



Securing Housing for All in Diverse European Societies

Applying International and European Antidiscrimination Law to the Housing Context

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Abstract

The central argument of this thesis is that the application of antidiscrimination law to the field of housing complements and enriches a right to adequate housing approach in two ways: firstly, it helps to elaborate and expand the rationale and implications of certain components of the right to housing; secondly, it allows us to address human rights concerns that cannot be adequately tackled through the right to housing alone. I reach this conclusion through an analysis of the conceptual and practical implications arising from the application of antidiscrimination norms to the housing context, with a focus on Europe.

An enquiry into the philosophical foundations of antidiscrimination law leads me to identify four aims that antidiscrimination norms ought to pursue: eliminating hostility, prejudice, and stigma; respecting cultural diversity and avoiding misrecognition; transforming existing structures; and ensuring a fair distribution of important goods in society. Applying this framework to the field of housing, I find that various antidiscrimination legal concepts can be mobilised to achieve those four aims, among which direct and indirect discrimination, discriminatory harassment, and reasonable accommodation. I also defend the usefulness of incorporating and mobilising socioeconomic disadvantage as a prohibited ground of discrimination to this end.

I then build on two case studies, housing segregation, on the one hand, and housing commodification and financialisation, on the other hand, to further demonstrate the contribution of antidiscrimination law to specific housing issues. Finally, I propose several procedural and substantive avenues to achieve diversity-conscious, all-inclusive housing policies, looking in particular at equality duties and housing decommodification policies. The legal analysis developed throughout the thesis, based on a human rights law methodology, is enriched through references to political and legal philosophy and to urban sociology.

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List of Abbreviations

CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CLTs	Community Land Trusts
CRPD	Convention on the Rights of Persons with Disabilities
DALO	Right to Enforceable Housing <i>(droit au logement opposable)</i>
ECHR	European Convention on Human Rights
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
ESC	European Social Charter
EU	European Union
HRC	Human Rights Committee
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
PSEDs	Public Sector Equality Duties
REITs	Real Estate Investment Trusts
RESC	Revised European Social Charter
SGEI	Service of General Economic Interest
SRAH	Special Rapporteur on Adequate Housing as a component of the right to an adequate standard of living and on the right to nondiscrimination in this context

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General Introduction

The research project

The central goal of this research project is to analyse the conceptual and practical implications arising from the application of international and European antidiscrimination law to the field of housing, from a legal perspective.

In line with this central goal, the research aims to: (1) explore the legal requirements that international and European antidiscrimination norms impose on housing policies, and the manner in which housing policies should be revisited in order to comply with these requirements; (2) study the right to housing from an equality and nondiscrimination perspective, further elucidating some substantive components of this right which remain undertheorised, and reflecting on the criteria that, from a human rights perspective, may legitimately govern the distribution of housing; and (3) consider whether and, if so, how international and European antidiscrimination law should evolve in light of the lessons drawn from the analysis of discriminatory processes in the field of housing.

By taking these three elements into account, the research ultimately seeks to advance the theoretical understanding of both antidiscrimination law and the right to housing, as well as to conceptually identify the specific forms of discrimination at play in this field. This theoretical understanding can then be used to ground policy and legislative measures that effectively address these forms of discrimination, and housing policies which are all-inclusive and diversity-conscious.

Since the adoption of the first antidiscrimination directives in 2000, EU antidiscrimination law has generated a wealth of scholarly analysis.¹ The

¹ Mark Bell, *Anti-Discrimination Law and the European Union*, Oxford Studies in European Law (Oxford: Oxford University Press, 2002); Dagmar Schiek, Lisa Waddington, and Mark Bell, eds., *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Ius Commune Casebooks for the Common Law of Europe (Oxford: Hart Publishing, 2007);

operation of these norms within the field of employment and occupation has been widely studied.² On the other hand, the right to housing as an economic, social, and cultural right has received a great deal of attention in human rights law literature.³

However, very few publications specifically address the implications of international and European antidiscrimination law when applied to the field of housing.⁴ This research project seeks to bridge that gap in literature by providing an original, in-depth analysis of how these two areas of law intersect and of the multiple legal consequences ensuing from their interaction, in the form of a PhD thesis.

The research builds on two complementary dimensions. The first dimension concerns the right to housing and housing policies, examined

Dagmar Schiek and Victoria Chege, eds., *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (London: Routledge-Cavendish, 2009); Sandra Fredman, *Discrimination Law*, 2nd ed., Clarendon Law Series (Oxford: Oxford University Press, 2011); Alexander Somek, *Engineering Equality: An Essay on European Anti-Discrimination Law* (Oxford: Oxford University Press, 2012); Evelyn Ellis and Philippa Watson, *EU Anti-Discrimination Law*, 2nd ed, Oxford EU Law Library (Oxford: Oxford University Press, 2012).

² Olivier De Schutter, *Discriminations et marché du travail : Liberté et égalité dans les rapports d'emploi* (Brussels: P.I.E.-Peter Lang, 2001); Julie Ringelheim, "Adapter l'entreprise à la diversité des travailleurs : la portée transformatrice de la non-discrimination," *Journal européen des droits de l'homme* 2013, no. 1 (2013): 57–82.

³ Scott Leckie, "The Human Right to Adequate Housing," in *Economic, Social and Cultural Rights: A Textbook*, ed. Asbjørn Eide, Catarina Krause, and Allan Rosas, 2nd rev. ed. (Dordrecht: Martinus Nijhoff, 2001), 149–168; Rachel G. Bratt, Michael E. Stone, and Chester W. Hartman, eds., *A Right to Housing: Foundation for a New Social Agenda* (Philadelphia: Temple University Press, 2006); Jessie Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Oxford: Hart Publishing, 2013).

