

Anti-Discrimination Law and Economic Inequalities

Julie Ringelheim and Sarah Ganty

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Julie Ringelheim** and Sarah Ganty***

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Abstract

A number of scholars and civil society actors criticize anti-discrimination law arguing that it neglects the fundamental problem of socio-economic inequalities and rests on an overly narrow notion of equality compared to the one underlying classic (re)distributive policies. This chapter discusses this critique. It argues that while this critical view usefully highlights some of the limitations of anti-discrimination law, such limitations do not mean that anti-discrimination law and (re)distributive policies are in conflict with each other and that a choice needs to be made between them. Part I of the chapter sheds light on how each of these legal and policy instruments relates to the ideal of equality. It shows that anti-discrimination law and (re)distributive policies address a different kind of inequality and operate through different tools. Yet, there are important points of juncture between them. Part II explores one important avenue to build a bridge between anti-discrimination law and concerns for economic inequalities, which is the inclusion of socio-economic disadvantage among prohibited discrimination grounds. The chapter concludes that both anti-discrimination law and (re)distributive policies can be said to rely on a partial, and incomplete, vision of equality. Accordingly, it is essential to combine rather than oppose them: both discrimination and economic inequality need to be adequately tackled if we are to foster a more equal society.

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** Senior Researcher with the Belgian fund for scientific research (FRS-FNRS) and the Center for Philosophy of Law of Louvain University (UCLouvain) and Professor at UCLouvain.

*** FRS-FNRS Post-doctoral fellow at UCLouvain Center for Philosophy of Law, JSD candidate at Yale Law School, and Lecturer at Central European University in Vienna and the Université Saint-Louis in Brussels.

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Introduction

Anti-discrimination law has long been criticized by advocates of deregulation and unfettered markets on the grounds that it entails an unacceptable restriction of the freedom to contract and the right to property of private economic actors. According to this view, the prohibition of discrimination amongst private parties constitutes an illegitimate intrusion of the state into economic interactions: employers, landlords and service providers should be free to select workers, tenants or customers according to the criteria they deem appropriate.¹

In the last twenty years, anti-discrimination law has started to face attacks originating from scholars and civil society actors who, on the contrary, strongly support government intervention in the economy, especially to counter inequalities. However, these critics claim that state authorities should be primarily – or at least equally – concerned with inequalities between categories defined by a socio-economic criterion, i.e. social class, rather than between groups based on grounds such as gender, race or ethnic origin, religion or sexual orientation, in other words on ‘status grounds.’² By placing an exclusive emphasis on unfair treatment suffered by certain people based on such personal characteristics, anti-discrimination discourse and policies are said to divert attention from fundamental inequalities produced by the market which harm the socio-economically disadvantaged in general.³

These critics contrast anti-discrimination law with classic social policies developed in the framework of the welfare state, in particular social security, progressive taxation, public services, labour rights and collective bargaining, which for decades have helped reduce economic inequalities in societies where they were implemented.⁴ We will refer to this set of policies as ‘(re)distributive policies’. Some of them indeed are based on *redistribution* (i.e. progressive taxation and social security) but others, such as collective bargaining and labour rights, are not; rather they influence the *primary distribution* of wealth and resources.⁵

According to this critical view, insofar as anti-discrimination law purports to promote equality, it is an overly narrow notion of equality compared to the one that underlies these classic ‘(re)distributive policies.’⁶ Some of these critics add that by fostering an alternative conception of equality, anti-discrimination law undermines the legitimacy of (re)distributive policies, at a

¹ See in particular Milton Friedman’s plea against anti-discrimination law in: Milton Friedman, with the assistance of Rose Friedman, *Capitalism and Freedom* (University of Chicago Press, 2002, first published in 1962), 108-118. The idea that the prohibition of discrimination between private parties is a violation of the freedom to contract or the right to property was largely referred to in Germany during debates about the transposition of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 (hereinafter the Racial Equality Directive) by opponents to the bill. See Oliver Treib, ‘Les conflits politiques en Allemagne autour de la transposition de la directive européenne contre le racisme’ (2006) 33(5) *Critique internationale* 27 and Valérie Amiraux and Virginie Guiraudon, ‘Discrimination in Comparative Perspective: Policies and Practices’ (2010) 53 *American Behavioral Scientist* 1691, 1698.

² Many authors refer to these traditional prohibited discrimination grounds as ‘status grounds.’ See Sandra Fredman, ‘Redistribution and Recognition: Reconciling Inequalities’ (2007) 23 *South African Journal on Human Rights* 214; Samuel Moyn, *Not enough. Human Rights in an Unequal World* (Harvard UP 2018) 176; Olivier De Schutter, ‘Combating Discrimination on Grounds of Socio-Economic Disadvantage: A Tool in the Fight against Poverty’ (2022) 3 *European Journal of Human Rights/Journal Européen des Droits de l’Homme* 223, available at https://cridho.uclouvain.be/en/publications/working_papers.php (accessed 27 October 2022).

³ See in particular Moyn (“Great advance were made when it came to status equality and supranational responsibility, but at the high price of material fairness at every scale, for which human rights law lacked the norms and human rights movements the will to advocate.” (n 2, 176)); and Alain Supiot, *L’esprit de Philadelphie. La justice sociale face au marché total* (Seuil, 2010) (“Wage status is breaking down, leading to staggering inequalities in the labour market, but there is no year in which the principle of equality is not invoked to extend the list of discrimination prohibited by the Labour Code.” (49, our translation)).

⁴ This description is inspired by the definition of the concept of ‘social democratic state’ provided by Piketty in Thomas Piketty, *Capital and Ideology*, trad. Arthur Goldhammer (Harvard UP 2020) 487.

⁵ See Piketty, *Capital and Ideology* (n 4), 528 and Anthony B. Atkinson, *Inequality: What Can Be Done?* (Harvard UP 2015), 73. On the concept of ‘predistribution’, see Martin O’Neill and Thad Williamson, ‘The Promise of Predistribution’ (2012) Policy Network, available at file:///Users/ringelheim/Downloads/The_Promise_of_Predistribution_Policy_N.pdf (accessed 1 September 2022).

⁶ See in particular Alexander Somek, *Engineering Equality. An Essay on European Antidiscrimination Law* (OUP 2011) and François Dubet, *Les places et les chances. Repenser la justice sociale* (Seuil 2010).

moment when they are under attack from neoliberal economics and governance.⁷ Some also argue that because it insists on identity differences, anti-discrimination law stirs division and undermines solidarity amongst people who suffer similar injustices when viewed from a socio-economic perspective.⁸

In support of this argument, these critics often cite the fact that in the last thirty years anti-discrimination law has undergone impressive development at the international, European, and national levels, while during the same period economic inequalities have grown dramatically in most countries in the world.⁹ Between the 1920s and the late 1970s, a massive decline in economic inequality had been observed in many countries, in particular in Europe and North America. This reduction in inequality was in large part due to policies typical of the welfare state put in place during this period, in particular progressive taxation, social security systems, labour rights and collective bargaining.¹⁰ But since the 1980s, this trend has been reversed – the rise of income and wealth inequalities within countries in many parts of the world has been widely documented.¹¹ The gap between top and bottom-income earners has widened, especially in the United States but also, although more moderately, in Europe: the share of the national income of the top 10% of earners rose from 34% in the US and 27% in Europe in 1980 to 47% and 34% in 2018, respectively, while, during the same period, the share of the bottom 50% of earners fell from 20% to 12% in the US, and from 25% to 21% in Europe.¹² Wealth disparities have also increased: in the United States, in particular, share of wealth enjoyed by the top 1% grew from 22% in 1978 to almost 39% in 2014.¹³ As shown by various authors, a major factor in this increase in wealth and income inequalities has been the neoliberal policy reforms implemented from the 1980s onward at different scales in many Western countries, which have led to the weakening of state redistributive institutions and social policies, in particular the curtailment of top marginal tax rates, the decline in taxation of wealth and inheritance, cuts in social expenditures and the flexibilization of the labour market.¹⁴

This chapter aims to discuss this ‘leftist’ critique of anti-discrimination law. We argue that these critics usefully highlight some of the limitations of anti-discrimination law. Yet, we do not think that these limitations entail that anti-discrimination law and (re)distributive policies are in

⁷ See in particular Dubet (n 6). This echoes the critique levelled against human rights in general by (Marxist) scholars who see human rights as an ideological construct that help maintain the *status quo* by masking the structural causes of social injustice and marginalizing alternative, more radical, ways of addressing them. See Christophe Menke, *Critique of Rights* (Polity 2020); Susan Marks, ‘Human Rights and Root Causes’ (2011) 74 MLR 57; David Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* (Princeton UP 2005) and ‘International Human Rights Movement: Part of the Problem?’ (2002) 15 Harvard Human Rights Journal 101. For a critical discussion of this literature, as well as Samuel Moyn’s theses, see Florian Hoffmann, ‘Quite Enough (Still). Human Rights in (Times of) Crisis’ in Nehal Bhuta et al. (eds), *The Struggle for Human Rights* (OUP 2021) 382.

⁸ See eg Walter Benn Michaels, *The Trouble with Diversity: How We Learned to Love Identity and Ignore Inequality* (Picador, 2016, first published in 2006).

⁹ See in particular Moyn (n 2).

¹⁰ See in particular Piketty, *Capital and Ideology* (n 4), 487; Facundo Alvaredo et al., *World Inequality Report 2018* (World Inequality Lab 2018, <https://wir2018.wid.world/>, last visit: 1.9.2022), 68; Atkinson (n 5) 65-75.

¹¹ Alvaredo et al. (n 10); Branko Milanović, *Global Inequality: A New Approach for the Age of Globalization* (Harvard University Press 2016); Wiemer Salverda et al., *Changing Inequalities and Societal Impacts in Rich Countries* (OUP 2014); Thomas Piketty, *Capital in the Twenty-First Century*, trad. Arthur Goldhammer (Harvard UP 2014); Joseph E. Stiglitz, *The Price of Inequality: How Today’s Divided Society Endangers Our Future* (W.W. Norton and Company 2012).

¹² Piketty, *Capital and Ideology* (n 4) 492. Figures on Europe cover both Western and Eastern Europe. See also Alvaredo et al. (n 10), 68 and 78-92; Federico Cingano, *Trends in income inequality and its impact on economic growth*, OECD Social, Employment and Migration Working Papers, No. 163 (2014), (<https://doi.org/10.1787/5jxrjncwvxvj-en>, accessed 1 September 2022); and OECD, *Divided we Stand. Why Inequality Keeps Rising. An Overview of Growing Income Inequalities in OECD Countries: Main Findings*, 2011, available at <https://www.oecd.org/els/soc/49499779.pdf> (accessed 1 September 2022).

