of the right to housing under article 11(1) of the Covenant, combined with the non-discrimination clause of article 2(2), based on the consideration that the individual circumstances of the author were not taken into account, and that the legislation allowing landlords to terminate the lease periodically without having to provide a reason had instead been applied inflexibly.⁸² The Committee noted that the author "ha[d] lived in the same apartment for 25 years, ha[d] always fulfilled his contractual obligations and [was] now an older person with limited income who has strong social ties to his neighbourhood". Despite this, no alternatives had been explored that would have allowed him to stay in his apartment. Belgium, the Committee concluded, should review the legislation allowing the landlord to terminate the lease without cause "in order to introduce flexibility and special measures to avoid a disproportionate impact on the right to adequate housing of disadvantaged groups, such as older persons in a disadvantaged socioeconomic situation".⁸³

In education and employment, the duty to provide reasonable accommodation is particularly relevant to people in poverty since such individuals often have non-standard life courses: they

⁷⁹ For instance, a company refusing to finalize a purchase contract with a social assistance recipient based on the assumption that "she had more free time to cause problems given that she was not employed", was found to be discriminating on grounds of social condition (Wayne MacKay and Natasha Kim, *Adding Social Condition to the Canadian Human Rights Act. Final Report for the Canadian Human Rights Commission* (2009)36 (citing *Sejko v. Gabriel Aubé, Inc.*, [1999] JQ no 2858 (CQ))).

⁸⁰ United Kingdom House of Lords (now Supreme Court), *R (on the application of R.J.M.) (FC) (Appellant) v Secretary of State for Work and Pensions (Respondent)*, 25 June 2008 [2008] UKHL 63, paras. 41-47 (in which Lord Neuberger of Abbotsbury, author of the lead opinion for the House of Lords, explains why being homeless may be considered a "personal characteristic" for the purpose of applying article 14 of the European Convention on Human Rights, in a case in which it was asked whether a support scheme providing persons with a disability could exclude persons with disabilities who are "without accommodation"; the House of Lords answers this question in the affirmative).

⁸¹ In Ireland, the Equality (Miscellaneous Provisions) Bill 2021, currently pending adoption, defines having a socio-economic disadvantage as being member of a "socially or geographically identifiable group that suffers from such disadvantage resulting from one or more of the following circumstances: (a) poverty, (b) source of income, (c) illiteracy, (d) level of education, (e) address, type of housing or homelessness, (f) employment status, (g) social or regional accent, or from any other similar circumstance" (see <https://data.oireachtas.ie/ie/oireachtas/bill/2021/6/eng/initiated/b0621d.pdf>). While this provides a useful starting point, it is essential that such attempts to list grounds that may indirectly lead to discrimination against people in poverty include an open clause (such as the reference in the Bill to "any other similar circumstance") to ensure that apparently neutral criteria or practices can nevertheless be assessed and, if found to result in *de facto* discrimination, challenged.

⁸² *Lorne Walters v. Belgium*, communication n° 61/2018, Views of 15 October 2021, paras. 12.4 and 12.5.

⁸³ *Id.*, para. 16(a).

may have acquired skills or experiential knowledge that are not codified in a formal diploma, for instance, but that nevertheless ought to be valued and recognized.⁸⁴ This may require changing the criteria by which qualifications (suitability for a job or for a degree) are assessed, as well as reasonable efforts on the part of the employer or of the educational institution to ensure equal and fair participation of people from a disadvantaged background, provided this does not result in a disproportionate burden being imposed.

3. Implementing the framework: four challenges

These advances are noteworthy. Yet, many jurisdictions are still reluctant to acknowledge the need to address discrimination on grounds of socio-economic disadvantage. A number of challenges emerge. Two challenges are common to the four norms listed above. Two other challenges are more specifically addressed to some components of the framework. All are obstacles to the strengthening of the protection of people in poverty against discrimination.

Challenge #1: Assuming an identity of people in poverty that doesn't exist

A first transversal concern is that that people in poverty are a heterogenous group and that poverty is not an "identity" that deserves protection or a characteristic that the individual cannot change. This is sometimes invoked to deny that socio-economic condition (living on low incomes) should be treated as a "quasi-suspect" ground, since in contrast to characteristics such as race, ethnicity or disability, poverty can be a transient condition, and may sometimes at least be attributable to individual choices.

While this is correct in principle, poverty is nevertheless a trap that individuals may find difficult to escape from.⁸⁵ Moreover, we should be cautious not to limit the scope of the "personal characteristics" that should not lead to discrimination to only those characteristics that are immutable and totally beyond the control of the individual. As argued by Lord Neuberger of Abbotsbury, author of the lead opinion for the House of Lords in a case where the question arose as to whether being homeless could be treated as a "personal characteristic" for the purposes of applying the non-discrimination clause of article 14 of the European Convention on Human Rights:

Ignoring the point that in some cases [homelessness] 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. [Similarly,] the fact that homelessness was not a legal status was [considered by the Court of Appeal] a "significant but not conclusive point" against it being a "status" for article 14 purposes, but I do not consider that it is a telling point. After all, "political or other opinion" involves no legal status, and I doubt whether some of the other statuses specified in article 14 do so either.⁸⁶

⁸⁴ In the South African context, see *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC); and G. Basson, cited above, pp. 138-140.

⁸⁵ See *The persistence of poverty: How real equality can break the vicious cycles*. Report of the Special Rapporteur on extreme poverty and human rights, Olivier De Schutter, to the 76th session of the General Assembly (A/76/177 (2021)).

⁸⁶ United Kingdom House of Lords (now Supreme Court), *R (on the application of R.J.M.) (FC) (Appellant) v Secretary of State for Work and Pensions (Respondent)*, 25 June 2008 [2008] UKHL 63, para. 47.

Negative stereotyping about people in poverty and the imposition of unfavourable treatment to them are common, moreover, and well documented as an obstacle to real equal opportunities for people in poverty: while the "poor" may not be a fixed social group to which an individual is assigned for life, "povertyism" does exist and should be addressed as such.

Challenge #2: Questioning allocation based on purchasing power

A second potential objection to the prohibition of discrimination on grounds of socio-economic disadvantage is that the prohibition must operate in a market-based society – a society therefore in which, in a number of areas, the distribution of goods and services on the basis of purchasing power is seen as acceptable. Is it not therefore illusory to include ability to pay as a suspect ground in an anti-discrimination framework?