⁴ Nicolas Bernard, "Les lois anti-discrimination et le secteur du logement (privé et social)," in *Les nouvelles lois luttant contre la discrimination*, ed. Christian Bayart, Stefan Sottiaux, and Sébastien Van Drooghenbroeck (Bruges: La Charte, 2008), 797–843; Natalie Boccadoro, "Le droit au logement et la discrimination raciale," *Revue du droit européen relatif à la non-discrimination* 9 (2009): 22–35; Claude Cahn, "Slums, The Right to Adequate Housing and the Ban on Discrimination," *The Equal Rights Review* One (2008): 60–64; Julie Ringelheim and Nicolas Bernard, *Discrimination in Housing* (Luxembourg: European Network of Legal Experts in the Non-Discrimination Field, 2013), <https://www.equalitylaw.eu/downloads/1337-discrimination-in-housing-en>; Hilary Silver and Lauren Danielowski, "Fighting Housing Discrimination in Europe," *Housing Policy Debate* 29, no. 5 (2019): 714–35.

through the lens of antidiscrimination law. The research question here is: How does the application of antidiscrimination law to the field of housing transform our understanding of the right to housing and housing policies? The second dimension focuses on antidiscrimination law, viewed from the angle of the right to housing. The corresponding research question is: How does the application of antidiscrimination law to the field of housing transform antidiscrimination law itself?

The project proceeds from two hypotheses. The first hypothesis, parallel to the first dimension, posits that international and European antidiscrimination norms contain certain legal concepts (notably, indirect discrimination and reasonable accommodation) that call for some substantive aspects of the right to housing to be clarified and for housing policies to be revisited.

The concept of indirect discrimination, prohibited on an equal footing with direct discrimination, allows us to go beyond the classical viewpoint that circumscribes discrimination to the contractual relationship between a landlord and a tenant, or between an owner and a buyer. Insofar as it provides that discrimination may arise from a provision, criterion, or practice that is neutral on its face but which would, in fact, put persons belonging to a protected group at a particular disadvantage, the concept of indirect discrimination focuses attention upon the exclusionary effects of certain policies on some groups.

This notion ultimately points towards the responsibility of states in devising diversity-conscious, all-inclusive housing policies. For instance, a particular policy having a detrimental effect on a certain ethnic group while not being justified by a legitimate aim, or not being concretised through appropriate and necessary means, could be deemed discriminatory, even in the absence of any deliberate will to discriminate.

For its part, the notion of reasonable accommodation (which, for what regards housing, is enshrined in the UN Convention on the Rights of Persons with Disabilities, which all EU Member States and the European Union itself have ratified) entails that public authorities have a responsibility to ensure the availability of housing adapted to the needs of persons with disabilities.

In other words, it contains a positive obligation to take the specific needs of this group into account when designing and implementing housing policies.

The second hypothesis suggests that the specificities found within the field of housing demonstrate the need for including socioeconomic disadvantage among the prohibited discrimination grounds by law. Antidiscrimination law is based on the idea that certain protected characteristics should not have an impact on the distribution of important social goods because this would be unfair. At the same time, the legitimate distributive criteria for a particular social good may vary depending on the characteristics of that good and the meaning that society ascribes to it.

While socioeconomic disadvantage is not featured as a prohibited ground in EU antidiscrimination law, it is found in other instruments, such as the International Covenant on Economic, Social and Cultural Rights, the European Convention on Human Rights, or the European Social Charter. However, a lack of sufficient conceptual articulation and practical application deprive this ground of much of its potential to effect change.

This gap in protection reveals a certain paradox at the core of antidiscrimination law: often, housing policies having a disproportionate impact on underprivileged, lower income groups can only be deemed indirectly discriminatory (and, therefore, be prohibited) if those groups can be defined at the same time on the basis of racial or ethnic origin, gender, disability, age, religion, or sexual orientation.

The research is based on a standard legal methodology, resting on a combination of legal text analysis, analytic reasoning, and argumentation. Three concerns in particular guide the text analysis: casting light on the normative implications of relevant legal texts, testing whether legal rules are in accordance with the principles and objectives they are meant to pursue, and, where necessary, reinterpreting existing legal concepts and developing new ones.

Different sources are mobilised in order to respond to the research questions. The relevant legislative framework at the European Union level is thoroughly analysed, including the latest developments and the case law of the Court of Justice of the European Union. This framework is put into

perspective more broadly, and therefore other international and regional human rights instruments are considered, as well as the work of their monitoring bodies, in particular the developments within the European Committee of Social Rights, the European Court of Human Rights, the UN Committee on Economic, Social and Cultural Rights, and the UN Committee on the Rights of Persons with Disabilities.

The focus of this study is on international and European human rights norms and the work of international and European human rights monitoring bodies. However, in order to illustrate the concrete implications of international and European norms, the project also looks at selected case law and legislation at the national level in a limited manner.

The research does not aim to undertake a comparative law study of national legal systems or to analyse in depth domestic legal and policy frameworks: these are only used to anchor the conceptual and theoretical analysis by means of particular examples. The selection of cases presented therefore does not correspond to a systematic and comprehensive review of domestic case law and the application of antidiscrimination law in specific countries, but rather to the adequacy of particular examples to best illustrate the relevant concepts or arguments.

Given that this study focuses on European law, most of the cases considered are drawn from European countries. While examples from a wide range of countries have been used, particular attention is given to the experience of Spain, the United Kingdom, France, and Belgium. This group of countries, which are all EU Member States, illustrate a diversity of legal situations in Europe with regard to the relative strength or weakness of the national antidiscrimination legal framework and whether they include or not socioeconomic criteria in their domestic antidiscrimination law provisions.

Spain is a state with an underused antidiscrimination framework. While there are appeals to socioeconomic criteria featured in the Constitution, there are none in its legislation. One can observe notable developments in the field of housing in this country following the 2008 financial crisis. In contrast, the United Kingdom has a notably strong antidiscrimination law tradition, and foresees (but has not implemented) a public sector equality

duty requiring that public authorities take into account socioeconomic considerations in policy design. My research stays at the University College London (UK) and at the University of Barcelona (Spain) have allowed me to study these countries in detail.

For its part, France expressly includes the particular vulnerability resulting from an individual's economic situation among the prohibited grounds of discrimination, and it contains legislation creating an enforceable right to housing (DALO). Finally, Belgium has also incorporated the ground of socioeconomic disadvantage (*fortune*) in its legislation. It has a growing antidiscrimination acquis, and constitutes a particularly accessible state for practical reasons, including access to its national equality body (Unia).