¹³ Alvaredo et al. (n 10) 208. It was established in 2018 that across OECD countries, the wealthiest 10% of households held, on average, 52 % of total wealth, whereas the 60% least wealthy households owned little over 12%. See *Inequalities in Household Wealth Across OECD Countries: Evidence from the OECD Wealth Distribution Database*, Carlotta Balestra, Richard Tonkin, OECD Statistics Working Papers 2018/01 (2018), 4 (<https://doi.org/10.1787/7e1bf673-en>, accessed 1 September 2022).

¹⁴ See in particular Salverda et al. (n 11) esp. 33-37, 43-45 and Atkinson (n 5) 65-75. Technological change and globalization, leading to the decline of developed world middle class, are also widely considered as contributing to explain the rise in inequality in developed countries. These theories, however, cannot account for the between country variations in the level of the increase (Alvaredo et al. (n 10) 257).

conflict with each other and that a choice needs to be made between them. The temporal coincidence between the development of anti-discrimination law and the rise in economic inequalities does not, in itself, prove that there is any causal link between the two. More fundamentally, while it can be agreed that anti-discrimination law reflects a partial, and incomplete, conception of equality, the same can be said about classic (re)distributive policies: by ignoring the specific disadvantage suffered by certain groups which have historically been excluded or marginalized such as women or ethnic and racial minorities, they overlook one important dimension of equality. Crucially, we argue that the relationship between anti-discrimination law and (re)distributive policies should not be regarded as one of competition. On the contrary, these two types of policies should be considered as complementary as both are essential to promote a more just and equal society.¹⁵

Part I of this chapter seeks to shed light on how anti-discrimination law, on the one hand, and (re)distributive policies, on the other hand, relate to the ideal of equality. It claims that each addresses a different kind of inequality, operates through different tools, and points to a different conception of equality. But it also shows that there are important points of juncture between them. Some could object that comparing a field of *law* with *policies* is inadequate. We think however that the instruments compared in this context both have a *legal* and a *policy* dimension. Anti-discrimination law consists of a set of rules, rights and obligations which give effect to a *policy* aimed at eliminating specific disadvantages suffered by certain groups in various social fields. Conversely, what we call here (re)distributive policies translate into *legal norms* in the social and fiscal domains which operationalize political objectives pursued by public authorities. Ultimately, both can be described as legal and policy instruments aimed at addressing certain inequalities. Our legal framework of reference for characterizing anti-discrimination law in this first part is European Union law.

Part II explores one important avenue to build a bridge between anti-discrimination law and economic inequality concerns, namely the inclusion of socio-economic disadvantage among prohibited discrimination grounds. Here, we consider developments at the European but also United Nations and domestic levels.

The final, concluding, part, insists on the importance of combining anti-discrimination law with robust (re)distributive policies.

¹⁵ A similar stance is defended by Thomas Piketty in *Mesurer le racisme, vaincre les discriminations* (Seuil 2022) and Colm O’Cinneide in ‘Completing the Picture: The Complex Relationship between EU Anti-Discrimination Law and ‘Social Europe’’, in Nicola Countouris and Mark Freeland (eds), *Resocialising Europe in a Time of Crisis* (OUP 2013) 118-137.

I. Anti-discrimination law and (re)distributive policies compared

Anti-discrimination law and (re)distributive policies reflect two different approaches to equality (I.1). Yet, there are points of convergence between them and we argue that they are in any case complementary (I.2).

I.1. Two concepts of equality?

It can be tempting to use the famous distinction drawn by Nancy Fraser between ‘redistribution’ and ‘recognition’ claims to characterize the difference between the core concerns of anti-discrimination law and (re)distributive policies.¹⁶ According to this analytical framework, the ‘redistributive’ perspective on social justice seeks ‘a more just distribution of resources and wealth’,¹⁷ while the recognition paradigm targets injustices stemming from institutionalized patterns of cultural value which constitute some people as inferior, excluded, wholly other, or invisible.¹⁸ In short, redistribution is concerned with harms related to economic conditions whereas recognition relates to issues of social status and cultural values in a broad sense.¹⁹

On closer consideration, however, this opposition does not adequately capture the difference between the two kinds of legal and policy instruments discussed here. Anti-discrimination law straddles the distinction between redistribution and recognition: when a person is refused a job or a house because of her gender or racial background, she is affected in her sense of dignity but also suffers from economic harm. Anti-discrimination law thus aims to address failures to treat certain people with equal respect (the ‘misrecognition’ harm in Fraser’s terminology), but it also seeks to protect them from being unjustly deprived of economic opportunities such as employment, housing, or other goods or services.²⁰

In what follows, we seek to better delineate the difference between anti-discrimination law and (re)distributive policies by delving into the conceptions of equality and inequality that underlie each of them as well as their respective relationship to the market.

I.1.1. Equality as anti-discrimination

Although scholars have offered different accounts of the justifying aim of anti-discrimination law,²¹ there is a general agreement that its primary thrust is to protect people from being unjustly

¹⁶ Nancy Fraser, ‘Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation’, in Nancy Fraser and Axel Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (Verso 2003).

¹⁷ Fraser (n 17) 7.

¹⁸ Fraser (n 17) 29.

¹⁹ Fraser (n 17).

²⁰ Fraser herself insists that gender and race are two-dimensional social differentiations and that overcoming gender injustice or racism requires attending to both redistribution and recognition (Fraser, n 17, 19-23). For the view that anti-discrimination law is aimed at dealing with both recognition and distributive concerns, see Sandra Fredman, ‘Redistribution and Recognition’ (n 2); and Meghan Campbell, ‘The Austerity of Lone Motherhood: Discrimination Law and Benefit Reform’ (2021) 41(4) OJLS 1197.

²¹ For instance, Khaitan argues that the general purpose of discrimination law is ‘to secure an aspect of the well-being of persons by reducing the abiding, pervasive, and substantial relative disadvantage faced by members of protected groups’ and ‘which prevents a person from securely accessing three basic goods necessary to live a good life’, ie ‘negative freedom, an adequate range of valuable opportunities, and self-respect.’ (Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) 91). Hellman submits that discrimination is morally wrong and deserves to be addressed through discrimination law when it consists in a differential treatment that demeans any of those affected (Deborah Hellman, *When is Discrimination Wrong?* (Harvard UP 2018)). For Solanke, discrimination law is fundamentally concerned with combating stigma attached to certain groups (Iyiola Solanke, *Discrimination as Stigma. A Theory of Anti-Discrimination Law* (Hart 2017)). Choudhry contends

disadvantaged because of personal attributes they have and which are structurally the source of prejudice and exclusion. Anti-discrimination law is thus concerned with inequality resulting both from unequal access to rights or important goods and stigmatization of individuals and groups bearing certain attributes.²²

It finds its roots in classical constitutional equality provisions which prohibit any arbitrary distinction between people, reflecting the Aristotelian principle that likes should be treated alike²³ unless there is a rational justification for the contrary. But anti-discrimination law, which developed mainly after the Second World War, differs from this classic understanding of the right to equality in that it focuses on particular personal characteristics which have historically proved to be especially prone to generate unfair treatment, such as gender, race, disability, or sexual orientation.²⁴ This focus on personal characteristics, or grounds, and thus membership into groups sharing these personal features, is a distinctive trait of anti-discrimination law.²⁵ Some international and domestic legal texts have an open list of prohibited grounds: they enumerate a number of criteria – for which the protection is deemed especially important – but leave open the possibility to claim discrimination based on another factor. This is the case with Article 14 of the European Convention on Human Rights (ECHR), for instance.²⁶ Other legal provisions, by contrast, contain an exhaustive list of grounds on the basis of which discrimination is prohibited. Article 19 of the Treaty on the Functioning of the European Union (TFEU) empowers European institutions to take action to combat discrimination but only in relation to sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation, whereas Article 18 TFEU lays down that any discrimination on grounds of nationality shall be prohibited.

Like the right to equality, the right not to be discriminated against was originally understood as a prohibition on treating differently people in similar situations. It has however evolved towards a more sophisticated conception of discrimination. Notably, it has been recognized that discrimination can be indirect as well as direct. While the prohibition of direct discrimination precludes taking into account a prohibited ground when allocating certain goods or opportunities without valid justification,²⁷ the concept of ‘indirect discrimination’ tackles ‘apparently neutral’ provisions, criteria, or practices which place persons sharing a protected ground at a particular disadvantage, compared to other persons, without objective justification.²⁸ Indirect discrimination thus extends the scope of anti-discrimination law by having regard to the unfairness arising from the *effects* of a measure on different groups, and

that anti-discrimination norms aim to guarantee some form of distributive justice by preventing people from being denied access to certain goods or opportunity based on factors that are irrelevant to the distribution at stake (Sujit Choudhry, ‘Distribution vs. Recognition: The Case of Antidiscrimination Laws’ (2000) 9(1) *German Law Journal* 145). Fredman defends a multi-dimensional approach to anti-discrimination law, arguing that in order to achieve substantive equality, it should seek at the same time to redress disadvantage; address stigma, stereotyping, prejudice and violence; enhance participation; and accommodate difference and promote structural change (Sandra Fredman, ‘Substantive Equality Revisited’ (2016) 14(3) *J. CON* 712; Sandra Fredman, *Discrimination Law* (OUP 2011).

²² See Deborah Hellman and Sophia Moreau, ‘Introduction’, in Deborah Hellman and Sophia Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013) 2.

²³ Aristotle, *Ethica Nicomachea*, W.D. Ross trans. (OUP 1925), 5.1131 a10-b15.

²⁴ On the difference between classic constitutional equality provisions and anti-discrimination law, see Christopher McCrudden and Haris Kountouros, ‘Human Rights and European Equality Law’ in Helen Meenan (ed), *Equality Law in an Enlarged European Union* (CUP 2009) 73 and Bruno De Witte, ‘From a “Common Principle of Equality” to “European Antidiscrimination Law”’ (2010) 53(12) *American Behavioral Scientist* 1715. The focus on grounds is already reflected in minority treaties concluded by the Allied Powers with certain Central and Eastern Europe countries after the First World War. The 1919 treaty between the Principal Allied and Associated Powers and Poland for instance guarantees in its Article 7 that all Polish citizens enjoy the same civil and political rights ‘without distinction as to race, language or religion’. But it was mainly after the post-Second World War era that this approach will be developed at both the international and domestic levels. Significantly, the UN Charter, signed in 1945, mentions among the purposes of the United Nations that of ‘encouraging respect for human rights and fundamental freedoms for all *without distinction as to race, sex, language, or religion*’ (Article 1(3), our emphasis). One of the first anti-discrimination statutes adopted at the national level was the Civil Rights Act passed in 1964 by the US Congress.

²⁵ See in particular Khaitan (n 22) 87-88.

²⁶ On the difference between the ECHR and the EU systems in terms of prohibited grounds, see the chapter by Janneke Gerards in this volume.