Making access conditional on purchasing power in this "commodity space", however, may result in a violation of human rights where the goods and services in question are essential to the enjoyment of social rights: the Committee on Economic, Social and Cultural Rights has thus noted that in areas such as the provision of water or electricity, education or healthcare, privatisation should go hand in hand with "public sector obligations" to ensure that profit maximisation does not lead to exclude people based on their inability to pay.⁸⁷ Moreover, essential goods and services, such as water and sanitation,⁸⁸ food⁸⁹ or healthcare,⁹⁰ should remain affordable to all. In other terms, a State may be in violation of its duty to protect from discrimination on grounds of socio-economic disadvantage if it fails to guarantee equal access to essential goods and services, either by regulating private actors, or by guaranteeing income security at a level that is adequate to ensure that all can enjoy the full range of Covenant rights regardless of income.⁹¹

Similarly, the Human Rights Committee found a violation of the non-discrimination clause of article 26 of the International Covenant on Civil and Political Rights in the case of a woman who, due to the criminalization of abortion in Ireland, had to travel to the United Kingdom to secure an abortion. The Committee noted that she had to do so at her own expense, leading her

⁸⁷ Committee on Economic, Social and Cultural Rights, General Comment No. 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (E/C.12/GC/24 (2017)), paras. 21-22.

⁸⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 15: The right to water (E/C.12/2002/11 (2002)), para. 12 ("Water and water facilities and services must be accessible to all, including the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds") and 15 ("States parties have a special obligation to provide those who do not have sufficient means with the necessary water and water facilities and to prevent any discrimination on internationally prohibited grounds in the provision of water and water services").

⁸⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 12: The right to adequate food (E/C.12/1999/5 (1999)), para. 13 ("personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised").

⁹⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 14: The right to the highest attainable standard of health (E/C.12/2000/4 (2000)), para. 12 ("health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households").

⁹¹ Committee on Economic, Social and Cultural Rights, General Comment No. 19: The right to social security (E/C.12/GC/19 (2008)), para. 22 ("The [criteria relied on to determine whether social benefits are adequate] should be monitored regularly to ensure that beneficiaries are able to afford the goods and services they require to realize their Covenant rights").

to incur "financial costs that were difficult for her to raise" and obliging her "to travel back to Dublin only 12 hours after the delivery, as she and her husband could no longer afford to stay in the UK": the Committee saw this as a failure of Ireland to "adequately take into account her medical needs and socio-economic circumstances", and thus as discriminatory.⁹²

Moreover, even where allocation based on purchasing power would in principle be acceptable, discrimination on grounds of socio-economic disadvantage may occur where, despite individuals having an ability to pay, they are denied certain goods or services, for instance, because of the source of their income or because of the neighborhood where they live. A landlord refusing to rent an apartment to a person relying on social assistance or a service provider refusing to serve certain poor neighborhoods would be committing such discrimination. In Quebec for instance, courts have repeatedly found that landlords could not exclude prospective tenants based on assumptions about the ability to pay of beneficiaries of social assistance⁹³ or of people, such as freelance writers, in precarious forms of employment.⁹⁴ In Argentina, the Ombudsman of the City of Buenos Aires considered that the refusal of a telephone provider to install Internet service because the person was living in an economically deprived area of the city of Mar del Plata, claiming that the area was considered a "risk zone", resulted in discrimination against the person on the ground of "social position", which is included in the Argentinian anti-discrimination law.⁹⁵ In the United States, people receiving so-called Section 8 vouchers, granted to low-income families and individuals (who live below 50% of the median income in their location), are routinely rejected by landlords:⁹⁶ 67 percent of Philadelphia's landlords refused to consider voucher-holders, and rejection rates are even higher in cities like Los Angeles,⁹⁷ a practice that contributes to the perpetuation of residential segregation on racial and socio-economic grounds.⁹⁸ Indeed, it is in reaction to such practices that New York City's Human Rights Law includes "lawful source of income" as part of the protected grounds of discrimination, allowing the New York City Human Rights Commission to protect tenants or prospective tenants against this form of exclusion, even obliging companies found to discriminate to set aside apartments for residents living on a voucher.⁹⁹

The two challenges that have just been mentioned raise the questions whether people in poverty can be treated as a separate group with a well-defined identity and whether goods and services can be allocated based on purchasing power. These challenges are transversal: they cut across all the components of the anti-discrimination framework described above. Other challenges are specific to certain components of that framework. Two stand out in particular. They relate specifically, respectively, to the duty of lawmakers or policymakers not to discriminate against people in poverty (our first norm); and to the duty of States to protect people in poverty from discrimination in inter-individual relationships (the third norm).

Challenge #3: Circumventing democratic decision-making processes

⁹² Human Rights Committee, *Amanda Jane Mellet v. Ireland*, comm. n° 2324/2013, Views adopted on 31 March 2016, paras. 7.10 and 7.11.

⁹³ *Leroux et CDPQ v. J.M. Brouillette Inc.*, [1994] JTDPQ no 16; *Reeves et Québec (CDPDJ) v. Fondation Abbé Charles-Émile Gadbois*, [2001] JTDPQ no 13.

⁹⁴ *Bia-Domingo et Québec (CDPDJ) v. Sinatra*, [1999] JTDPQ no 19.

⁹⁵ Ombudsman of Buenos Aires, Decision 26 of 2013.

⁹⁶ U.S. Department of Housing and Urban Development, *A Pilot Study of Landlord Acceptance of Housing Choice Vouchers* (2018).

⁹⁷ Mary K Cunningham, et al., 'Landlords limit voucher holders' choice in where they can live' (Urban Institute, 20 August 2018).

⁹⁸ Antonia K Fasanelli and Philip Tegeler, 'Your Money's No Good Here: Combatting Source of Income Discrimination in Housing' (*American Bar Association*, 30 November 2019).

⁹⁹ See <https://www1.nyc.gov/site/cchr/media/lawful-source-of-income-factsheet-for-tenants.page> (last consulted on 23 May 2022).

The first norm of the anti-discrimination framework is directed to the lawmaker (or, more broadly, policymakers), requiring that no general law, regulation or policy results in discrimination, whether direct or indirect, against people in poverty. The difficulty here, however, is that people living on low incomes or who lack wealth will almost always, by definition, be more severely affected by certain general rules or policies, simply because they will find it more difficult to mitigate the impacts of such rules or policies, in particular by relying on alternatives for which they must pay.