This means, however, that more attention has been given to countries situated in Western Europe. Notably, less attention has been paid to Central and Eastern European countries and to Scandinavian countries. This might lead to certain research dimensions being underplayed or underexplored. Yet, in view of the practical constraints of the research project in terms of time and extension as well as the ability to access national legislation and case law in the local language, the same degree of attention could not be granted to all regions of Europe. It must also be recalled that the primary focus of this research is on international and European norms.

Interdisciplinary approach

While the research project is mostly based on a fundamental legal research methodology, resting on a combination of legal text analysis, analytic reasoning, and argumentation, it incorporates an interdisciplinary dimension by bringing in urban sociology research, on the one hand, and political and legal theory, on the other hand. As stated above, the project seeks to analyse the legal implications arising from the application of international and European antidiscrimination law to the field to housing.

However, this legal analysis cannot occur in a vacuum. It is necessary to anchor the enquiry by taking into account, on the one hand, the existing dynamics at play in the field of housing and the different factors that may hinder in practice the fulfilment of the right to housing, and, on the other

hand, the justice and distributive principles underlying equality and nondiscrimination norms in connection with the right to housing.

Urban sociology research is particularly well suited for this first aspect. Whereas a legal enquiry alone is unable to offer a sufficiently rich account of the role of housing in society, including the different types of housing policies, the dynamics at play in the field of housing, and the current housing issues that limit the enjoyment of this right, urban sociology allows us to properly understand these elements.

This is all the more relevant for a complex, polycentric matter like housing, where any prospective legal solutions require a profound understanding of the circumstances surrounding that subject-matter. Urban sociology thus offers a factual and analytical substrate essential to successfully deploy my legal enquiry.

Political and legal theory, for their part, are crucial for the second aspect. They articulate the step in the argument relating to whether housing can be classified a social good, why this classification matters in terms of distributive justice, and what are the criteria that should legitimately govern, from a human rights perspective, a fair distribution of housing.

Taking into account different theories of justice, the fairness of the current distributive criteria for housing and the possibility to take into account socioeconomic factors may be correctly assessed. Moreover, these theoretical insights cast light into the moral principles underpinning equality and nondiscrimination as well as the right to housing, suggesting a certain interpretation of antidiscrimination norms in line with these principles.

This interdisciplinary dimension will be transversal to many of the chapters and sections in this thesis, notably those where a reference to housing dynamics is made as well as those dealing with the principles that should guide the distribution of housing and the role of socioeconomic criteria in this distribution.

Impact statement

I argue that this research, while being a fundamental research project in nature, has a social impact in light of the challenge that discrimination in housing represents today.

The pervasiveness of discrimination in housing is indeed a major challenge for contemporary societies. Inequality and discrimination in the field of housing, their role in preventing the realisation of the right to housing, and the discriminatory effects of housing policies elaborated and implemented by public authorities have attracted much attention from stakeholders.⁵

This thesis includes an in-depth theoretical analysis of discrimination in housing at the international and European levels, and it complements and enriches the current understanding of the right to adequate housing. It also shows that antidiscrimination law has an added value when compared to a right to housing approach in some regards. Processes of housing commodification and financialisation and experiences of housing segregation are thoroughly discussed, and I offer a nondiscrimination perspective through which to address these phenomena. Finally, the research provides some examples of specific housing policies in different countries, showing how they produce discriminatory results in their current operation.

The following specific stakeholders and groups are therefore likely to benefit from the research results. Legislators and policy makers may benefit from the study of how antidiscrimination norms transform housing policies,

⁵ See *Baromètre de la diversité Logement* (Brussels: Unia, 2014), https://www.unia.be/files/Documenten/Publicaties_docs/barometre_de_la_diversite_logement.pdf; *La discrimination au logement* (Brussels: Unia, 2019), https://www.unia.be/files/Documenten/Publicaties_docs/1363_BXL_Logement_-_brochure_-_FR-AS.pdf; Wendy Wilson, "Can Private Landlords Refuse to Let to Housing Benefit Claimants?," Briefing Paper (London: House of Commons Library, 2019), <http://researchbriefings.files.parliament.uk/documents/SNO7008/SNO7008.pdf>; Mathieu Bunel et al., "Les discriminations dans l'accès au logement à Paris : Une expérience contrôlée," Rapport de recherche (Paris: TEPP-CNRS, 2017), <http://www.tepp-repec.eu/RePEc/files/tepprr/TEPP-rr-17-01-mb-yl-ldp-pp.pdf>; *Louer sans discriminer* (Paris: Défenseur des droits, 2017), https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/636150450_webv2.pdf; *¿Qué es la discriminación residencial por origen étnico?* (Madrid: Provienda, 2014), http://www.nadiesinfuturo.org/IMG/pdf/COMIC-PROVIVIENDA-23-12-20131_1_.pdf.

and the specific constraints that these norms impose on the formulation and implementation of housing policies at different levels of governance. International and European monitoring bodies may welcome the analysis of socioeconomic disadvantage as a prohibited discrimination ground, especially when the relevant human rights instruments already incorporate such a ground. Finally, civil society organisations are also potential beneficiaries of the research, as they might benefit from an increased understanding of housing discrimination and what an antidiscrimination law approach can achieve in this connection.

Thesis structure

In terms of structure, the thesis is divided in seven chapters, along with a general introduction and a general conclusion. In Chapter 1, I set out the legal and conceptual framework regarding antidiscrimination law, on the one hand, and the right to adequate housing, on the other hand.

In Chapter 2, I explore the philosophical underpinnings of antidiscrimination law, looking at the most salient theories of justice to give content to the notion of substantive equality, which constitutes the basis for the pluralistic account of antidiscrimination law that I deploy in my enquiry. In so doing, I identify four aims that antidiscrimination norms ought to pursue: eliminating hostility, prejudice, and stigma; respecting cultural diversity and avoiding misrecognition; transforming existing structures; and ensuring a fair distribution of important social goods.