²⁷ See the chapter by Rafaële Xenidis in this volume.

²⁸ See the chapter by Mark Bell in this volume.

not merely from its explicit content.²⁹ Yet a common thread runs through both notions: their common aim is to neutralize the impact of a set of predefined characteristics, which are known to generate bias and exclusion, on the distribution of rights, goods and opportunities.

The relationship between anti-discrimination law and the market is complex. This law questions the functioning of the market to some extent by challenging certain economic practices. At the very least, it seeks to combat the influence that conscious or unconscious bias against certain groups may have on market players. A number of authors defend a stronger conception of anti-discrimination law, arguing that it also calls into question certain norms, standards, or habits embedded in market practice that create indirect barriers to the inclusion and advancement of women, racial or ethnic minorities, people with disabilities, and other protected groups.³⁰ But this conception is only partially reflected in legislation and case-law (see section I.2). On the whole, as Somek points out, anti-discrimination law's objective is ultimately to *facilitate* access to the market for specific groups which are excluded from it or disadvantaged, and enable members of these groups to compete on fair terms in the market. It is not to *exempt* certain spheres or certain goods from the operation of the market or to correct power differentials between capital and labor generally.³¹

To this extent, in terms of the underlying conception of social justice, anti-discrimination law primarily rests on a conception of equality understood as 'equality of opportunity': its central concern is to ensure the fairness of the competition for the best positions in the social scale (be it in employment, higher education, housing, or other areas). But provided that fair access to social and economic positions is guaranteed regardless of gender, race, sexual orientation, etc., and that protected groups are not overrepresented at the lowest levels of the social scale, anti-discrimination law does not object to the existence of an occupational and social hierarchy as such, even when it leads to wide inequalities in income, wealth and living conditions between people according to their position in this hierarchy.

This is not a problem in itself insofar as anti-discrimination law can be combined with other policies aimed at addressing other forms of unfairness than discrimination. But it would become a problem if anti-discrimination law were to be regarded as the *only* legal and policy instrument needing to be implemented in order to realize equality. A society in which anti-discrimination law would have achieved its objectives while also being the sole equality policy would be one in which an individual's chances to access employment, find housing, or receive good education and adequate healthcare, would not depend on his or her gender, race, sexual orientation, or any other protected ground. However, it could be a society where deep inequalities of income, wealth and life conditions flourish: as long as women, minorities and other protected categories have the same chances as others to end up among the richest or the poorest, the existence of such vast disparities would not be a concern for anti-discrimination law.³²

²⁹ See Dagmar Schiek, 'Indirect Discrimination' in Dagmar Schiek, Lisa Waddington, Mark Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart, 2007) 323.

³⁰ See i.a. Olivier De Schutter, *Discriminations et marché du travail. Liberté et égalité dans les rapports d'emploi*, P.I.E.-Peter Lang, Oxford, 2001, esp. 21-32 and 203; Susan Sturm, 'Second Generation Employment Discrimination: A Structural Approach', (2001) 101 *Colum. L. Rev.* 458; Fredman, 'Substantive Equality Revisited' (n 21) and O'Conneide (n 16) 135-136.

³¹ Somek (n 6) esp. at 15 and 137. For a critical discussion of Somek's thesis, see Iyiola Solanke, 'Engineering Equality: An Essay on European Anti-Discrimination Law by Alexander Somek', *EUTopia Law*, May 1, 2012, available at <https://eutopialaw.wordpress.com/2012/05/01/review-engineering-equality-an-essay-on-european-anti-discrimination-law-by-alexander-somek/> (last visit: 29.12.2022).

³² See Dubet (n 6) 56-57 and Khaitan (n 22) 130.

1.1.2. Equality and (re)distributive policies

By contrast with anti-discrimination law, classic (re)distributive policies allow the *de facto* material inequalities between individuals in a given society to be addressed, regardless of particular personal attributes. The concern here is to provide everyone with a certain level of essential resources (income but also housing, education, or healthcare) and to reduce the gap in living conditions among people at different positions in the economic structure. The beneficiaries of these policies are thus defined by socio-economic criteria rather than status grounds.

While anti-discrimination law operates through two main tools, namely the legal prohibition of certain practices or conditions and the establishment of a remedy for potential victims, (re)distributive policies rely on a broader range of mechanisms. The latter include social protection, progressive taxation, social rights and collective bargaining as well as public services. All these institutions share a particular relationship to the market: they rest on the idea that the way the market distributes goods, resources, and opportunities is not necessarily just; it is biased by inherited inequalities and power differentials. Accordingly, these policies seek to counterbalance market processes with a view to guaranteeing that everyone, whatever his or her social position, has access to an equal threshold of essential goods and resources.

Social protection purports to guarantee that all people are equally protected against certain risks, such as illness, unemployment, and old age.³³ Since the level of contribution to its financing depends on level of income, it has a redistributive dimension. Moreover, it has been characterized as having a *decommodifying* potential:³⁴ it makes access to certain goods or services independent from the market, thereby emancipating individuals from market dependency and limiting socio-economic disparities. Public services are also based on a decommodification principle: they hive off important services, notably education and health care, from market forces in order to ensure universal access to them.³⁵ Insofar as they are financed through taxation, public services involve some form of redistribution, if this concept is understood broadly as including not only monetary transfers but also transfers in-kind.³⁶ As already noted, not all the policies under consideration rest on social transfers and redistribution: they also include social entitlements and regulation which help promote a fairer *primary* distribution of resources.³⁷ In particular, labour rights (especially minimum wage) and collective bargaining limit the power imbalance between economic actors: by enhancing the position of workers compared to that of employers, they allow for a fairer primary distribution of the wealth produced by enterprises.

The French sociologist François Dubet points out that whereas anti-discrimination law is primarily aimed at equalizing *opportunities* to access the best positions within the social scale, this set of policies tends to equalize the social *positions* themselves: while not achieving a perfect equalization of these positions, they do bring the living conditions attached to them closer together.³⁸ They therefore reflect a conception of social justice that considers equality of

³³ On the relations between social protection and the reduction of inequality, see James Midgley, *Inequality, Social Protection and Social Justice* (Edward Elgar 2020). Midgley argues that ‘if carefully designed and properly implemented, social protection can reduce inequality’ (3). See also Beth Goldblatt, ‘Economic Inequality and the Right to Social Security: Contested Meanings and Potential Roles’ in Gillian MacNaughton, Diane F. Frey and Catherine Porter (eds), *Human Rights and Economic Inequalities* (CUP 2021) 295.

³⁴ Gosta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity Press, 1990).

³⁵ Dubet (n 6) 19. See also R. Castel, *Les métamorphoses de la question sociale* (Fayard, 1995) and *La montée des incertitudes. Travail, protection, statut des individus* (Seuil, 2009).

³⁶ On this extended conception of redistribution, see the study of the French national institute of statistics and economic studies: Institut national de la statistique et des études économiques (INSEE), *Revenus et patrimoines des ménages* (2021) 77.

³⁷ See references cited at n 14.

³⁸ Dubet (n 6).

opportunity as insufficient to satisfy the ideal of equality. This echoes a number of critiques that have been levelled against the concept of ‘equal opportunity.’ It has been emphasized first that achieving complete equality of opportunity is illusory: given the differences in family circumstances and the intergenerational transfer of wealth, people never start with the same chances in life, some will always be more advantaged than others in the social and economic competition.³⁹ Rawls famously added that even the distribution of natural talents is morally arbitrary.⁴⁰ Accordingly, the idea that the inequalities attached to the different positions held by individuals in the social hierarchy are just, and that nothing should be done about them, because people have obtained these positions through a fair competition is questionable. The critique, however, goes further: various authors argue that even assuming that equal opportunities could be achieved, the fair competition argument would still not be sufficient to justify the vast disparities in rewards associated with these different positions. For these differences are not necessarily based on objective factors, they depend on what is valued in a given society at a given time. Scanlon notes that ‘ideas about what level of economic reward people deserve for performing certain jobs are largely matters of social convention, and are without any moral basis.’⁴¹ Sandel further observes that it is questionable whether ‘a person’s market value is a good measure of his or her contribution to society’.⁴²

All these critiques point to the conclusion that, in addition to efforts to ensure equal opportunity, the ideal of equality also requires mechanisms to correct the inequalities produced by the market. This does not necessarily mean that a complete elimination of any inequality should be sought, but that such disparities should be limited in order to ensure an adequate level of opportunities and resources for all throughout their lives. Various principles for justification have been advanced to support this position. Rawls’ ‘difference principle’ is based on the idea that since the distribution of natural talents is morally arbitrary, the most gifted cannot claim the exclusive benefit of the rewards they get from these talents. Social and economic inequalities are therefore acceptable only to the extent that they are arranged to work for the good of the least advantaged members of society.⁴³ Sen, for his part, contends that social justice implies equalizing *capabilities*, that is a set of functionings (or states of ‘being and doing’, such as being in good health, having a shelter, or literacy) which effectively enable people to achieve the kind of life they value; in other words, which provide them with the effective freedom to lead a life of their choosing.⁴⁴ A third approach, endorsed by authors such as Fraser, Anderson, and Rosanvallon, argues that a democratic society requires that people should be able to relate to each other as equals. From this perspective, limiting economic inequalities is a necessary condition to preserve the kind of social relationship that democracy presupposes.⁴⁵

However, like anti-discrimination law, (re)distributive policies also suffer from blind spots. Because they focus on categories defined solely by socio-economic criteria, they tend to overlook specific disadvantages experienced by certain groups because of a personal attributes such as their gender, race or ethnic origin, or disability. Even more problematic, it has been shown that in practice, welfare systems as they were constructed in post-1945 Europe reflected certain inequalities that ran through European societies at the time.⁴⁶ They have been largely

³⁹ Thomas Michael Scanlon, *Why Does Inequality Matter?* (OUP 2018) 71-73. See also Stiglitz (n 11) esp. 17-20.

⁴⁰ John Rawls, *A Theory of Justice* (Harvard UP 1971), 64.

⁴¹ Scanlon (n 43) 38 and chapter 8.

⁴² Michael J. Sandel, *The Tyranny of Merit. What’s Become of the Common Good?* (Penguin, 2020) 136. See also Elizabeth Anderson, ‘What is the point of equality?’ (1999) 109(2) *Ethics* 287, 325.

⁴³ John Rawls, *A Theory of Justice* (Harvard UP 1971) 101-102.

⁴⁴ Amartya Sen, *The Idea of Justice* (Allen Lane, 2009) and ‘Equality of What?’ in McMurrin S Tanner Lectures on Human Values, Vol. 1 (Cambridge UP 1980).