The emerging practice of the European Committee on Social Rights illustrates the point. In Europe, it is this body – more so than the European Court of Human Rights or the Court of Justice of the European Union – that has been the most explicit as regards the prohibition to operate unjustifiable differences of treatment on grounds of socio-economic disadvantage. Its approach also shows, however, the limitations courts or quasi-judicial bodies face when guaranteeing equality before the law.

While the non-discrimination clause of the European Social Charter (article E) refers to "social origin", the European Committee of Social Rights considers that this "obviously includes non-discrimination on grounds of poverty".¹⁰⁰ In *Central Union for Child Welfare v. Finland*, this led the Committee to find that Finland had violated the non-discrimination requirement of the Charter, by introducing a legislation limiting access to early childhood education and care to 20 hours per week when one of the parents is unemployed or caring for another child, on maternity, paternity or parental leave. The Finnish government sought to justify this restriction by putting forward budgetary constraints and by arguing, rather tautologically, that the difference in treatment between families in which the two parents were working full-time and other families "has an objective and reasonable justification because it takes into account the different needs of distinct families and no one is entirely deprived of early childhood education and care services". The Committee disagreed. It took the view that "unemployment of a parent is already a factor that has a harmful impact on children, and yet restricting access for this group of children to early childhood education and care makes their position even more difficult".¹⁰¹ It concluded that Finland had been discriminating on the basis of the socio-economic status of the parents suffered by those children, as compared to children whose parents are working. The explanation of the Committee is worth quoting, for the clarity with which it expresses how facing such discrimination in access to early childhood education and care adds to the disadvantages low-income households already are imposed, due to their lack of resources. The Committee noted:

"[V]ulnerable or disadvantaged families face obstacles as their access to childcare services is restricted, depending on socio-economic status. These are often migrant families whose parents are unemployed. However, it is precisely the children from these families who could benefit the most from full-time pre-school care in order to successfully overcome cultural and linguistic barriers. The law also creates barriers for all single-parent families. This is often the case when a woman is the head of the family, who raises the children alone and cannot work full time. This is why supports and benefits in terms

¹⁰⁰ European Committee of Social Rights, *Statement of interpretation - article 30* (2013).

¹⁰¹ European Committee of Social Rights, *Central Union for Child Welfare v. Finland*, decision of 11 Sept. 2019, Complaint no. 139/2016, paras. 61 and 71. At issue were amendments to the Act on Early Childhood Education and Care which entered into force on 1st August 2016. The conclusion that Article E read in conjunction with Article 17§1(a) of the Charter (the right of children and young persons to social, legal and economic protection) had been violated was reached by a majority of 10 votes to four. The conclusion that article E was breached in combination with article 16 (the right of the family to social, legal and economic protection), however, was reached by 13 votes to one.

of access to early childhood education must be affordable and available to these families".¹⁰²

The *Central Union for Child Welfare v. Finland* case was a relatively easy case, however, where the domestic legislator itself had introduced a difference in treatment between households based on the professional status (employed full-time or not) of the parents. In contrast, disproportionate impact alone on children from lower socio-economic background may not be sufficient to trigger the conclusion that the non-discrimination clause of the European Social Charter is violated. In *International Federation for Human Rights (FIDH) and Inclusion Europe v. Belgium*, the complainant organisations were alleging that the lack of inclusive education for children with intellectual disabilities resulted in a discrimination on the ground of socio-economic origin. They reasoned that "families from more affluent backgrounds have both the cultural means to object to the orientation recommended and the financial resources to find alternatives", and they presented the Committee with data showing that children residing in low-income neighbourhoods were more frequently placed in specialized institutions (rather than in mainstream schools) than children from more affluent areas.¹⁰³ While the Committee found that Belgium has not acted in compliance with the requirements of the European Social Charter in other respects,¹⁰⁴ however, it rejected the allegation that the facts showed a discrimination on grounds of socio-economic condition. The Committee did not exclude that it could in principle address such a *de facto*, or indirect, discrimination¹⁰⁵; but it considered that the complainant organisations had not provided evidence specific enough to prove the alleged discrimination.

Why exactly the complainant organisations failed to convince the Committee that the failure to ensure inclusive education for children with disabilities is a matter of speculation. Two separate hurdles exist. First, disparate impact should be shown. While it is relatively easy to demonstrate that low-income people are relatively more affected than other groups by general measures, the point at which disparate impact should lead to shift the burden on the State to prove that the impugned measure is justified remains unclear. In *FIDH and Inclusion Europe v. Belgium*, the complainant organisations put forward statistics showing a strong correlation between the social origin of pupils and the average socio-economic level of their place of residence: data showed that in the least affluent districts, 6% of children were enrolled in special institutions, whereas in the more affluent districts, the figure was only 1.5% of children, i.e. four times lower.¹⁰⁶ Was this disparity not wide enough? If not, what would have been needed?

Second, once disparate impact is demonstrated, the question arises of which considerations can be put forward by the State to justify the measure. The State must show that the measure pursues legitimate objectives by means that are proportionate. It falls to the European Committee on Social Rights to assess both which objectives are legitimate (for instance, may saving resources

¹⁰² Id., para. 111.

¹⁰³ European Committee of Social Rights, *International Federation for Human Rights (FIDH) and Inclusion Europe v. Belgium*, Complaint no. 141/2017, decision on the merits of 9 Sept. 2020, paras. 110-114 (of the arguments of the complainants) and paras. 196-197 (for the conclusion of the Committee).

¹⁰⁴ Article 17§2 of the Charter has been violated because children with intellectual disabilities do not have an effective right to an inclusive education in Belgium's French Community.

¹⁰⁵ The European Committee of Social Rights has regularly reaffirmed that "Article E not only prohibits direct discrimination but also all forms of indirect discrimination. Such indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all" (ECSR, *Autism-Europe v. France*, Complaint no. 13/2002, decision on the merits of 4 Nov. 2003, para. 52).