In Chapter 3, I focus on the first three identified aims to examine how various antidiscrimination legal concepts may be mobilised in pursuit of those objectives. In particular, I look at direct discrimination, discriminatory harassment, indirect discrimination, reasonable accommodation, and accessibility, especially in the context of Roma and Travellers and of persons with disabilities.

In Chapter 4, I argue that the fourth identified aim triggers a reflection around the incorporation of socioeconomic disadvantage as a prohibited ground in antidiscrimination law. I observe that, even though this ground is present in certain human rights instruments and domestic legal orders, a

lack of conceptual articulation and practical application deprives the socioeconomic ground of much of its effectiveness.

In Chapter 5, I look at the phenomenon of housing segregation as a first case study to show the merits of an antidiscrimination law approach, focusing on the stigmatisation suffered by residents of segregated areas. I analyse different situations from an antidiscrimination law perspective, including the active pursuit of segregation by states and their passivity when faced with a situation of *de facto* segregation.

In Chapter 6, I take housing commodification and financialisation as a second case study to show how antidiscrimination law can complement and enrich a right to adequate housing approach. After taking a closer look at these processes, I evaluate the role and responsibility of states and of private actors in creating and promoting commodification and financialisation, arguing that antidiscrimination norms can be mobilised in this regard.

Lastly, in Chapter 7 I reflect on how to achieve diversity-conscious and all-inclusive housing policies, in light of the lessons drawn from the legal analysis developed in previous chapters. I consider both procedural and substantive avenues, especially equality duties and decommodification policies, and I propose some concrete measures that could be adopted to secure a more inclusive and diverse realisation of the right to housing for all.

Chapter 1

Legal and conceptual framework

In this first chapter, I present the legal and conceptual framework of antidiscrimination law, on the one hand, and the right to housing, on the other hand. This chapter is more descriptive in nature and it sets the stage for my legal enquiry into the application of antidiscrimination law to the field of housing and the implications arising from this application. In terms of geographical scope, the focus lies on European Union (EU) law and on the Council of Europe system, without losing view of international human rights law.

Firstly, I present a brief overview of the historical development of antidiscrimination law, explaining the context in which it arises, the general aims it is set up to pursue, and its evolution process (Section 1.1). I then explore the various forms that antidiscrimination provisions may take and the key legal concepts used in antidiscrimination law (1.2). Secondly, I consider the right to housing and how it is defined in international and European human rights law (1.3), to then look at the components of adequate housing and what it takes for this right to be realised (1.4). Thirdly, I delve into housing discrimination, introducing the enquiry I develop in subsequent chapters (1.5). A final section concludes (1.6).

1.1. The development of antidiscrimination law

Antidiscrimination law is the central body of law I engage with in this thesis. Over time, antidiscrimination law has grown to become very technical and complex, to the point that it can today be considered as a self-standing subdiscipline within human rights law. In this section, I briefly map out the history of antidiscrimination law, in particular at the Council of Europe and the EU levels.

The most distinctive trait of antidiscrimination norms is their emphasis on combatting differences in treatment based on certain specified characteristics. Antidiscrimination law has evolved from the broad prohibition of unequal treatment (“likes should be treated alike”) to target narrow distinctions linked to a limited number of characteristics, creating a nuanced and complex web of prohibitions and duties. Antidiscrimination norms stem from the key tenet that there should be no difference in treatment linked to certain traits or essential choices deemed fundamental for a human existence lived in dignity.

A brief overview of the historical evolution of antidiscrimination law helps us to better understand its aims and scope. From 1945 onwards, the heinous human rights violations committed before and during World War II, including the large-scale and systematic extermination of Jewish, disabled, Roma and LGBTQI+ individuals, made patent the need to introduce general and comprehensive prohibitions against discriminatory conduct.

Equality and nondiscrimination were thus enshrined as core principles in the Universal Declaration of Human Rights adopted in 1948, whose Article 2 reads:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.⁶

Many other international human rights instruments would follow suit and protect discriminatory conduct, translating this general prohibition into specific prohibitions in relation to particular types of rights (civil and political rights; economic, social, and cultural rights) or with regard to

⁶ United Nations, General Assembly, “Universal Declaration of Human Rights,” A/RES/217 (III) (10 December 1948).

particular prohibited discrimination grounds or disadvantaged groups (racialised individuals, women, children, persons with disabilities).⁷

In this thesis, the international human rights instruments that I will predominantly refer to are the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the Convention on the Rights of Persons with Disabilities (CRPD).

At the European level, nondiscrimination is enshrined in the European Convention on Human Rights (ECHR), adopted in 1950 in the framework of the Council of Europe. Article 14 ECHR states that:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.⁸

This is considered as an accessory provision, which must be invoked in conjunction with a substantive article of the Convention. Although a violation of Article 14 ECHR does not necessarily entail a breach of the substantive provision, there is no room for its application unless the facts at issue fall within the ambit of one or more of the rights protected in the Convention. In practice, this has been interpreted in a broad manner.⁹

⁷ See United Nations, General Assembly, “International Convention on the Elimination of All Forms of Racial Discrimination,” A/RES/2106 (XX) (21 December 1965); United Nations, General Assembly, “International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights,” A/RES/2200A (XXI) (16 December 1966); United Nations, General Assembly, “Convention on the Elimination of All Forms of Discrimination Against Women,” A/RES/34/180 (18 December 1979); United Nations, General Assembly, “Convention on the Rights of the Child,” A/RES/44/25 (20 November 1989); United Nations, General Assembly, “International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families,” A/RES/45/158 (18 December 1990); United Nations, General Assembly, “Convention on the Rights of Persons with Disabilities,” A/RES/61/106 (24 January 2007).

⁸ Council of Europe, “Convention for the Protection of Human Rights and Fundamental Freedoms,” ETS 5 (4 November 1950).

⁹ See *Handbook on European Non-Discrimination Law – 2018 Edition* (Luxembourg: European Union Agency for Fundamental Rights and Council of

Moreover, while Article 14 only prohibits discrimination in the enjoyment of the rights set forth in the Convention itself, Protocol No. 12 to the ECHR, in force since 2005, prohibits discrimination in the enjoyment of any right set forth by law.¹⁰

The other core human rights instrument within the Council of Europe system, the European Social Charter, also contains antidiscrimination clauses. Whereas the 1961 European Social Charter (ESC) only includes a reference to nondiscrimination in its Preamble,¹¹ the 1996 revised European Social Charter (RESC) dedicates a full article to it.¹² Article E RESC reads:

The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.