⁴⁵ Fraser (n 17) 36; Pierre Rosanvallon, *The Society of Equals*, Arthur Goldhammer trans. (Harvard UP, 2013); Anderson (n 46) and Elizabeth Anderson, *The Imperative of Integration* (Princeton UP 2010).

⁴⁶ See O’Cinneide (n 16) 132. For a recent analysis of discrimination in the field of social protection, see Sarah Ganty and Karin de Vries, ‘Non-discrimination in European Social Security Law: Exploring Safeguards Against Gender and Racial Discrimination’, in Frans Pennings and Gijsbert Vonk (eds), *Research Handbook on European Social Security Law* (Edward Elgar forthcoming).

built on the basis of the ‘male breadwinner model’, thereby contributing to maintaining traditional gender roles.⁴⁷ They were also originally closely linked to the nation state paradigm: in many countries, the provision of (certain) social allowances was conditioned on nationality.⁴⁸ This situation has evolved considerably under the impact of EU principles of free movement and equal treatment.⁴⁹ Nationality-based conditions have also been challenged using the prohibition of nationality discrimination under human rights instruments such as the ECHR and the International Covenant on Civil and Political Rights.⁵⁰ Today, social benefits are usually conditioned on residence in the country rather than nationality, at least in relation to contributory benefits.⁵¹ Nonetheless, rules that directly or indirectly exclude non-national residents, especially from beyond the EU, can still be found in several European countries in relation to non-contributory benefits, with harmful consequences for migrants and transnational families which are predominantly racial and ethnic minorities.⁵² Additionally, in relation to disability, welfare states have long been based on the assumption that exclusion of people with disabilities from employment was ‘normal’ as they were unable to conform to the demands of the labour market. Social policies thus aimed to compensate for this exclusion through specific allowances or to provide them work through separate tracks (sheltered workshops or quotas), rather than to promote their inclusion in employment on an equal footing with others.⁵³

I.2. Convergences and necessary alliance

The general distinction we drew in the previous section between anti-discrimination law and (re)distributive policies needs nuancing. European anti-discrimination law has evolved considerably over time. Some of the concepts that have been recognized as part of this law complicate the picture and indicate points of convergence with (re)distributive policies.

A first important concept of anti-discrimination law that shares some of the concerns of (re)distributive policies is positive action. It is defined in EU law as specific measures aimed at preventing or compensating for disadvantages linked to a protected ground, which member states are allowed to maintain or adopt ‘with a view to ensuring full equality in practice.’⁵⁴ This type of measure contrasts with standard anti-discrimination tools in that it aims to correct *de facto* inequalities in the enjoyment of certain important goods, in particular employment and higher education, rather than merely guaranteeing the fairness of the procedure for allocating these goods. It stems from the observation that merely prohibiting direct and indirect discrimination is insufficient to redress structural inequalities experienced by groups who have historically been treated unfairly because of their race, gender, or other status grounds, and as a result of which do not start out in life with the same chances as others. Positive action thus

⁴⁷ Fredman, ‘Redistribution and Recognition’ (n 2) 221-223; Sandra Fredman, *Women and the Law* (OUP 1998); Beth Goldblatt and Lucie Lamarche (eds), *Women’s Rights to Social Security and Social Protection* (Hart 2011).

⁴⁸ Maurizio Ferrera, *The Boundaries of Welfare. European Nation State and the New Spatial Politics of Social Protection* (OUP 2005).

⁴⁹ See inter alia Jean-Michel Lafleur and Daniela Vintila (eds), *Migration and Social Protection in Europe and Beyond (volume 1). Comparing Access to Welfare Entitlements* (Springer 2020); Susanne K. Schmidt and Michael Blauberger, ‘Free Movement and Equal Treatment in an Unequal Union’ (2018) 25(10) *Journal of European Public Policy* 1391.

⁵⁰ See inter alia Olivier De Schutter, ‘Interdiction de discriminer envers les étrangers et obligation d’intégration par le droit’, in Julie Ringelheim (ed), *Le droit et la diversité culturelle* (Bruylant 2011) 367-394 and Ida Elisabeth Koch, *Human Rights as Indivisible Rights. The Protection of Socio-Economic Demands under the European Convention on Human Rights* (Martinus Nijhoff 2009) esp. 192-203.

⁵¹ Lafleur and Vintila (n 53) 21-28.

⁵² Lafleur and Vintila (n 53) 26-27. See also Iyiola Solanke, ‘Who Speaks for the Zambrano Families? Multi-level Abandonment in the UK and EU’ in Moira Dustin, Nuno Ferreira and Susan Millns (eds), *Gender and Queer Perspectives on Brexit* (Springer 2019).

⁵³ Katarina Heyer, *Rights Enabled. The Disability Revolution from the US to Germany and Japan, to the United Nations* (University of Michigan Press 2015); Daniel Kelemen and Lisa Vanhala, ‘The Shift to the Rights Model of Disability in the EU and Canada’ (2010) 20 *Regional and Federal Studies* 1; Colin Barnes and Geof Mercer, ‘Disability, Work, and Welfare: Challenging the Social Exclusion of Disabled People’ (2005) 19(3) *Work, Employment and Society* 527; Lisa Waddington, ‘Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-Discrimination Laws’ (1996) 18 *Comp. Lab. L. J.* 62.

⁵⁴ See eg Article 5 Racial Equality Directive. On this concept, see further the chapter by Liu in this volume.

rests on the idea that simply removing obstacles to fair competition will not suffice to correct certain types of inequalities in the distribution of goods. This echoes the logic of (re)distributive policies.

Positive action is nonetheless based on a different relationship to the market than (re)distributive policies. The inequalities such measures aim to remedy are seen as resulting primarily from the history of exclusion, marginalization, and discrimination, as well as enduring stereotypes and prejudice against certain groups which reverberate in market interactions.⁵⁵ Because of the lasting effect of past injustice, as well as ongoing bias and prejudice, the competition between those belonging to these groups and those who do not in accessing jobs, housing, education, or other goods, cannot be fair; they do not enjoy equal opportunities. Accordingly, positive action policies are considered as a targeted and temporary response to an *abnormal* situation: it is assumed that once this legacy of exclusion and prejudice is overcome, these policies will lose their *raison d'être* and the 'normal' rules of competition will be restored. By contrast, (re)distributive policies are based on the assumption that market processes inherently produce inequalities and therefore need to be continuously corrected. Positive action measures further differ from (re)distributive policies in that they benefit groups defined by a discrimination ground rather than any individual based on their socio-economic situation.

It can be added that under EU law, positive action policies are not considered as a compulsory component of anti-discrimination norms. Rather, the institution of positive action measures is construed as an exception to the principle of equal treatment and remains an option for public and private actors, subject to a number of conditions.⁵⁶ The CJEU has established strict limits within which such measures are deemed compatible with the prohibition of discrimination.⁵⁷

A second concept that converges to some extent with the logic of (re)distributive policies is the right of people with disabilities to reasonable accommodation.⁵⁸ This right has been recognized in EU law in the field of employment under the Employment Equality Directive,⁵⁹ following the US example.⁶⁰ It is also enshrined in the UN Convention on the rights of persons with disabilities where its scope is not limited to employment.⁶¹ This right challenges market mechanisms to some degree. From an economic viewpoint, it is not irrational for an employer not to employ a person who has a disability if this has an impact on her capacity to perform the work as defined by the company. The right to reasonable accommodation, however, posits that employers must do more than abstaining from taking disability into account or from indirectly disadvantaging disabled persons where disability is irrelevant: employers are required to adapt, up to a certain point, the work organization or environment, even if this entails a certain amount of expenditure or inconvenience for them, in order to enable workers with disabilities to access or remain in employment. Reasonable accommodation thus fosters a transformation of the workplace to make it more welcoming to people with disabilities. Importantly, it places part of

⁵⁵ For a discussion of the rationales of positive action, or affirmative action as it is called in the US, see among others Olivier De Schutter, 'Positive Action', in Dagmar Schiek, Lisa Waddington and Mark Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing 2007) 757-869; Anderson, *The Imperative of Integration* (n 43); and Daniel Sabbagh, *Equality and Transparency: A Strategic Perspective on Affirmative Action in American Law* (Palgrave 2007).

⁵⁶ This is criticized by a number of authors who argue that positive action should on the contrary be a compulsory component of European anti-discrimination law. See in particular Solanke, *Discrimination as Stigma* (n 22); Christopher McCrudden, *Gender-based positive action in employment in Europe. A comparative analysis of legal and policy approaches in the EU and EEA*, European network of legal experts in gender equality and non-discrimination (Publication office of the European Union 2019); and Sandra Fredman, 'Changing the Norm: Positive Duties in Equal Treatment Legislation' (2005) 12(4) *Maastricht Journal of European and Comparative Law* 369.

⁵⁷ See the chapter by Liu in this volume. See also McCrudden (n 60).

⁵⁸ On this concept, see the chapter by Anna Lawson in this volume.

⁵⁹ Article 5 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16 (hereinafter the Employment Equality Directive).

⁶⁰ Americans with Disability Act 1990.

⁶¹ Articles 2 and 5(3).

the cost of securing the inclusion of disabled persons in employment on the employer. The market logic here yields to the imperative of social inclusion.⁶²

Yet, there is an important limit to the adaptation which can be required from employers: the duty to accommodate only applies to the extent that ‘such measure would not impose a disproportionate burden on the employer’.⁶³ If the contrary is the case, the accommodation would no longer be ‘reasonable’ and could be refused. The scope of the obligation imposed on employers through this concept therefore depends on how the notions of ‘disproportionate burden’ and ‘reasonableness’ are understood, which ultimately depends on the courts. It can prove relatively modest if these notions are interpreted restrictively.⁶⁴

A similar observation can be made about indirect discrimination: as highlighted by the ECJ case-law on indirect sex discrimination, this concept makes it possible to sanction as discriminatory certain measures, criteria or practices (eg lower hourly rate⁶⁵ or reduced pension entitlements⁶⁶ for part-time workers) that have a detrimental impact on a protected group because they interact with a structural disadvantage suffered by this group (eg the overrepresentation of women among part-time workers as a result of persisting gender pay gap and gender roles which induce women to take on the largest share of domestic responsibilities). Accordingly, it is potentially a powerful tool for exposing structural gender inequality and requiring private economic actors and public authorities to reconsider their practices or policies in order to address such inequalities.⁶⁷ However, a measure that entails a particular disadvantage for a protected group does not constitute indirect discrimination if it can be objectively justified by a legitimate aim and if the means used are appropriate and necessary.⁶⁸ The extent to which indirect discrimination effectively enables fostering structural change therefore depends on what is accepted by the courts as a ‘legitimate aim’ and how strictly the conditions of appropriateness and necessity are interpreted. The current case law of the ECJ does not provide clear answers in this regard as it is very casuistic and not always consistent, while at national level indirect discrimination cases seem rarely successful.⁶⁹

A fourth aspect of anti-discrimination law that allows bridges to be built with (re)distributive policies consists in the prohibition of discrimination based on socio-economic disadvantage – a norm that is enshrined in some international and national provisions on discrimination. This concept however requires a broader discussion and will be explored in the next section. As will be seen, it appears to be a useful complement to (re)distributive policies but by no means an alternative.