¹⁰⁶ European Committee of Social Rights, *International Federation for Human Rights (FIDH) and Inclusion Europe v. Belgium*, Complaint no. 141/2017, decision on the merits of 9 Sept. 2020, para. 110.

justify limiting certain forms of support to the population, even if that affects low-income households more?), and whether such objectives have been pursued by measures that are not imposing an excessive burden on such households (or instead could have been achieved by other means). For the Committee as for other judicial or quasi-judicial bodies facing similar situations, it may not always be easy to avoid crossing the line between legal assessment and political choice: the stricter the scrutiny they perform, the more they will be accused of judicial law-making, or of questioning the result of democratic decision-making processes.

The concern is legitimate, but its foundations may be more fragile than is generally thought. When the legitimacy of human rights bodies to interfere with the choices of legislatures is questioned, this is often grounded in the idea that low-income groups affected by certain public policies or individual behaviours should rely on the political process to challenge the exclusion they face. Whether it is explicitly articulated or not, this argument suggests that, if all societies must accept at least a certain degree of inequality, and if markets will inevitably be less hospitable to the groups that have less, courts should not be trusted to make choices about how much inequality is acceptable or decide on the threshold for when a failure to account for the specific circumstances of people in poverty should be deemed discriminatory: such choices, it is argued, are fundamentally political in nature.

The argument is grounded in an idealized view of decision-making processes rather than in empirical fact. There is now ample research demonstrating that, even in the best-functioning democracies, the wealthiest groups of the population exercise a disproportionate influence in the political system,¹⁰⁷ and that this phenomenon has become worse with the growth of inequalities over the past forty years: a study covering 136 countries for the period 1981-2011 showed that "as income inequality increases, rich people enjoy greater political power and respect for civil liberties than poor people do".¹⁰⁸ Indeed, it is in part because recipients of public assistance are a "discrete and insular minority" who cannot count on the democratic political process to uphold their interests that in Canada, the Equality Clause of section 15 of the Charter of Rights and Freedoms could be invoked by people living on low incomes.¹⁰⁹

Challenge #4: Interfering with freedom of contract

A specific challenge relates, finally, to the prohibition of discrimination in "horizontal" relationships between private parties. This relates to the third norm of the anti-discrimination framework outlined above: landlords in their relationships to tenants or prospective tenants, employers in their relationships to their employees or prospective employees, schools in relationship to the pupils' parents, cannot discriminate on grounds of socio-economic condition. Many of these relationships, however, are grounded in the free choice of private parties to as to whom they choose to interact with, and particularly, as to whom to contract with. The question therefore inevitably arises as to whether the prohibition of discrimination is an interference with freedom of contract, and if so, whether such an interference can be allowed.

The argument is of limited weight, for essentially two reasons. First, while it has been constitutionalized in certain domestic legal orders, freedom of contract does not have the status of a human right in international law. In situations of conflict, human rights should therefore

¹⁰⁷ M. Gilens, *Affluence and Influence. Economic Inequality and Political Power in America* (Princeton: Princeton University Press, 2012).

¹⁰⁸ Wade Cole, "Poor and powerless: Economic and political inequality in cross-national perspective, 1981-2011", *International Sociology* (2018):21-22.

¹⁰⁹ *Federated Anti-Poverty Groups of British Columbia v. British Columbia (Attorney General)*, (1991) 70 B.C.L.R. (2d) 325 (S.C.) (Parrett, J.); *Schaff v. Canada*, [1993] T.C.J. (T.C.C.), para. 52.

prevail above what is a mere economic freedom. Second, the reason why freedom of contract is valued in political philosophy is because of the assumption that contracts are freely negotiated between two parties, both of whom not only have full legal capacity but also are sufficiently equipped to be immune from any form of coercion. Coercion, it should be recalled, may result not only from a person being literally forced to sign a contract, for instance by a gun being directed at her, but also from the *economic pressure* that may result from a party not having real alternatives, because of her weak economic position: "freedom", for people living on low incomes, may result in coercion in that sense, when they have urgent needs to satisfy and when support provided by the State or by informal networks is insufficient, so that the person realistically has no effective possibility to refuse the offer that is made – even if this means, for instance, to accept a job with impossible working hours, or a shoddy apartment.¹¹⁰

Of course, the kind of compulsion on the right-holder that a private actor may exercise in contractual relationships differs from that which the State may exercise : as noted by the economist Heilbroner, "there is a qualitative difference between the power of an institution to wield the knout, to brand, mutilate, deport, chain, imprison, or execute those who defy its will, and the power of an institution to withdraw its support, no matter how life-giving that support may be. Even if we imagined that all capital was directed by a single capitalist, the sentence of starvation that could be passed by his refusal to sell his commodities or to buy labor power differs from the sentence of the king who casts his opponents into a dungeon to starve, because the capitalist has no legal right to forbid his victims from moving elsewhere, or from appealing to the state or other authorities against himself".¹¹¹ But that difference between the police State and the capitalist monopolizing economic power relates to the means through which compulsion may be exercised; the compulsion itself imposed by the capitalist may be different, but it is no less real.

This is why some States have sought to protect individuals from the kind of vulnerability to coercion that results from economic insecurity;¹¹² indeed, this is already what the above-mentioned prohibition of discrimination on grounds of "social precarity" in France, defined as "economic vulnerability", alludes to. And this is why the European Court of Human Rights, in particular, has expressed strong reservations vis-à-vis individuals being induced to waive certain rights under the pressure of financial incentives. In the 2002 case of *Wilson, National Union of Journalists and Others v. the United Kingdom*, the workers were offered by their employers to sign a personal contract and lose union rights, or accept a lower pay rise: in other terms, an employer could under British law offer higher wages to workers in order to encourage them to not join the union and not be represented by the union in collective bargaining schemes. This was in effect undermining the ability for the unions to represent the workers effectively.

¹¹⁰ As a result, the expansion of freedom of contract may restrict, rather than expand the real freedom of the individual, since that individual will be exposed to coercion in the market relationships. Robert Lee Hale was one of the most insightful writers on this apparent paradox. See generally Robert L. Hale, "Coercion and Distribution in a Supposedly Non-Coercive State", *Political Science Quarterly*, 38(1923): 470. For an excellent comment from an institutionalist economist's perspective, see Warren J. Samuels, "The Economy as a System of Power and its Legal Bases: The Legal Economics of Robert Lee Hale", *U. Miami L. Rev.*, 27(1973):261.