Within the EU context, three main phases can be roughly identified with regard to the evolution of antidiscrimination law.¹³ Initially, from the 1957 Treaty of Rome,¹⁴ equal treatment played a predominantly instrumental role for the achievement of the single market and the realisation of the free movement of persons, services, goods, and capital.

The Treaty of Rome only prohibited discrimination based on the nationality of a Member State and discrimination based on gender, both linked to economic objectives. In particular, the prohibition of discrimination against women in the context of wages was intended to avoid unfair competitive

Europe, 2018), sec. 1.3, <http://fra.europa.eu/en/publication/2018/handbook-european-law-non-discrimination>.

¹⁰ Council of Europe, “Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms,” ETS 177 (4 November 2000), art. 1.

¹¹ Council of Europe, “European Social Charter,” ETS 35 (18 October 1961).

¹² Council of Europe, “European Social Charter (revised),” ETS 163 (3 May 1996).

¹³ See Uladzislau Belavusau and Kristin Henrard, “The Impact of the 2000 Equality Directives on EU Anti-Discrimination Law: Achievements and Pitfalls,” in *EU Anti-Discrimination Law Beyond Gender*, ed. Uladzislau Belavusau and Kristin Henrard (Oxford: Hart Publishing, 2019), 6–17.

¹⁴ European Union, “Treaty establishing the European Economic Community” (25 March 1957).

advantages in the single market benefiting states which had not yet enacted such rules.¹⁵ A series of subsequent directives would clarify this prohibition.¹⁶

The 1997 Treaty of Amsterdam brought with it a sharper focus on fundamental rights, including gender mainstreaming, and expanded the prohibited discrimination grounds from sex to “racial or ethnic origin, religion or belief, disability, age or sexual orientation.”¹⁷ These Treaty provisions were later complemented by means of several directives.¹⁸

For our purposes, the two most relevant directives are Council Directive 2000/43/EC, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the “Race Equality Directive”),¹⁹ and Council Directive 2004/113/EC, implementing the principle of equal treatment between men and women in the access to and supply of goods and services (the “Gender Access to Goods and Services Directive”),²⁰ respectively prohibiting housing discrimination on the grounds of racial or ethnic origin and of gender.

¹⁵ Belavusau and Henrard, “The Impact of the 2000 Equality Directives on EU Anti-Discrimination Law,” 6.

¹⁶ European Union, “Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women,” OJ L 45 (19 February 1975); European Union, “Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions,” OJ L 39 (14 February 1976).

¹⁷ European Union, “Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts,” OJ C 340 (10 November 1997), art. 7.

¹⁸ See European Union, “Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation,” OJ L 303 (2 December 2000); European Union, “Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast),” OJ L 204 (26 July 2006).

¹⁹ European Union, “Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin,” OJ L 180 (19 July 2000).

²⁰ European Union, “Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services,” OJ L 373 (21 December 2004).

In 2007, the Treaty of Lisbon enhanced the centrality of equality and nondiscrimination in the EU framework by giving legally binding force to the Charter of Fundamental Rights of the European Union (CFREU) as a primary law instrument,²¹ at the same level as the Treaties, and by including a mainstreaming obligation for all discrimination grounds. Article 21(1) CFREU reads:

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

Despite the far-reaching language contained in this provision, the CFREU only applies to EU institutions, and to Member States insofar as they implement EU law. Moreover, the CFREU does not extend the field of application of EU law beyond what is already established in the Treaties.²²

In the 2010s, this trend of progressive improvement of the protection against discrimination in the EU was significantly slowed down. Particularly striking is the EU's failure to adopt the 2008 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation,²³ due to the lack of agreement within the Council of the European Union.

This directive would have prohibited discrimination in the access to goods and services, including housing, on the basis of the other prohibited grounds contained in the Treaties besides racial or ethnic origin and gender: that is, religion or belief, disability, age and sexual orientation. This would have represented a significant step forward in the protection against housing discrimination within the EU.

²¹ European Union, "Charter of Fundamental Rights of the European Union," OJ C 326 (26 October 2012).

²² See European Union, "Consolidated version of the Treaty on European Union," OJ C 326 (26 October 2012), art. 6(1); European Union, "Charter of Fundamental Rights of the European Union," art. 51(2).

²³ European Union, "Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation," COM/2008/0426 final (2 July 2008).

The Court of Justice of the European Union (CJEU) has been called on to interpret EU antidiscrimination provisions in a number of cases.²⁴ EU antidiscrimination provisions are regarded by the CJEU as specific instances of the general principle of equality, which requires that comparable situations not be treated differently and that different situations not be treated in the same way, unless such treatment is objectively justified.²⁵

The CJEU's interpretation has generally favoured a robust application of these provisions, including through the early acknowledgment that the equality principle had a horizontal direct effect and could thus be invoked by individuals against other individuals.²⁶

In conclusion, nondiscrimination was codified in international and European human rights law as a fundamental value rooted in human dignity and as a fundamental human right. As I develop in the next chapter, this right to nondiscrimination is ultimately rooted in a substantive notion of equality, which draws from different theories of justice. Suffice it to say for now that I understand substantive equality as a type of equality that ensures that all individuals can effectively interact with each other as equals in society. Let us consider now the different forms antidiscrimination provisions may take and the key concepts generally used in antidiscrimination law.

1.2. Key concepts in antidiscrimination law

Antidiscrimination legal provisions may take different forms. In their most primitive formulation, directly stemming from the equality principle, we encounter general equality clauses cast in general terms. These clauses generally prohibit any arbitrary or illegitimate difference made without an

²⁴ The “Equality Law in Europe: A New Generation” project at the European University Institute has compiled a database of all CJEU discrimination cases decided between 1970 and 2018. See Equality Law in Europe: A New Generation CJEU Database, available at: <https://equalitylaw.eui.eu/database/>.