There are thus important areas of convergence between anti-discrimination law and (re)distributive policies. Our previous conclusion remains nonetheless valid: anti-discrimination law fundamentally differs from (re)distributive policies. It tackles a different form of unfairness and leaves unaddressed economic inequalities unrelated to status grounds.

⁶² See Christine Jolls, ‘Antidiscrimination and Accommodation’ (2001-2002) 115 *Harvard Law Review* 642; Julie Ringelheim, ‘Adapter l’entreprise à la diversité des travailleurs : la portée transformatrice de la non-discrimination’ (2013) 1 *European Journal of Human Rights* 57, 61; Olivier De Schutter, *Discriminations et marché du travail. Liberté et égalité dans les rapports d’emploi* (P.I.E.-Peter Lang, 2001) 27. A similar analysis can be made of the legal regime protecting pregnant women from discrimination. See O’Cinneide (n 16) 130-131.

⁶³ Article 5 Employment Equality Directive.

⁶⁴ Domestic courts in European countries have interpreted very differently the term ‘reasonable’ when applying the concept of reasonable accommodation. See Lisa Waddington, ‘When is it Reasonable for Europeans to Be Confused: Understanding When a Disability Accommodation is ‘Reasonable’ from a Comparative Perspective’ (2008) 29(3) *Comparative Labor Law & Policy Journal* 317.

⁶⁵ See ECJ, Judgment of 31 March 1981, *Jenkins*, C-96/80, ECLI:EU:C:1981:80.

⁶⁶ See ECJ, Judgment of 13 May 1986, *Bilka v Weber von Hartz*, C-170/84, ECLI:EU:C:1986:204; ECJ, Judgment of 22 November 2012, *Elbal Moreno*, C-385/11, ECLI:EU:C:2012:746.

⁶⁷ Jule Mulder, *Indirect Sex Discrimination in Employment*, European network of legal experts in gender equality and non-discrimination (Publication office of the European Union 2021), esp 24 and 123.

⁶⁸ See eg Art. 2(b)(i) Employment Equality Directive.

⁶⁹ Mulder (n 71), 68-80 and 123-124.

It therefore represents only a partial actualization of the ideal of equality. This, however, is also true of (re)distributive policies: while focusing on economic inequalities between individuals, they overlook the specific disadvantage and unfairness experienced by particular groups based on their gender, race, sexual orientation, or other personal characteristics. Yet, the highlighting of essential differences between these two types of policies should not lead to the conclusion that they are in conflict. Each of them tackles a crucial form of inequality affecting contemporary societies. The pursuit of equality requires *both* anti-discrimination law and (re)distributive policies.

In fact, in many countries, groups especially exposed to discrimination are overrepresented among the most disadvantaged.⁷⁰ For many ethnic or racial minorities, single women, or persons with disabilities, socio-economic disadvantage is partly a consequence of the discrimination they endure historically and structurally. Discrimination, socio-economic disadvantage and inequality appear in their case to be deeply intertwined.⁷¹ This further highlights the importance of combating both discrimination and economic inequalities in parallel and in a coordinated manner.

II. The prohibition of discrimination based on socio-economic disadvantage: potential and limits

One particular legal tool appears to create a direct link between anti-discrimination law and the issue of economic inequalities – the prohibition of discrimination based on socio-economic status or socio-economic disadvantage. This concept allows certain forms of unfair treatment experienced by those who are negatively affected by economic inequalities because they are among the disadvantaged – in particular those who are at the bottom of the distribution scale, i.e. people living in poverty – to be challenged. It has attracted growing attention in recent years, with an increasing number of voices arguing that discrimination based on socio-economic condition, however termed, should be explicitly addressed.⁷² The UN Special Rapporteur on extreme poverty and human rights, Olivier De Schutter, in particular argues that disadvantaged individuals face systemic discrimination in a range of areas including health, education, housing and employment, and that prohibiting this form of discrimination could contribute to breaking the cycles perpetuating poverty.⁷³

In fact, a number of legal instruments already include a criterion of this kind among the discrimination grounds they list. At the United Nations level, Article 26 of the International Covenant on Civil and Political Rights explicitly protects people against any discrimination on

⁷⁰ Fredman ‘Redistribution or Recognition’ (n 2) and Sandra Fredman, ‘The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty’ (2011) *Stellenbosch Law Review* 22, no. 3 (2011): 566-590.

⁷¹ See also Sarah Ganty, ‘Poverty as Misrecognition: What Role for Antidiscrimination Law in Europe?’ (2021) 21(4) *Human Rights Law Review* 962.

⁷² Olivier De Schutter, ‘Combating Discrimination on Grounds of Socio-Economic Disadvantage’ (n 2); Sarah Ganty and Juan-Carlos Benito Sánchez, *Expanding the List of Protected Grounds within Anti-Discrimination Law in the EU* (Equinet, 2022); Ganty, (n 76); A. Benn, ‘The Big Gap in Discrimination Law: Class and the Equality Act 2010’ (2020) 3(1) *Oxford Human Rights Hub Journal* 30; Juan Carlos Benito Sánchez, ‘Towering Grenfell: Reflections around Socioeconomic Disadvantage in Anti-discrimination Law’ (2019) 5(2) *Queen Mary Human Rights Law Review* 1; Shreya Atrey, ‘The Intersectional Case of Poverty in Discrimination law’ (2018) 18 *HRLR* 411; T. Kadar, *An analysis of the introduction of socioeconomic status as a discrimination ground* (Equality and Rights Alliance, 2016), <http://17october.ie/wp-content/uploads/2019/08/Analysis-of-socioeconomic-status-as-discrimination-final.pdf> (accessed 23 October 2022); Equinet, *Equality Bodies contributing to the protection, respect and fulfillment of Economic and Social Rights* (2015), https://equineteurope.org/wp-content/uploads/2019/02/economic_and_social_rights_electronic-3.pdf (accessed 1st September 2022).

⁷³ Olivier De Schutter, *The persistence of poverty: how real equality can break the vicious cycles*, A/76/177 (19 July 2021), <https://undocs.org/A/76/177> (accessed 23 October 2022). See also De Schutter, ‘Combating Discrimination on Grounds of Socio-Economic Disadvantage’ (n 2), and the report of the previous Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston, *Extreme Inequality and Human Rights: A/HRC/29/31* (27 May 2015), <https://digitallibrary.un.org/record/798707> (accessed 23 October 2022).

grounds of ‘social origin’ and ‘property’.⁷⁴ These criteria also appear in Article 14 ECHR and Article 1 of Protocol No. 12 to the ECHR, as well as Article E of the revised European Social Charter. The open-ended character of these provisions also allows more specific features related to the socio-economic situation of a person to be covered, such as unemployment status. At the national level, according to a study comparing 39 European countries, eighteen among them enshrine grounds related to socio-economic condition broadly speaking in their anti-discrimination legislation, through various concepts, such as social status, property, economic vulnerability, social origin, social standing, economic situation, profession, or part-time employment.⁷⁵ By contrast, Articles 18 and 19 TFEU, and as a result the EU anti-discrimination directives, do not include any such criterion in the closed list of grounds they contain. Article 21 of the EU Charter of Fundamental Rights (EUCFR) does mention social origin, property, and birth, and has an open-ended character, but the breadth of the protection it provides is much more modest, due to the limited scope of the Charter as defined in Article 51(1).⁷⁶

But what exactly does the prohibition of discrimination based on socio-economic disadvantage permit tackling? And how does it relate to (re)distributive policies? In what follows, we show that this concept first allows addressing certain forms of exclusion resulting from prejudice and stigma against the socio-economically disadvantaged, in particular people living in poverty. These are situations involving what Fraser would call ‘misrecognition’. A nascent line of case-law on such discrimination exists at the national level but remains scarce. The European Court of Human Rights (ECtHR) has so far failed to acknowledge explicitly such discrimination (II.1.). We then highlight that the prohibition of discrimination based on socio-economic disadvantage also creates a remedy for certain forms of ‘distributive harm’, consisting in the exclusion from or unequal access to certain state provided services or resources, stemming from a neglect for the needs of the underprivileged. Case-law illustrating this use of the anti-discrimination norms is limited but some applications do exist (II.2.). Finally, we emphasize that the inclusion of socio-economic disadvantage among prohibited grounds allows certain forms of intersectional discrimination to be acknowledged (II.3).

II.1. Addressing stigma and stereotypes towards people in poverty

Poverty cannot be reduced to lack of income or material deprivation. A study conducted by ATD Fourth World and the University of Oxford sheds light on the complexity of what poverty entails:⁷⁷ Besides the well-known dimensions related to material hardship (lack of decent work, insufficient and insecure income, and material and social deprivation) usually tackled by (re)distributive and anti-poverty programmes, the report also identifies aspects which are much less taken into account in the framework of such policies, namely the relational dimension (or ‘relational dynamics’), which includes social maltreatment, institutional maltreatment, and unrecognised contributions.

These latter dimensions are closely related to the stereotyping and stigma that people in poverty experience. Alexandra Timmer emphasizes that ‘stereotypes often serve to maintain existing

⁷⁴ These grounds are also listed in Article 2(1) of this Convention and Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, which prohibit discrimination in the enjoyment of the rights these conventions set out.

⁷⁵ See Isabelle Chopin and Catharina Germaine, *A comparative analysis of non-discrimination law in Europe 2020*, European network of legal experts in gender equality and non-discrimination (European Commission, 2021) 121-133. In addition to the 27 EU Member States, this study compares the cases of Albania, North Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia Turkey and the United-Kingdom. See also Sarah Ganty and Juan-Carlos Benito Sánchez (n 77) 13-16.

⁷⁶ On the prohibition of discrimination under the EU Charter of Fundamental Rights, see the chapter by Bruno De Witte in this volume.