¹¹¹ Robert L. Heilbroner, *The Nature and Logic of Capitalism* (W.W. Norton & Co., New York and London, 1985), at 39-40.

¹¹² See, e.g., the position of the French Court of cassation, according to which a situation of economic dependency cannot be "abused" by a party in order to force on the vulnerable party certain concessions (Cass. fr. (1^{ère} ch. civ.), 3 April 2002 ("l'exploitation abusive d'une situation de dépendance économique, faite pour tirer profit de la crainte d'un mal menaçant directement les intérêts légitimes de la personne, peut vicier de violence son consentement")). This idea, originally accepted by courts, was introduced in the French Civil Code in 2016, art. 1143 of which now reads: "Il y a ... violence lorsqu'une partie, abusant de l'état de dépendance dans lequel se trouve son cocontractant, obtient de lui un engagement qu'il n'aurait pas souscrit en l'absence d'une telle contrainte et en tire un avantage manifestement excessif".

The Court noted that "it is of the essence of the right to join a trade union for the protection of their interests that employees should be free to instruct or permit the union to make representations to their employer or to take action in support of their interests on their behalf. If workers are prevented from so doing, their freedom to belong to a trade union, for the protection of their interests, becomes illusory. It is the role of the State to ensure that trade union members are not prevented or restrained from using their union to represent them in attempts to regulate their relations with their employers".¹¹³ In other terms, although workers have of course a freedom not to join a union, if this is to be a real *choice*, the employer must be enjoined from pressuring how that freedom is exercised, by inducing workers through financial means to prefer the negotiation of individual contracts of employment to collective representation through the union. Coercion by the power of the purse, resulting in an abuse of the economic vulnerability of individuals in need, is as problematic as physical coercion: freedom of contract therefore should not be sanctified, where one of the contractors is a person whose poverty creates a situation of vulnerability.

4. The role of affirmative action

The fourth norm contained in the comprehensive anti-discrimination framework described above deserves a particular emphasis. It has been underlined above that the discrimination that people in poverty face is systemic in nature, both in the sense that it affects different spheres of life, and in the sense that it is widespread, having its source in anti-poor stereotyping that, not infrequently, official discourse may encourage. Affirmative action policies are essential to break the vicious cycles that result from the systemic nature of the discrimination faced by people in poverty. Whereas preferential treatment is well-established as regards the allocation of goods or services that *compensate* for poverty or social exclusion, as in means-tested social protection schemes or in the award of scholarships to help overcome financial barriers to education, it is less common and more heavily contested where it is seen to challenge the mainstream narrative about "deservingness", as in access to employment or to the most coveted schools or universities. Yet, affirmative action is especially needed in such fields, if real equality of opportunities is to be achieved.¹¹⁴

Israel successfully designed a form of class-based affirmative action to access the country's most prestigious universities since the mid-2000s,¹¹⁵ which determines socioeconomic disadvantage on the basis not only of financial status, but also of neighbourhood and high school attended, family socioeconomic status (including parental education and family size) and "individual and/or family adverse circumstances".¹¹⁶ In India, while the Constitution includes various anti-discrimination provisions and bans the practice of "untouchability" (art. 17), it also states that special measures may be adopted "for the advancement of any socially and educationally backward classes of citizens", as a means to reduce social inequalities for members of these groups (art. 15, (4) and (5)). This mainly takes the form of reserved seats in public offices and educational institutions (both public and private), as well as job reservations in the public sector, for the castes and tribes mentioned in articles 341 and 342. In addition however, article 16(4) of the Constitution now allows for "the reservation of appointments or

¹¹³ Eur. Ct. HR (2nd sect.), *Wilson, National Union of Journalists and Others v. the United Kingdom* (Appl. nos. 30668/96, 30671/96 and 30678/96), judgment of 2 July 2002, § 46.

¹¹⁴ See *The persistence of poverty: How real equality can break the vicious cycles*. Report of the Special Rapporteur on extreme poverty and human rights, Olivier De Schutter, to the 76th session of the General Assembly (A/76/177 (2021)), paras. 44, 49-50 and 60.

¹¹⁵ Sigal Alon, "Insights from Israel's Class-Based Affirmative Action", *Contexts* 12(2013):19.

¹¹⁶ Sigal Alon and Ofer Malamud, "The impact of Israel's class-based affirmative action policy on admission and academic outcomes", *Economic of Education Review* 40(2014):123-139, 126.

posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State": consistent with this constitutional mandate, the Central Educational Institutions (Reservations in Admissions) Amendment Bill stipulates that 27 percent of seats are reserved for "Other Backward Classes" (OBC) in publicly funded higher education institutions, a policy which led to significantly improve the socio-economic diversity in universities.¹¹⁷

Affirmative action is in principle acceptable under international law;¹¹⁸ indeed, both the Human Rights Committee and the Committee on Economic, Social and Cultural Rights noted that it may be required to combat systemic discrimination,¹¹⁹ and domestic law occasionally frames it not as a derogation from the principle of equal treatment, but instead as an implication from that principle.¹²⁰ Domestic courts have correctly taken the view that such policies are not a derogation to the principle of non-discrimination, but rather should be seen as implementing the mandate to ensure effective equality, in particular for low-income groups. In *Society for Un-aided Private Schools of Rajasthan v Union of India*, the Indian Supreme Court upheld a requirement imposed on private unaided schools under section 12(1)(c) of the 2009 Right to Education Act to fill 25% of the seats in Class I with children from weaker and disadvantaged groups, taking into account that the Act sought to remove "financial and psychological barriers which a child belonging to the weaker section and disadvantaged group has to face while seeking admission", and that this objective could justify reasonable restrictions to the economic freedoms of educational establishments.¹²¹ In Kenya, a High Court allowed a government policy providing more opportunities in national schools to students from public institutions as opposed to students from private institutions:¹²² it found that this measure was aimed at achieving substantive equality by reducing the inequality gap between the rich and the poor and was consistent with Article 27 (6) of the Kenyan Constitution which commits the State to give full effect to the realization of the right to equality and freedom from discrimination by taking legislative and other measures, including affirmative action programs and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

At a symbolic level, affirmative action recognizes the specific obstacles people in poverty face owing to the persistence of povertyism, thus questioning the mainstream narrative about society distributing outcomes on the basis of "merit". Increased diversity in different sectors and levels of the professional sphere also provides role models to adolescents and young adults from underprivileged backgrounds and expands their "aspirations window". It diminishes negative stereotyping of the poor, as shown by the branch of social psychology known as the "intergroup contact theory":¹²³ Gautam Rao found, for instance, that negative prejudice against poor children diminished after elite schools in Delhi were forced to open more spaces to children

¹¹⁷ Rakesh Basant and Gitanjali Sen, "Quota-Based Affirmative Action in Higher Education: Impact on Other Backward Classes in India", *The Journal of Development Studies*, 56(1)(2020):1-25.