²⁵ See, for instance, Court of Justice of the European Union, Judgment of 13 December 1984, *Sermide*, C-106/83, EU:C:1984:394, para. 28.

²⁶ See, for instance, Court of Justice of the European Union, Judgment of 8 April 1976, *Defrenne v. Sabena*, C-43/75, EU:C:1976:56.

adequate justification, using terms like “everyone is equal before the law” and conveying the maxim that equals should be treated alike.²⁷

These clauses are open-textured and they do not target particular grounds or specific groups of population suffering from structural discrimination, and they can therefore be considered as equality law provisions rather than antidiscrimination law provisions.

Antidiscrimination law provisions usually contain a ban on discriminatory conduct on the basis of either a closed or an open-ended list of grounds. They target salient groups experiencing structural disadvantage. The structural character refers here to persistent discrimination cutting across different spheres of life, “resulting in a situation where the prohibition of discrimination in any one of these spheres or, indeed, in all of them, will not suffice to ensure effective equality.”²⁸ This occurs because structural discrimination is the consequence of “deeply embedded patterns of disadvantage and exclusion that can only be addressed through changes to social and institutional structures.”²⁹

Closed lists of grounds incorporate a limited number of characteristics on the basis of which discrimination is prohibited (e.g. gender, race or ethnicity, disability, sexual orientation, age, religion and belief). By contrast, open-ended lists of grounds either prohibit discrimination “on any ground,” containing then an enumeration by way of example, or begin with an exemplifying enumeration of grounds and include at its end terms like “or any other ground,” “or other status.”

Notable examples of closed lists of grounds are those contained in the EU treaties and antidiscrimination law directives. By contrast, the CFREU contains an open-ended list of grounds, as most international and European human rights instruments do.

²⁷ See, for example, European Union, “Charter of Fundamental Rights of the European Union,” art. 20.

²⁸ Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary*, 2nd ed. (Cambridge: Cambridge University Press, 2014), 733.

²⁹ Daniel Moeckli, “Equality and Non-Discrimination,” in *International Human Rights Law*, ed. Daniel Moeckli et al., 3rd ed. (Oxford: Oxford University Press, 2018), 161.

Antidiscrimination norms (be they closed or open-ended) use a series of core concepts to qualify distinct types of situations where discrimination may have arisen. Different sorts of discriminatory conduct by public authorities or by private actors are addressed differently by these norms, depending on their nature or their effects. At the same time, these core concepts differ between legal orders. I take here EU antidiscrimination law as a reference point, discussing the specificities of these concepts under other international and European antidiscrimination norms at different points in my enquiry.

The main legal concepts used in EU antidiscrimination law are direct discrimination, indirect discrimination, the refusal of reasonable accommodation, discriminatory harassment, victimisation, and instruction to discriminate. Two related concepts, positive action and mainstreaming, help to clarify the duties owed by public authorities and private actors under certain circumstances to combat discrimination. Finally, three additional concepts like discrimination based on perceived characteristics, discrimination by association, and multiple discrimination serve to better understand the relationship between legal concepts and discrimination grounds. Let us explore these various concepts one by one.

Firstly, direct discrimination arises when one person is treated less favourably than another person is treated or would be treated in a comparable situation on the basis of a prohibited discrimination ground. This requires that one person is treated worse than another because of a certain characteristic or status they possess and that they are in a comparable, analogous, or relevantly similarly situation. Finding an appropriate comparator may sometimes be difficult.

Direct discrimination cannot be justified as a matter of principle, although EU antidiscrimination norms usually make exceptions by declaring that certain behaviours do not constitute discrimination, for example in the context of the requirements necessary for carrying out certain types of work (“genuine occupational requirements”). Antidiscrimination norms may also

allow for justification in certain specific cases, notably with regard to age discrimination.³⁰

Secondly, indirect discrimination occurs when a provision, criterion, or practice which is apparently neutral creates a particular disadvantage for a group defined by one of the prohibited grounds, without this measure being justified by a legitimate aim and being implemented through appropriate and necessary means. The disproportionate impact created by this provision, criterion, or practice on a specific group can be used as evidence of particular disadvantage. This type of discrimination can be proven, among others, by means of statistics concerning relative group advantage or disadvantage.³¹

Indirect discrimination is usually either a consequence of intentional discrimination hidden behind apparently neutral criteria in order to circumvent the prohibition of direct discrimination or the result of established and unchallenged rules which fail to take into account the specific situation of certain groups without a proper justification.³² Although there is no formal difference in treatment here, treating unequals equally may lead to unequal results due to structural biases embedded in those provisions, criteria, or practices.³³

In practice, the distinction between direct and indirect discrimination is not always clear-cut, and there may be differences in interpretation regarding how to qualify particular situations.³⁴ Some antidiscrimination norms, notably Article 14 ECHR and Protocol No. 12 to the ECHR, do not make an explicit distinction between direct and indirect discrimination, but they

³⁰ See Nicholas Bamforth et al., *Discrimination Law: Theory & Context, Text and Materials* (London: Sweet & Maxwell, 2008), 1119–21.

³¹ See Dagmar Schiek, “Indirect Discrimination,” in *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, ed. Dagmar Schiek, Lisa Waddington, and Mark Bell, *Ius Commune Casebooks for the Common Law of Europe* (Oxford: Hart Publishing, 2007), 397–99.

³² De Schutter, *International Human Rights Law*, 704.

³³ Moeckli, “Equality and Non-Discrimination,” 156.

³⁴ See further Mark Bell, “Direct Discrimination,” in *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, ed. Dagmar Schiek, Lisa Waddington, and Mark Bell, *Ius Commune Casebooks for the Common Law of Europe* (Oxford: Hart Publishing, 2007), 185–86.

rather focus on whether there is a “reasonable relationship of proportionality between the means employed and the aim sought to be realised.”³⁵

Thirdly, the refusal of reasonable accommodation constitutes another form of discrimination. Reasonable accommodations are necessary and appropriate modifications and adjustments made in light of the needs of a person in a specific situation to ensure that they enjoy or exercise their human rights on an equal basis with others.³⁶ These measures must not impose an undue burden on the person in charge of adopting them, in particular in terms of their economic cost. The obligation to adopt these measures may fall on public authorities or private actors, and reasonable accommodation measures are always taken on an individualised basis, which distinguishes them, as we will see later, from positive action measures.