⁷⁷ Rachel Bray et al., *The Hidden Dimensions of Poverty* (International Movement ATD Fourth World, 2019).

power relationships; they are control mechanisms. Stereotypes uphold a symbolic and real hierarchy between “us” and “them”.⁷⁸ Poor people are commonly associated with negative stereotypes linked to various aspects of their socio-economic situation, such as their reliance on social assistance, their economic vulnerability, their lack of education, the neighbourhood they live in, how they look and dress, their accent, etc.⁷⁹ These stigma are multiple, as powerfully put by Hershkoof and Cohen regarding the situation of the poor in the US.⁸⁰ This negative perception generates various forms of exclusionary attitudes on the part of private persons or public bodies. In the healthcare field, for instance, a study carried out in France on the basis of situation testing found that 42% of people relying on a health insurance scheme reserved to disadvantaged persons were refused an appointment with dentists, gynaecologists, or psychiatrists.⁸¹

In situations of this kind, people do not only suffer a material harm resulting from being deprived of the enjoyment of a right or access to a good or service without legitimate justification, they also face a symbolic harm, a form of ‘misrecognition’: they are denied equal value with others.⁸² This is a form of harm that is not addressed by classic (re)distributive policies which focus on the provision of resources and services. Sarah Ganty has argued elsewhere⁸³ that addressing this symbolic harm is essential to tackling the feelings of humiliation, shame and unworthiness that are typically part of the experience of living in poverty⁸⁴ and which may lead some disadvantaged people to refrain from claiming the benefits of anti-poverty rights or programmes in order to avoid identifying as poor.⁸⁵ In the same vein, Olivier De Schutter has emphasized the importance of addressing ‘povertyism’, understood as the negative stereotyping about people in poverty,⁸⁶ and the resulting imposition of adverse treatment on them, which constitute ‘an obstacle to real equal opportunities for people in poverty’.⁸⁷

In some European countries, courts or equality bodies have recognized in various situations that differential treatment of underprivileged persons inspired by prejudice and stigma did constitute discrimination. Belgian courts, for instance, have ruled that the refusal of private landlords to rent out housing to potential tenants because they were relying on social benefits – despite these candidates having sufficient means to pay the rent – was discrimination based on wealth.⁸⁸ The French Equality Body (*Défenseur des droits*) found discrimination based on the ground of ‘economic vulnerability’ in the case of a municipality which refused to enroll Roma children in a school because their parents were living in a slum and subject to an eviction order;⁸⁹ a school

⁷⁸ Alexandra Timmer, ‘Toward an Anti-Stereotyping Approach for the European Court of Human Rights’ (2011) 11 HRLR 707, 715. On the relation between discrimination and stigma, see also Solanke, *Discrimination as Stigma* (n 22).

⁷⁹ Ganty (n 76).

⁸⁰ Helen Hershkoof and Adam S Cohen, ‘Begging to Differ: The First Amendment and the Right to Beg’ (1991) 104(4) *Harvard Law Review* 896, 912.

⁸¹ Défenseur des droits (French Ombudsman), *Les refus de soins discriminatoires liés à l’origine et à la vulnérabilité économique : tests dans trois spécialités médicales en France. Études & Résultats* (October 2019) 3 (available at <https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/etres-refussoins-num-21.10.19.pdf>, accessed 23 October 2022)

⁸² Fraser (n 17).

⁸³ Ganty (n 76).

⁸⁴ See in particular J. Ianni, B. Luyts and B. Tardieu, *Discrimination et pauvreté. Livre Blanc: analyse, testings et recommandations* (ATD Fourth World, 2013), available at https://www.atd-quartmonde.fr/wp-content/uploads/2014/08/DiscriminationPauvrete_LivreBlanc.pdf, accessed 23 October 2022.

⁸⁵ Hilke Kayser, Joachim Frick, ‘Take it or leave it: (non-)take-up behavior of social assistance in Germany’, (2000) 121 *Journal of Applied Social Sciences* 27; Jennifer Stube, Karl Kronebusch, ‘Stigma and other determinants of participation in TANF and Medicaid’ (2004) 23 *Journal of Policy Analysis and Management* 509; Ben Baumberg, ‘The stigma of claiming benefits: A quantitative study’ (2016) 45 *Journal of Social Policy* 181.

⁸⁶ This term was proposed by Sheilagh Turkington: ‘A Proposal to Amend the Ontario Human Rights Code: Recognizing Povertyism’ (1993) 9 *Journal of Law and Social Policy* 134.

⁸⁷ De Schutter, ‘The persistence of poverty: how real equality can break the vicious cycles’ (n 73) para. 28.

⁸⁸ See among others Tribunal of first instance of Namur, 5 May 2015 and Tribunal of first instance of Leuven, 6 September 2018.

⁸⁹ *Défenseur des droits* (French Ombudsman), Decision n°2021-001, 21 January 2021. See also *Défenseur des droits*, Decision n°2017-091, 27 March 2017.

that created a ‘special’ table at the canteen – with ‘special’ meals – for pupils whose parents had not paid the school bills;⁹⁰ or a physician who refused to provide healthcare to a person relying on state medical help.⁹¹

At the European level, the ECtHR, to our knowledge, has never acknowledged discrimination related to stereotypes and stigma against disadvantaged persons, despite the fact that in landmark cases it has explicitly recognized the role of stereotypes in producing discrimination based on gender⁹² and ethnic origin.⁹³ In several cases where parents lost the custody of their children exclusively because of their unsatisfactory living conditions or material deprivation, the Court found a violation of their right to private and family life,⁹⁴ but failed to recognize that these practices had a discriminatory dimension, insofar as they were based on the assumption that poor parents are lazy, irresponsible and unable to look after their children.⁹⁵ Similarly, in *Garib v The Netherlands*, the Court refused to tackle on the grounds of Article 14 ECHR a policy which, allegedly in order to promote more social diversity in a deprived neighbourhood, conditioned permission to live in the area on a minimum income threshold.⁹⁶ The reasons that motivated the national legislator to adopt the challenged policy revealed stigma and stereotypes against the socio-economically disadvantaged. The policy had indeed been justified on the grounds that the poor quality of life in the area in question was due ‘to unemployment, poverty and social exclusion [...] together with antisocial behaviour, the influx of illegal immigrants and crime’.⁹⁷ Contesting this view, Judges Lopez Huerra and Keller observed in their joint dissenting opinion before the Chamber that the ‘poor do not *per se* pose a threat to public security, nor are they systematically the cause of crime’ and that ‘the need to reverse the decline of impoverished inner-city areas [...] can be achieved through other policy measures not tied to personal characteristics’.⁹⁸

II.2. Addressing (some) distributive harms through the prohibition of socio-economic discrimination

In addition to the recognition dimension, the prohibition of socio-economic discrimination also enables redress of certain forms of ‘distributive harms’. This not only concerns the cases, as discussed above, of people who are denied access to a certain good, such as housing or healthcare, based on prejudice linked to their underprivileged condition. Including socio-economic disadvantage as a ground for discrimination also enables challenging policies which treat underprivileged persons unfairly in the allocation of a resource or a service by disregarding their needs or specific situation. This neglect can take two forms: in some cases, people with a

⁹⁰ *Défenseur des droits*, Decision No. 2018-063, 22 February 2018.

⁹¹ *Défenseur des droits*, Decision No. 2020-233, 11 December 2020. For other examples of relevant cases, see De Schutter, ‘Combating Discrimination on Grounds of Socio-Economic Disadvantage’ (n 2) 233-236.

⁹² ECtHR, *Konstantin Markin v. Russia* (GC), 22 March 2012, para 127.

⁹³ ECtHR, *Biao v. Denmark* (GC), 24 May 2016, para 118.

⁹⁴ ECtHR, *Wallovà and Walla v. Czech Republic*, 26 October 2006 and ECtHR, *Soares de Melo v. Portugal*, 16 February 2016.

⁹⁵ See Valeska David, ‘ECtHR Condemns the Punishment of Women Living in Poverty and the “Rescuing” of Their Children’ (2016) Strasbourg Observers

<https://strasbourgobservers.com/2016/03/17/ecthr-condemns-the-punishment-of-women-living-in-poverty-and-the-rescuing-of-their-children/> (accessed 23 October 2022). See also *Lăcătuș v Switzerland*, concerning a blanket criminalization of begging: the Court recognized a breach of the right to private life but avoided addressing the question of discrimination, although the challenged measure was built on a presumption that beggars are criminals and should be made invisible. Sarah Ganty, ‘The Double-Edged ECtHR *Lăcătuș* Judgment on Criminalisation of Begging: Da Mihi Elimo Sinam Propter Amorem Dei’ (2022) 3(3) European Convention on Human Rights Law Review 393.

⁹⁶ ECtHR (GC), *Garib v The Netherlands* 43494/09, 6 November 2017.

⁹⁷ Explanatory Memorandum to the Inner City Problems (Special Measures) Bill, cited in ECtHR (GC), *Garib v The Netherlands* 43494/09, 6 November 2017, para. 26.

⁹⁸ Joint dissenting opinion of judges Lopez Guerra and Keller in *Garib v The Netherlands* 43494/09, 23 February 2016 (Chamber judgment), para. 1.

certain socio-economic status are – directly or indirectly – excluded from the benefit of a right, grant or service provided by the state. The demand here is to *extend* the access to the good at stake to this excluded category. In other situations, it is how a resource is allocated between different groups that is contested, on the grounds that it results in underprivileged people receiving less than other groups. The demand here is to *revise* the allocation scheme for the resource at stake in order to achieve a fairer distribution.

National and European case-law offer a number of examples of recognition of such forms of socio-economic discrimination. Illustrating the first category of cases distinguished above, in the 1950s-1960s the US Supreme Court issued several judgments finding a breach of the Equal Protection clause on the grounds of wealth or property. This concerned in particular state laws making the right to vote conditional upon payment of a poll tax⁹⁹ or subjecting the right of appeal of criminal defendants to the provision of a trial transcript at their own expense.¹⁰⁰ Although the Court does not use the term, these cases can be understood as instances of *disparate impact* or *indirect discrimination*: the rules at stake were neutral on their face – they applied equally to everyone – but they obviously had a disproportionate adverse impact on poor people by conditioning the exercise of a right to the ability to meet certain costs. Disadvantaged persons were thus *de facto* excluded.¹⁰¹

A similar reasoning can be found in a 2004 judgment of the Belgian Constitutional Court. The Court found that the suppression of the printed edition of the Belgian official journal (where laws and regulations are published), the *Moniteur belge/Belgische Staatsblad*, constitutes discrimination on the basis of wealth because it makes it impossible or extremely difficult for those who do not have easy access to computer equipment to consult the journal.¹⁰² The Court observes that the challenged measure does not create by itself a difference in treatment as it applies identically to everyone.¹⁰³ The problem however is that it does not take into account the fact that people do not have equal access to computer technology. Given that it is not accompanied by sufficient provisions to ensure equal access to official texts, it has a disproportionate impact on certain categories of people.¹⁰⁴

More recently, in *Central Union for Child Welfare v Finland*,¹⁰⁵ the European Committee of Social Rights examined a government decision to exclude certain people from a social benefit based on their socio-economic status. An amendment to the Finnish Act on Early Childhood Education and Care had restricted individual entitlement to early childhood education and care to 20 hours per week where one of the parents was unemployed or on maternity, paternity, or parental leave for a sibling, while other parents were entitled to these services fulltime. The Committee found that the difference in treatment this provision created could not be objectively and reasonably justified by the need to cut the annual costs of preschool facilities. It pointed out that the ‘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

⁹⁹ US S.C., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966). See dissenting opinion of Justice Marshall in US S.C., *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), who discusses the Harper case (para. 118).