¹¹⁸ For a systematic treatment, see *The concept and practice of affirmative action*. Final report submitted by Mr Marc Bossuyt, Special Rapporteur, in accordance with Resolution 1998/5 of the Sub-Commission for the Promotion and Protection of Human Rights (E/CN.4/ Sub.2/2002/21 (17 June 2002)).

¹¹⁹ Human Rights Committee, General Comment (No. 18): Non-discrimination (1989), paras. 9-10; CESCR General Comment on non-discrimination, para. 9.

¹²⁰ In South Africa, see section 9(2) of the Constitution and section 14(1) of the PEPUDA ("It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons").

¹²¹ (2012) 6 SCC, Writ Petition (C) No. 95 of 2010 (para. 10).

¹²² High Court of Kenya at Nairobi, *John Kabui Mwai & 3 Others v Kenya National Examination Council & 2 Others*, Petition 15 of 2011, paras 5-11.

¹²³ Negative stereotypes will diminish especially where members of different groups cooperate as equals towards common goals: see Gordon W. Allport, *The Nature of Prejudice* (Addison-Wesley, Cambridge, MA, 1954).

from low-income families,¹²⁴ and a review of 515 studies found that in 94 percent of the cases, mere intergroup contact (i.e., increased diversity) reduced prejudice.¹²⁵ Greater diversity also results in decisions made in institutions being better informed by the lived experiences of people in poverty, reducing the risk of indirect (including unconscious) discrimination; and the services provided by such institutions will be more attentive to the specific circumstances of low-income people.

5. The role of intersectionality

Socio-economic disadvantage exposes individuals to discrimination particularly when combined with another "traditional" status, such as ethnicity or sex. In turn, membership in a group traditionally subject to discrimination exposes the individual to the risk of discrimination particularly when they live on low incomes or lack wealth. Only by addressing this intersectionality can the experience of those combining various "devalued social identities" be properly understood.¹²⁶ In *Trujillo Calero v. Ecuador*, the Committee on Economic, Social and Cultural Rights found intersectional discrimination on grounds of gender, ill-health, age and economic status due to barriers faced by poor women in accessing social security benefits; it held that intersectional discrimination triggered "special" or "strict" scrutiny.¹²⁷ This was also explicitly acknowledged, in particular, by the Inter-American Court of Human Rights, when faced in the case of *Gonzales Lluy y otros v. Ecuador*¹²⁸ with the situation of a child who tested positive for HIV following a blood transfusion and consequently faced severe social stigmatization and discrimination: the Court referred *inter alia* to the limitations on the child's access to education as a result of having HIV, being a girl, having a disability, being a child *and* living in poverty,¹²⁹ and it noted that the accumulation of characteristics resulted in a "specific form of discrimination".¹³⁰ The case of *Hacienda Brasil Verde workers v. Brazil*,¹³¹ which concerned the slavery-like working conditions of workers in a cattle ranch, led the Inter-American Court to highlight the central role played by structural discrimination based on "economic position" under Article 1.1 ACHR in the discussion of the merits. Relying on an "intersectional" type of analysis, it emphasized the particular victimization and vulnerability of the workers because they were poor, illiterate and Afro-descendants¹³².

In order to recognize intersectionality, equal treatment legislation should define discrimination as including "a practice based on one or more prohibited grounds of discrimination or the effect of a combination of prohibited grounds".¹³³ In South Africa, section 9(3) of the Constitution provides explicitly for the possibility of using *multiple* grounds ("one or more grounds") in a

¹²⁴ Gautam Rao, "Familiarity Does not Breed Contempt: Generosity, Discrimination and Diversity in Delhi Schools", *American Econ. Rev.*, 109(3) (2019): 774-809.

¹²⁵ Thomas F. Pettigrew and Linda R. Tropp, "Does Intergroup Contact Reduce Prejudice? Recent Meta-Analytic Findings", *Reducing Prejudice and Discrimination*, 93(114) (2000).

¹²⁶ CESCR General Comment on non-discrimination, para. 17. Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics", *University of Chicago Legal Forum* (1989):139-167; Canan Corus, Bige Saatcioglu, Carol Kaufman-Scarborough, Christopher P. Blocker, Shikha Upadhyaya, and Samuelson Appau, "Transforming Poverty-Related Policy with Intersectionality", *Journal of Public Policy & Marketing* 35(2)(2016):211-222; Wayne MacKay and Natasha Kim, *Adding Social Condition to the Canadian Human Rights Act. Final Report for the Canadian Human Rights Commission* (2009), 179.

¹²⁷ Comm. n°10/2015, views of 26 March 2018, para 19.2.

¹²⁸ Inter-American Court of Human Rights, *Gonzales Lluy y otros v. Ecuador*, 1 September 2015, para. 298.

¹²⁹ *Id.*, para. 285.

¹³⁰ *Id.*, para. 290.

¹³¹ Inter-American Court of Human Rights, *Hacienda Brasil Verde workers v. Brazil*, 20 October 2016.

¹³² *Id.*, paras. 339-340.