In the context of disability, reasonable accommodation finds international recognition through the UN CRPD. The obligation to provide reasonable accommodation stems from the acknowledgement that, in certain cases, the interaction between an impairment and the physical or social environment may result in the inability for certain individuals to realise their human rights, such as their right to housing.³⁷ Refusing this reasonable accommodation therefore constitutes prohibited discrimination.

Fourthly, discriminatory harassment consists in an undesirable conduct linked to one of the prohibited grounds with the aim to harm dignity or to create an intimidating, hostile, degrading, or offensive environment.³⁸

³⁵ See, for instance, European Court of Human Rights, Second Section, *Guberina v. Croatia*, Application no. 23682/13 (22 March 2016).

³⁶ United Nations, General Assembly, “Convention on the Rights of Persons with Disabilities,” art. 2: “‘reasonable accommodation’ means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”

³⁷ Lisa Waddington, “Reasonable Accommodation,” in *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, ed. Dagmar Schiek, Lisa Waddington, and Mark Bell, Ius Commune Casebooks for the Common Law of Europe (Oxford: Hart Publishing, 2007), 631.

³⁸ European Union, “Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin,” art. 2(3). See further Aileen McColgan, “Harassment,” in *Cases, Materials and Text on National, Supranational and International Non-*

Sexual harassment is a specific form of harassment which has sexual connotations, be they physical, verbal, or nonverbal.³⁹ The wrong embedded in harassment is that it causes a specific harm to an individual's autonomy, interfering with their psychological wellbeing and maintaining and reinforcing patterns of subordination.⁴⁰

Fifthly, the prohibition of victimisation embodies a legal protection against retaliation, covering a broad range of adverse consequences affecting those who bring forward discrimination complaints as well as those who provide evidence, act as a witness, or intervene in support of another person in the context of a discrimination claim.⁴¹

Sixthly, instruction to discriminate refers to the behaviour consisting in inciting others to discriminate against a person, a group, or its members. This includes situations where a preference or a signal of discouragement is expressed of such a nature so as to lead a person to commit a discriminatory act. It is important to note that, under EU law, those who are enjoined to discriminate will also commit discrimination if they carry out the instruction.

To sum up, the six key concepts of antidiscrimination law presented until now are: direct discrimination, indirect discrimination, the refusal of reasonable accommodation, discriminatory harassment, victimisation, and instruction to discriminate. These six concepts serve to categorise a broad range of discriminatory conduct and to render the scope of antidiscrimination norms more concrete.

Discrimination Law, ed. Dagmar Schiek, Lisa Waddington, and Mark Bell, Ius Commune Casebooks for the Common Law of Europe (Oxford: Hart Publishing, 2007), 477–560.

³⁹ European Union, “Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast),” art. 2(1)(d).

⁴⁰ Bamforth et al., *Discrimination Law*, 471.

⁴¹ Tufyal Choudhury, “Instructions to Discriminate and Victimisation,” in *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, ed. Dagmar Schiek, Lisa Waddington, and Mark Bell, Ius Commune Casebooks for the Common Law of Europe (Oxford: Hart Publishing, 2007), 603.

If a specific conduct, be it an action or an omission, falls under any of these six concepts, antidiscrimination norms will generally be able to intervene and prohibit such conduct. To be sure, particular antidiscrimination norms at different levels may leave out of their scope certain actions or omissions that conceptually fall under this framework, and a number of exceptions or justifications may come into play.

The next two antidiscrimination legal concepts point to the duties of states and, in some circumstances, of private actors: positive action and mainstreaming.

The notion of positive action arises from the recognition that prohibiting discrimination is not enough to do away with structural discriminatory patterns.⁴² Positive action measures are specific measures seeking to proactively remedy factual inequalities experienced by certain groups when compared with the rest of the population in one or multiple areas of social life, or to counter the ongoing effects of these inequalities.⁴³ In certain cases, the aim will be to achieve diversity in certain settings rather than to rectify preexisting inequalities.⁴⁴ These measures are circumscribed and limited in scope to what is necessary to achieve specific aims, and they must be proportional to the aims sought.

Unlike the failure to provide a person with reasonable accommodation, obligation which is always individualised, positive action operates in group-based terms. Additionally, even though there is an obligation to make reasonable adjustments (for their refusal constitutes prohibited

⁴² See further Christopher McCrudden, *Gender-Based Positive Action in Employment in Europe: A Comparative Analysis of Legal and Policy Approaches in the EU and EEA* (Luxembourg: European Network of Legal Experts in Gender Equality and Non-Discrimination, 2019), <https://op.europa.eu/en/publication-detail/-/publication/271e827b-0435-11ea-8c1f-01aa75ed71a1>.

⁴³ Isabelle Hachez and Julie Ringelheim, “L’action positive,” in *Les grands arrêts du droit du handicap*, ed. Isabelle Hachez and Jogchum Vrielink, Grands arrêts (Larcier, forthcoming), 347.

⁴⁴ De Schutter, *International Human Rights Law*, 723–24.

discrimination), positive action measures under EU law are permitted but not required.⁴⁵

Positive action is premised on the recognition that members of different groups are not similarly positioned to access certain important social goods or to achieve the realisation of certain human rights.⁴⁶ These measures include, among others, monitoring, outreaching, and the preferential treatment of members of the underrepresented group.⁴⁷

For its part, mainstreaming entails the incorporation of a nondiscrimination perspective into all stages of policy making (design, implementation, monitoring, evaluation), with a view to promoting substantive equality. This translates into assessing the differential impact of policies on groups defined by a prohibited ground, and addressing this differential impact by creating mechanisms to close this gap which allow for the meaningful participation of disadvantaged groups.⁴⁸

The final three antidiscrimination law concepts presented here are those contributing to a better understanding of the relationship between legal concepts and discrimination grounds. These concepts are discrimination based on perceived characteristics, discrimination by association, and multiple discrimination.