¹⁰⁰ U.S.S.C., *Griffin v. Illinois*, 351 U.S. 12 (1956). Also relevant is U.S.S.C., *Douglas v. California*, 372 U.S. 353 (1963) where the Court determined that a rule authorizing a court to deny the request of an indigent for appointment of counsel where it deems that a counsel would ‘not be helpful’ was in breach of the Equal protection clause.

¹⁰¹ The Special Rapporteur on human rights and extreme poverty, Olivier De Schutter, insists on the importance of prohibiting not only direct but also indirect discrimination based on socioeconomic disadvantage (De Schutter, ‘The persistence of poverty: how real equality can break the vicious cycles’ (n 78) para. 58).

¹⁰² Belgian Constitutional Court, 16 June 2004, Judgment No. 106/2004, paras. B18-B22.

¹⁰³ *Id.* B14.

¹⁰⁴ *Id.* B22. For another finding of discrimination based on wealth by this Court, see 26 October 2005, Judgment No. 160/2005, B.6 (finding that excluding judicial medical expert fees from the judicial proceedings costs that people on a low income could be exempted from entailed discrimination on the ground of wealth in the enjoyment of the right to a fair trial).

¹⁰⁵ European Committee of Social Rights, *Central Union for Child Welfare v. Finland*, Collective complaint no. 139/2016 (11 September 2019).

their position even more difficult'.¹⁰⁶ The Finnish authorities thus failed to consider the situation of people and families facing unemployment, many of whom were migrant families who needed to overcome cultural and linguistic barriers, and single mothers who were unable to work fulltime. They disregarded the fact that 'it is precisely the children from these families who could benefit the most from full-time pre-school care'.¹⁰⁷ The Committee therefore concluded that the new provision entails a discrimination based on the parents' socio-economic status as regards the children's right of access to education and care.¹⁰⁸ Noticeably, at issue here was an instance of *direct* discrimination as the exclusion was explicitly based on a socioeconomic criterion.

Cases bringing this sort of claim are not always successful of course. In the United Kingdom (UK), lone mothers have unsuccessfully challenged before the UK Supreme Court, on the basis of discrimination, restrictions introduced by the government in the benefits system amid austerity policy. Two of these cases, *SG and others v Secretary of State for Works and Pensions* and *DA and other v Secretary of State for Work and Pensions*, concerned the 'benefit cap' – the imposition of an upper limit on the total amount of social benefits that claimants can receive when they are out of work, unless they undertake at least 16 hours of work a week.¹⁰⁹ The judges acknowledged that the cap – which reduced the benefits well below the poverty line – had a severe impact on non-working households with several children living in areas with high-cost housing, especially single parents, the vast majority of which are women.¹¹⁰ Nonetheless, the majority found no discrimination. Lord Reed, writing for the majority in *SG and others*, insisted that 'the question of proportionality involves controversial issue of social and economic policy, with major implications for public expenditure. The determination of those issues is pre-eminently the function of democratically elected institutions'.¹¹¹ The government's decision was thus subject only to limited scrutiny. Two judges dissented, however. Lady Hale in particular emphasized that the cap 'breaks the link between benefit and need. Claimants affected by the cap will, by definition, not receive the sums of money which the state deems necessary for them adequately to house, feed, clothe and warm themselves and their children'.¹¹² In *SG and others*, she deemed that the application of the cap to lone parents was indirectly discriminatory on grounds of sex,¹¹³ while in *DA and others*, she considered that the requirement to work at least 16 hours a week to be exempted from the cap entailed unjustified discrimination against lone parents of children under school age compared to other parents, as the former face considerable difficulties in finding suitable work which also fits in with their child care arrangements.¹¹⁴ In a later case, the UK Supreme Court found, unanimously this time, that the limitation of the individual element of child tax credit to the amount payable in respect of two children regardless of the actual number of children in a family, did not constitute discrimination.¹¹⁵ While acknowledging that this measure had a disproportionate impact on women and treated children differently depending on whether they were living in households containing one or two children or more than two children, it ruled that it was proportionate to the aim of promoting the economic well-being of the country. The Court here appears even

¹⁰⁶ Id. para. 71.

¹⁰⁷ Id. para. 111.

¹⁰⁸ Id. para. 78 (violation of Article E taken in conjunction with Article 17§1(a) of the Charter) and para. 114 (violation of Article E taken in conjunction with Article 16).

¹⁰⁹ *SG and others v Secretary of State for Works and Pensions* [2015] UKSC 16 and *DA and other v Secretary of State for Work and Pensions* [2019] UKSC 21. See also *SC and others v Secretary of State for Work and Pensions* [2019] EWCA Civ 65 which concerns the restriction to the child tax credit. On these cases, see the critical discussion of Campbell (n 21).

¹¹⁰ *SG* (n 95) esp. [2] and [37]. Lord Wilson notes that its effects may be that 'the family, no doubt with great difficulty, has to move to cheaper accommodation; or that the mother builds up rent arrears and so risks eviction or otherwise falls into debt; or that (...) she has to cease buying meat for the children; or (...) that she has to go without food herself in order to feed the children or has to turn off the heating' (ibid. [37]).

¹¹¹ *SG* (n 95) [93].

¹¹² *SG* (n 95) [180].

¹¹³ *SG* (n 95) [232]. See also the opinion of Lord Kerr.

¹¹⁴ *DA* (n 95) [157] and [145]. See also the opinion of Lord Kerr.

¹¹⁵ *R (on the application of SC, CB and 8 children) v Secretary of State for Work and Pensions and others* [2021] UKSC 26.

more deferential to the Parliament's assessment, denying even the possibility that a court could find objective legal standards by which to decide how to balance between the competing interests at stake.¹¹⁶

The second category of cases in which the concept of socio-economic discrimination may be used to question policies which disregard the needs of the most disadvantaged, relate to situations where the way a resource is allocated is said to be unfair to people living in poverty. In such cases, disadvantaged persons are not excluded from the benefit of a good, rather they claim that they receive less than they should in comparison with other groups.

The judgment of the South African Supreme Court in *Social Justice Coalition v Minister of Police* provides a ground-breaking example of the recognition of this form of discrimination. The Court found that the system employed by the South African Police Service to determine the distribution of police human resources resulted in the allocation of a disproportionate part of these resources to wealthy, middle-class, and mainly white neighbourhoods in comparison to poor and black areas. It therefore held that this allocation scheme unfairly discriminates against black and poor people.¹¹⁷ The measure was facially neutral – it was based on a statistical formula – but it entailed in practice a specific disadvantage for this latter category, without justification, constituting therefore indirect discrimination. Interestingly, as pointed out by Cathy Albertyn, the issue at stake here went beyond the question of exclusion or inclusion of a category in the scope of a good or resource, it concerned the mode of distribution of a resource among different groups.¹¹⁸

Cases of this sort however are scarce, probably because convincing judges to find discrimination in such situations can be particularly difficult. *San Antonio Independent School District v. Rodriguez* before the US Supreme Court exemplifies these difficulties. Complainants challenged the Texas school financing system. Because it was based on local property taxation, this system resulted in serious disparities in the quality of education provided according to the wealth of the inhabitants in each area. It was also argued that it had a disparate impact on Mexican and African American communities given that 90% of the residents of the poor neighbourhoods of San Antonio were of Mexican-American descent and 6% were of African-American descent.¹¹⁹ The Court nonetheless validated this school financing system considering that 'at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages [...]'.¹²⁰ It is worth noting that despite the negative outcome of the case for the complainants, many States decided not to continue with such a tax system and changed their rules on the financing of schools in the years following the ruling.¹²¹

This latter judgment, like the UK Supreme Court rulings in the aforementioned cases, illustrates an important difficulty which socio-economic disadvantage discrimination claims are likely to face in courts. As widely noted, judges are often reluctant to sanction economic and social policies with complex budgetary implications, because they feel they lack the capacity or expertise properly to assess such issues or the legitimacy to make what they see as policy choices.¹²² The expanding transnational case-law on social and economic rights however

¹¹⁶ *R* (n 113), esp. para. 208.

¹¹⁷ South African Supreme Court, *Social Justice Coalition v Minister of Police* [2018] ZAWCHC 181.

¹¹⁸ Catherine Albertyn, 'Section 9 in a Time of COVID: Substantive Equality, Economic Inclusion and Positive Duties' (2021) 37(2) *South African Journal on Human Rights* 205, 211.

¹¹⁹ US S.C., *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), para 12. By contrast, Mexican-American and African-American represented only 18% and 1% of the population of rich neighbourhoods.

¹²⁰ US S.C., *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), para 24.

¹²¹ Jeffrey Sutton, 'San Antonio Independent School District v. Rodriguez and Its Aftermath' (2008) 94 *Virginia Law Review* 1963.

¹²² See Rosalind Dixon and Julie Suk, 'Liberal Constitutionalism and Economic Inequality' (2018) 85 *University of Chicago Law Review* 369, esp. 397-98; Mark V. Tushnet, 'The Inadequacy of Judicial Enforcement of Constitutional Rights Provisions to Rectify Economic Inequality, and the Inevitability of the Attempt' (2018) 18-25 *Harvard Public Law Working Paper*.

demonstrates that courts do have the capacity to develop adequate legal standards for interpretation and specific legal techniques to adjudicate human rights disputes with socio-economic implications.¹²³ Moreover, regarding the alleged lack of legitimacy of the courts to review economic policy choices made by elected institutions, it can be observed that the poorest segments of the population are largely marginalized in the political process. Accordingly, when courts act to ensure that the needs and interests of the most disadvantaged are duly taken into account in the conception or implementation of such policies, they may well be reinforcing democracy by compensating for defects in representation in a democratic system, rather than undermining it.¹²⁴ The fact remains that in practice, courts in many countries are reticent to adopt such an approach. Where an allegation of socio-economic discrimination submitted to a court relates to state public expenditure, the outcome will thus depend on the weight given by judges to budgetary concerns, and the discretion they recognize to the legislature in this regard, when reviewing the proportionality of a contested measure.

The prohibition of socio-economic discrimination nonetheless offers a ground to contest provisions or arrangements which result in underprivileged persons being deprived of access to a good or a service provided to others or being treated unfairly in its distribution. Olivier De Schutter shows that this potential is heightened when the protection against such discrimination can be coupled with the recognition of social and economic rights. De Schutter argues that '[m]aking access conditional on purchasing power [...] may result in a violation of human rights where the goods and services in question are essential to the enjoyment of social rights'.¹²⁵ He emphasizes that the UN Committee on Economic, Social and Cultural Rights has held 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' and 'that essential goods and services, such as water and sanitation, food or healthcare, should remain affordable to all.' He deduces from there that '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'.¹²⁶ Seen in this light, the implications of the prohibition of socio-economic discrimination converge with (re)distributive policies.