¹³³ Canadian Human Rights Act, s.3(1) (as amended in 1998).

single claim, thus allowing intersecting forms of discrimination to be addressed. This is of particular importance in countries where class, race, and gender inequalities are closely intertwined: the South African Constitutional Court itself recalled that grounds should not be forced "into neatly self-contained categories" since there is often a "complex relationship" between them.¹³⁴

Such formulations ensure that victims of discrimination are protected against discrimination (for instance) on grounds of sex, race or disability, when such grounds operate in combination with their socio-economic condition, even in circumstances where it would not be possible for such victims to prove that they have been subjected to discrimination based either on traditional status grounds or on poverty alone.¹³⁵

The recognition of intersectionality is also important where certain schemes provide for a monitoring of the impact of certain policies or regulations on specific groups, in order to prevent disparate impacts on such groups. For instance, the 2005 Indian Mahatma Gandhi National Rural Employment Guarantee Act (NREGA) guarantees a minimum of hundred days of employment on public works projects to rural households who have no other source of income. A number of provisions of the Act and its implementing regulations provide that certain groups shall be prioritized in access to the program: this is the case for women (one third of the employment opportunities are set aside for them), as well as for members of "Scheduled Castes" (the *Dalit*) and "Scheduled Tribes" (the indigenous communities). Official data therefore track the extent to which women, Scheduled Castes and Scheduled Tribes benefit from the program.¹³⁶ Such data however provide no indication either as to the representation of "Scheduled Castes" and "Scheduled Tribes" among the women that benefit from the NREGA program, or as to the representation of women among the "Scheduled Castes" and "Scheduled Tribes" categories: it cannot be excluded therefore that very few of the women belong to "Scheduled Castes" or "Scheduled Tribes", or that women are under-represented among the participants in the program that are members of "Scheduled Castes" or "Scheduled Tribes". Taking intersectionality into account, in contrast, would ensure that not only women, and not only members of *Dalit* or indigenous communities benefit, but that also women from such groups benefit from the program, to an extent at least roughly proportionate to their representation within the rural population.

As noted by the South African Human Rights Commission in its 2017/2018 Equality Report,¹³⁷ intersectionality is particularly important to guide affirmative action policies in order to ensure that such policies will not benefit primarily the most fortunate segments of the group targeted as beneficiaries, defined by criteria such as sex or ethnicity, and instead that they take into account both socio-economic factors and traditional status grounds.¹³⁸ The affirmative action programs launched in India, for instance, might fail to adequately protect certain groups disproportionately affected by poverty and face historical discrimination, such as the Muslims, where such programs benefit only specific caste or ethnic groups. They also may fail to address intra-caste disparities, with the risk that such programs will primarily benefit the better-off and

¹³⁴ *Harksen v Lane NO and Others* (CCT9/97) [1997] ZACC 12, para 50. See also *Mahlangu v Minister of Labour* 2021 2 SA 54 (CC), and the comments by Shreya Atrey, "Beyond Discrimination: *Mahlangu* and the use of Intersectionality as a General Theory of Constitutional Interpretation", *International Journal of Discrimination Law*, 11(2021):1-11.

¹³⁵ Beth Goldblatt, "Intersectionality in International Anti-Discrimination Law: Addressing Poverty in its Complexity", *Australian Journal of Human Rights*, 21(1)(2015):47-70; Shreya Atrey, "The Intersectional Case of Poverty in Discrimination Law", *Human Rights Law Review*, 18(3)(2018):411-440.

¹³⁶ These categories account for 55, 22 and 18 percent respectively.

¹³⁷ See https://www.sahrc.org.za/home/21/files/SAHRC%20Equality%20Report%202017_18.pdf

¹³⁸ E/CN.4/Sub.2/2002/21, paras. 11-12 and 15.

better-educated of the groups concerned (the so-called "creamy layer"¹³⁹), without helping the most socially and economically disadvantaged.¹⁴⁰ Indeed, it is in order to remedy this that the reservations system was extended to the "Other Backward Classes" in 1990, thus introducing socio-economic criteria in the definition of affirmative actions' target population, and that the Constitution was amended in 2019 to introduce a "special provision for the advancement of any economically weaker sections of citizens".¹⁴¹ This represents a step forward in the fight against poverty-based discrimination, as it recognizes that caste can no longer be the *sole* criterion for detecting socially backwardness.

At the same time, it is essential that, as long as caste-based discrimination persists, specific affirmative action programs be maintained: the fight against poverty-based discrimination should *supplement*, not undermine, the fight against other forms of discrimination. This final note of caution can be illustrated by the debate concerning the reservations policy put in place in Nepal, which are largely inspired by the Indian example.¹⁴² In Nepal, the Dalit are significantly more affected by poverty than other groups of the population: around 42% of Dalit live below the poverty line,¹⁴³ far above the national poverty rate of 25.2%.¹⁴⁴ In order to improve the socio-economic condition of the Dalit and to counter the social discrimination they face,¹⁴⁵ a reservations policy has been in place since 2007, providing that 45% of positions in the federal civil service should go to specific disadvantaged groups. While this policy was effective for some groups, however (women's representation in civil service, for instance, increased from 11% in 2007 to more than 20% a decade later),¹⁴⁶ progress was slower for other groups, for the Dalit in particular: Dalit representation in civil service was below 1% prior to the introduction of the reservations policy, but it remained around 2% by 2018, which remains significantly below the aims set by the policy.¹⁴⁷ In other terms, the task of overcoming the exclusion of the Dalit from the administration is still largely unfinished.

It is against that background that, on 1 August 2021, a Supreme Court joint bench composed of Justices Bishwambhar Prasad Shrestha and Anand Mohan Bhattarai adopted a directive order according to which the reservation system henceforth should be focused on needs and not on

¹³⁹ In *State of Kerala v. N.M. Thomas* (1976) 2 SCC 310, Krishna Iyer, J., noted that one danger of the reservations system is that "its benefits, by and large, are snatched away by the top creamy layer of the 'backward' caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake" (at 363). In *Indra Sawhney & Ors. v. Union of India* (1992) Supp 2 SCR 454, the Indian Supreme Court took the view that the reservation in favour of "Other Backward Classes" should not extend to those who are already "highly advanced socially as well as economically and educationally". This mandate was later clarified, most notably in the cases of *Indra Sawhney ("II") v. Union of India* (AIR 2000 SC 498) and *Jarnail Singh v. Lachhmi Narain Gupta* (2018) 10 SCC 396.

¹⁴⁰ Upendra Bhojani, C. Madegowda, N.S. Prashanth, P. Hebbar, T. Mirzoev, s. Karlsen and G. Mir, "Affirmative action, minorities, and public services in India: Charting a future research and practice agenda", *Indian Journal of Medical Ethics*, 4(2019):265-273, 267.

¹⁴¹ Constitution 103rd Amendment Act, 2019.

¹⁴² These paragraphs draw on the report prepared by the author, in his capacity as Special Rapporteur on extreme poverty and human rights, following his visit to Nepal: see A/HRC/50/38/Add.3, paras. 22-30.

¹⁴³ Asian Development Bank, *Country Poverty Analysis (Detailed) – Nepal*, p.11.

¹⁴⁴ Dalit NGO Federation, *et al.*, *Nepal's Civil Society Alternative Report to the UN Committee on the Elimination of All Forms of Racial Discrimination* (February 2018), p.15.

¹⁴⁵ Krishna Khanal, *Dalit representation in national politics of Nepal* (Nepal National Dalit Social Welfare Organisation, 2012), p.12.

¹⁴⁶ Ramesh Sunam and Krishna Shrestha, "Failing the most excluded: a critical analysis of Nepal's affirmative action policy," *Contributions to Nepalese Studies*, 46(2)(2019):283-305.

¹⁴⁷ According to the 1993 Civil Service Act as amended, 45% of total seats of the civil service workforce are to be filled through open competition by eligible candidates from "disadvantaged groups": women (33%), *Adivasi Janajatis* (27%), Madhesis (22%), Dalits (9%), persons with disabilities (5%) and persons from remote regions (4%).

ethnicity: the judgment states that socio-economic status rather than an individual's caste or ethnic identity should be considered when allocating reservations. The Court also ruled that an individual could only benefit once in a lifetime from the reservations system.

It would be wrong to draw the conclusion that this should lead to the abandonment of the reservations system based on ethnicity, sex and caste. The proper answer is, rather, to provide for an *additional* set-aside, separate from the current 45% reserved allocations, for candidates from a low socio-economic background. Such a provision would be consistent with the reference of the Constitution to the prohibition of discrimination on grounds of economic condition as well as to the "indigent Khas Arya" as part of the disadvantaged groups.¹⁴⁸ It would also alleviate any fear that the current policy will disproportionately favour those who, within certain groups, are the best positioned to seize the opportunities arising from the policy. Much as affirmative action can be seen as a tool towards a more inclusive society, ensuring a better representation of people with a low socio-economic status, this does not make it less urgent to deal with other forms of exclusion, such as those based on caste.

6. Conclusion

States should ensure their anti-discrimination framework effectively prohibits discrimination on grounds of socio-economic disadvantage: rules that directly or indirectly discriminate against people in poverty, or that do not provide for the necessary flexibility to accommodate the specific circumstances they face, should be revised; public authorities should not be allowed to commit such forms of discrimination; private agents (landlords, employers, private schools and hospitals) should be imposed similar prohibitions; and affirmative action should be considered to address the systemic nature of the discrimination people in poverty face. This would acknowledge the reality of povertyism, as well as the need to effectively remove the obstacles people in poverty face in areas such as housing, employment or education.

Three provisos are in order, however. First, for courts to effectively protect people in poverty from discrimination, they need to be accessible. In addition to the provision of legal aid to help overcome barriers that result from the cost of litigation, the creation of specialized courts specifically constituted to treat discrimination cases may be considered. In South Africa, the 2000 PEPUDA thus established "Equality Courts" to improve access to justice for victims of discrimination, providing a quick and inexpensive avenue for redress.¹⁴⁹ This solution inspired the Indian Centre for Legal and Policy Research in its draft Equality Bill,¹⁵⁰ and it could inspire others.

Secondly, neither the prohibition of discrimination on grounds of socio-economic disadvantage, nor pro-poor affirmative action policies specifically, should be seen as a substitute for policies that provide low-income individuals with the right kind of support that would ensure real equality of opportunities. In India for instance, even with reservation policies in place, it was

¹⁴⁸ The Constitution of Nepal (2015), in section 18(3), prohibits the State from discriminating "on grounds of origin, religion, race, caste, tribe, sex, economic condition, language, region, ideology or on similar other grounds", but then adds this proviso allowing for an affirmative action (or reservations) policy: "Provided that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or development of the citizens including the socially or culturally backward women, Dalit, indigenous people, indigenous nationalities, Madhesi, Tharu, Muslim, oppressed class, Pichhada class, minorities, the marginalized, farmers, labours, youths, children, senior citizens, gender and sexual minorities, persons with disabilities, persons in pregnancy, incapacitated or helpless, backward region and indigent Khas Arya".

¹⁴⁹ See Dana Kaersvang, "Equality Courts in South Africa: Legal Access for the Poor", *Journal of the International Institute*, 15(2)(2008).

¹⁵⁰ Centre for Legal and Policy Research, *The Equality (Prohibition of Discrimination) Bill*, 8 January 2021.

noted that gaps remain in pre-college preparation, college participation and college academic performance: disadvantaged students require improved guidance before and throughout higher education.¹⁵¹ Even the more robust of anti-discrimination frameworks does not diminish the need for investments in education, housing or social protection, to break the cycles that perpetuate poverty.¹⁵²

Third and finally, the prohibition of discrimination on grounds of poverty in areas related to the enjoyment of socio-economic rights such as housing, education or employment, should not distract from the urgent need to address imbalances in political power. In India, affirmative action was extended to electoral quotas in order to ensure a more balanced representation in public office, helping to fight caste-based discrimination: such quotas reduced street exclusion by one fifth and achieved some redistribution in public office.¹⁵³ In addition to improved access to jobs and education, another advantage of these policies, according to the International Dalit Solidarity Network, is that they "have provided some space and confidence for Dalits and have made them more assertive of their rights."¹⁵⁴ It is this space and this confidence that must urgently be created.

¹⁵¹ Surendrakumar Badge, Dennis Epple and Lowell Taylor, "Does Affirmative Action Work? Caste, Gender, College Quality, and Academic Success in India", *American Economic Review* 106(6)(2016):1495-1521, 1520.

¹⁵² *The persistence of poverty: How real equality can break the vicious cycles*. Report of the Special Rapporteur on extreme poverty and human rights, Olivier De Schutter, to the 76th session of the General Assembly (A/76/177 (2021)). See also Gwenaëlle Calvès and Diane Roman, "La discrimination à raison de la précarité sociale: progrès ou confusion ?", *Revue de droit du travail* (2016):526-531.

¹⁵³ Victoire Girard, "Don't Touch My Road. Evidence from India on Affirmative Action And Everyday Discrimination", *World Development*, 103(2018):1-13, 12.

¹⁵⁴ International Dalit Solidarity Network and others, *Caste-based Discrimination in India* (Joint NGO Submission, India's first Universal Periodic Review, April 2008), p. 4.