This however presupposes that social and economic rights are recognized in the jurisdiction in question so that discrimination against the socio-economically disadvantaged in the enjoyment of such rights can be alleged. It is uncertain whether the prohibition of socio-economic discrimination *on its own* can provide a basis to demand the creation of (re)distributive policies. It remains therefore unclear to what extent this concept permits to fundamentally question and correct the economic processes which *create* poverty in the first place, rather than challenging adverse treatment imposed on those who are already poor. Moreover, anti-discrimination based on socio-economic disadvantage focuses on the unfairness suffered by the *most disadvantaged* in society. By contrast, the scope of many (re)distributive policies is wider: by ensuring that *everyone* has access to an equal threshold of essential goods, they allow the reduction of inequalities experienced not only by the poorest segments of society but also by other

¹²³ See Amaya Úbeda Torres, 'Justiciability of Social Rights' in Christina Binder, Jane A. Hofbauer, Flávia Piovesan, Amaya Úbeda Torres (eds), *Research Handbook on International Law and Social Rights* (Edward Elgar 2020); Olivier De Schutter, 'Economic, Social and Cultural Rights as Human Rights: An Introduction', in Olivier De Schutter (ed), *Economic, Social and Cultural Rights as Human Rights* (Edward Elgar 2013); Paul O'Connell, *Vindicating Socio-Economic Rights. International Standards and Comparative Experiences* (Routledge 2012); Malcolm Langford (ed), *Social Rights Jurisprudence. Emerging Trends in International and Comparative Law* (CUP 2008). On the approach of the European Court of Justice and the ECtHR towards budgetary justification in indirect discrimination cases, see Marc Bell's chapter and Mulder (n 71) 76-77.

¹²⁴ De Schutter, 'Combating Discrimination on Grounds of Socio-Economic Disadvantage' (n 2) 244-245.

¹²⁵ De Schutter, 'Combating Discrimination on Grounds of Socio-Economic Disadvantage' (n 2) 240.

¹²⁶ *Ibid.*

categories, including the middle class, which has also been hit by rising economic inequality observed since the 1980s.¹²⁷ In other words, these policies – the extent of which of course varies from state to state – not only help tackle poverty, they also enable the promotion of a more equitable distribution of resources across the whole of society than would be the case if market mechanisms alone were relied upon (see above section I.2).

II.3. Acknowledging intersectional discrimination

The recognition of socio-economic disadvantage as a prohibited ground is also important for a further reason: it makes it possible to acknowledge intersectional discrimination resulting from a combination of status grounds and socio-economic condition.¹²⁸ Roma are a paradigmatic example of such phenomenon:¹²⁹ the widespread discrimination they face is linked to both the racialization and poverty they experience.¹³⁰ While the concept of intersectional discrimination has attracted increasing attention in European legal literature in recent years,¹³¹ the issue of socio-economic disadvantage is often neglected in these analyses.¹³² Overlooking how race, gender, and other status grounds may be deeply intertwined with poverty in the production and perpetuation of discrimination is to miss a key aspect of the problem¹³³, and may result in certain disadvantaged individuals falling through the cracks of protection.¹³⁴ Furthermore, as emphasized by Colm O’Cinneide in relation to social rights, in view of the traditional neglect of material inequality in human rights law, ‘the accommodation of intersectionality within social rights jurisprudence has the potential to bring these two dimensions of equality together. It lays down foundations for the development of a multidimensional understanding of social rights, which would be capable of engaging with the multiplicity of factors that generate social exclusion – and, in particular, the complex ways in which material inequality can intersect with other modes of discriminatory treatment’.¹³⁵

In fact, in several of the cases mentioned above, courts or equality bodies did acknowledge discrimination based on multiple grounds. The South African Supreme Court in *Social Justice Coalition v Minister of Police* found discrimination based on race and poverty. In the above-mentioned case of the Roma children who were refused enrolment in a school because their parents were living in a slum, the French Equality body held that there was discrimination on grounds of economic vulnerability as well as origin and place of residence.¹³⁶ Some international monitoring bodies have also recognized how socio-economic disadvantage interacts with other factors of vulnerability to produce discrimination. Notably, the United

¹²⁷ See in particular Rosalind Dixon, ‘On Law and Economic Inequality: A Response to Philip Alston’ (2018) 24(3) Australian Journal of Human Rights 276.

¹²⁸ Ganty (n 76).

¹²⁹ The concept of intersectional discrimination was famously coined by Kimberley Crenshaw. See ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) 1 University of Chicago Legal Forum.

¹³⁰ Morag Goodwin, ‘Multi-Dimensional Exclusion: Viewing Romani Marginalization Through the Nexus of Race and Poverty’ in Dagmar Schiek and Victoria Chege (eds), *European Union Law: Comparative Perspectives on Multidimensional Equality Law* (Routledge 2009) 137.

¹³¹ See in particular Iyiola Solanke, ‘The EU Approach to Intersectional Discrimination in Law’ in *The Routledge Handbook of Gender and EU Politics* (Routledge 2021) 93; Emmanuelle Bribosia, Robin Médard Inghilterra et Isabelle Rorive, ‘Discrimination intersectionnelle en droit : mode d’emploi’ [2021] 126 Revue Trimestrielle des Droits de l’Homme 241; Shreya Atrey, *Intersectional Discrimination* (OUP 2019); Dagmar Schiek and Anna Lawson (eds), *European Union Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination* (Ashgate 2011); Sarah Hannett, ‘Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination’ (2003) 23 OJLS 68.

¹³² See however Colm O’Cinneide, ‘The Potential and Pitfalls of Intersectionality in the Context of Social Rights Adjudication’ in Shreya Atrey and Peter Dunne (eds), *Intersectionality and Human Rights Law* (Bloomsbury 2020) and Atrey (n 77).

¹³³ MacKay and Kim, ‘Adding Social Condition to the Canadian Human Rights Act’ (2009): 37. See also Solanke (n 22) esp. 133-142.

¹³⁴ Ganty (n 76).

¹³⁵ O’Cinneide, ‘The Potential and Pitfalls of Intersectionality in the Context of Social Rights Adjudication’ (n 137).

¹³⁶ Défenseur des droits (French Ombudsman), Decision n°2021-001, 21 January 2021. See also Défenseur des droits, Decision n°2017-091, 27 March 2017.

Nations Committee on the Elimination of Discrimination against Women emphasized in *Alyne da Silva Pimentel Texeira v Brazil* that ‘discrimination against women based on sex and gender is inextricably linked to other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, cast, and sexual orientation and gender identity’.¹³⁷ In that case, it found that the failure to provide necessary and emergency care to a pregnant woman was discrimination based on her African descent and socio-economic background.¹³⁸ Such a finding would not however be possible based on EU anti-discrimination directives: as pointed out above, Articles 18 and 19 TFEU contain a closed list of discrimination grounds, which does not include socio-economic disadvantage. This clearly limits the capacity of EU law to engage in an intersectional understanding of discrimination which would pay due regard to the role of poverty in amplifying the social exclusion of certain protected groups.

To summarize, we find that the prohibition of socio-economic discrimination represents a useful complement to (re)distributive policies, while not providing an alternative to them. First, it permits identifying and tackling the ‘recognition harm’ caused by discrimination resulting from stigma and prejudice against people living in poverty – an issue that is not directly addressed by (re)distributive policies. Second, it can serve to challenge ‘distributive harms’ suffered by underprivileged people as a result of policies which neglect the needs of the most disadvantaged. In these latter contexts, a finding of socio-economic disadvantage discrimination may prompt an expansion of an existing social policy or service to categories that were excluded from it, or a revision of how a resource is allocated by public authorities so as to ensure that underprivileged groups receive a fair share. It could thus reinforce and extend the scope of classic (re)distributive policies. When combined with social and economic rights, it could even provide an additional basis for requiring the creation of certain kinds of (re)distributive policies. But in many countries, the traditional reluctance of courts to review the economic choices made by the legislature risks limiting what can be expected from judicial challenges to distributive harms, based on socio-economic discrimination. It must also be noted that while the prohibition of socio-economic discrimination allows the harms suffered by people living in poverty to be tackled, many (re)distributive policies go further and help reduce inequalities more generally throughout the society. Finally, the inclusion of socio-economic disadvantage among prohibited grounds is also important in that it allows the intersectional impact of poverty in the production of discrimination to be addressed.

Conclusion

Anti-discrimination law and (re)distributive policies address different forms of inequality and promote different dimensions of equality. Anti-discrimination law seeks to protect people from being treated unfairly, directly or indirectly, because of certain personal characteristics (gender, race, religion, sexual orientation, etc.) which are known to generate bias and prejudice. It is primarily concerned with guaranteeing equal opportunity. (Re)distributive policies, in turn, tackle economic inequality. They aim to equalize the living conditions of all members of society whatever their position in the social scale, up to a certain point, by ensuring – through a set of mechanisms which counteract market processes – that everyone has access to a certain threshold of essential goods and resources.

¹³⁷ CEDAW, *Alyne da Silva Pimentel Texeira v. Brazil*, 25 July 2011, No. 17/2008, para. 7.7.

¹³⁸ Human Rights Committee, 31 March 2016, *Amanda Jane Mellet v. Irlande*, 2324/2013, para. 7.11. By contrast, in *SC and others* and *DA and others* referred to above, the UK Supreme Court failed to take into account the intersection of gender with poverty which was at the core of the detrimental impact suffered by the claimants as a result of the restriction to social benefits decided by the government. See the critiques of Campbell (n 21).

This, however, does not mean that these two types of legal and policy instruments are in conflict. On the contrary, there are important points of convergences between them. In particular, the prohibition of socio-economic discrimination, which is already provided for in some national and international legal instruments but noticeably not in EU anti-discrimination directives, offers an interesting potential way to integrate concerns about economic inequalities into anti-discrimination law. It not only allows exclusion stemming from stereotypes and stigma against people in poverty to be combatted, but also certain forms of ‘misdistribution’ which adversely impact the most disadvantaged to be challenged. The applications of this concept have so far remained limited however and while the prohibition of socio-economic discrimination can reinforce (re)distributive policies, it certainly does not provide an alternative to them.

In sum, anti-discrimination law cannot on its own pretend to achieve equality in the full sense of the word; but neither can (re)distributive policies. As argued in this chapter, anti-discrimination law and (re)distributive policies are complementary: both discrimination and economic inequality need to be adequately tackled if one is to bring about a more equal society. Instead of opposing these two types of policies, avenues should be sought – at both national and European levels – to better combine and connect them in a mutually reinforcing way.