Firstly, the concept of discrimination based on perceived characteristics serves to acknowledge that differences in treatment may also arise on the basis of assumptions or beliefs that a certain person possesses a prohibited ground, even if this turns out to be false and the person discriminated against

⁴⁵ Under some UN human rights instruments, positive action measures (termed “temporary special measures”) may be required in some circumstances. See further Hachez and Ringelheim, “L’action positive.”

⁴⁶ Olivier De Schutter, “Positive Action,” in *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, ed. Dagmar Schiek, Lisa Waddington, and Mark Bell, Ius Commune Casebooks for the Common Law of Europe (Oxford: Hart Publishing, 2007), 759.

⁴⁷ Christopher McCrudden, “Equality and Non-Discrimination,” in *English Public Law*, 2nd ed., Oxford Principles of English Law (Oxford: Oxford University Press, 2009). See further Juan Carlos Benito Sánchez, “Gender Quotas in Corporate Governance: A Comparative Perspective,” *Anti-Discrimination Law Review* 2017, no. 1 (2017): 125–144.

⁴⁸ Bamforth et al., *Discrimination Law*, 428.

does not in fact possess that characteristic or status. EU antidiscrimination law generally forbids this type of discrimination.

Secondly, the notion of discrimination by association addresses the situation where an individual is treated less favourably because they are closely associated with another individual who holds the relevant characteristic or status, even if the person experiencing the unequal treatment does not. This type of discrimination is also generally prohibited by EU antidiscrimination norms.

Thirdly, the idea of multiple discrimination conveys that discrimination may occur (and indeed it often occurs) on the basis of a combination of grounds instead of an isolated single ground. Multiple discrimination may refer to a concurrence of grounds which has a cumulative effect, that is, additive discrimination, or to a genuine combination of factors in the sense that their interaction creates a distinct form of disadvantage that cannot be captured by the mere addition of grounds, that is, intersectional discrimination.⁴⁹

Antidiscrimination norms, both in the EU and beyond, are generally not able to address multiple discrimination well enough, as they tend to be rooted in a “single axis” conceptualisation of discrimination.⁵⁰ Plenty of legal commentators have shown how this model obscures many practical experiences of discrimination, leaving out of the scope of these norms blatant discriminatory conducts which cannot be neatly mapped onto the prevailing ideal-type of discrimination enshrined in law. This forces disadvantaged

⁴⁹ The notion of intersectional discrimination was initially developed by Kimberlé Crenshaw working on the intersection between race and sex, focusing in particular on black women. See Kimberlé Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,” *University of Chicago Legal Forum* 1989 (1989): 139–167; Kimberlé Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color,” *Stanford Law Review* 43 (1991): 1241–1299. See further Shreya Atrey, *Intersectional Discrimination* (Oxford: Oxford University Press, 2019).

⁵⁰ See further Bamforth et al., *Discrimination Law*, 519–21.

individuals to conform to rigid legal preconceptions of discrimination if they want to have recourse to these norms.⁵¹

This brief overview concludes my legal and conceptual introduction to antidiscrimination law. Many of these concepts will reappear at different stages of my enquiry, and further explanations and elaborations are provided where needed. Continuing with this general approximation to the subject-matter of this thesis, I present now a short discussion about the right to housing, the second key element analysed in this research project.

1.3. The right to adequate housing

The right to housing is relatively well-defined today in international and European human rights law. Much of this definition is owed to the guidance provided by international and regional treaty-monitoring bodies, in particular the UN Committee on Economic, Social and Cultural Rights (CESCR), which monitors the ICESCR, and the European Committee of Social Rights (ECSR), which monitors the European Social Charter in both its original and its revised versions.

At the international level, the CESCR has developed the most universal, authoritative interpretation of the right to housing through its general comments, its concluding observations on periodic state reports and, more recently, its decisions (“views”) on individual communications brought under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.⁵²

The starting point here is Article 11(1) ICESCR, which recognises the right of everyone to “an adequate standard of living for himself and his family [sic], including adequate . . . housing, and to the continuous improvement of living conditions.”

⁵¹ See further Sandra Fredman, *Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law*. (Luxembourg: European Network of Legal Experts in Gender Equality and Non-Discrimination, 2016), 30, <https://op.europa.eu/en/publication-detail/-/publication/d73a9221-b7c3-40f6-8414-8a48a2157a2f>.

⁵² Leckie, “The Right to Housing,” 153.

At the European level, the role of the ECSR must be highlighted. The ECSR has put forward what is probably the most progressive and exhaustive definition of the guarantees surrounding the right to housing and the safeguards that this right provides, through its decisions on collective complaints and its conclusions on periodic state reports.

Article 31 RESC explicitly recognises the right to housing, enjoining states parties “to promote access to housing of an adequate standard; to prevent and reduce homelessness with a view to its gradual elimination; [and] to make the price of housing accessible to those without adequate resources.”

While the original 1961 ESC does not contain an explicit right to housing, Article 16 ESC, which protects the right of the family to social, legal, and economic protection, has been interpreted as conferring substantially the same protection as Article 31 RESC in most aspects relative to this right.⁵³

The right to housing has also received some attention at the EU level, even though housing is not as such an EU competence. The CFREU refers in its Article 34(3) to the right to “social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources.” Some commentators have argued that the CFREU ought to be used in a more proactive way to enable the EU’s intervention in the field of housing.⁵⁴

For its part, the European Pillar of Social Rights launched in 2017 also refers to housing in its Principle 19, noting that “access to social housing or housing

⁵³ European Committee of Social Rights, *European Roma Rights Centre (ERRC) v. Bulgaria*, Collective complaint no. 31/2005 (18 October 2006), para. 17; European Committee of Social Rights, *European Federation of National Organisations working with the Homeless (FEANTSA) v. France*, Collective complaint no. 39/2006 (5 December 2007), para. 54.

⁵⁴ See Padraic Kenna and Héctor Simón-Moreno, “Towards a Common Standard of Protection of the Right to Housing in Europe through the Charter of Fundamental Rights,” *European Law Journal* 25, no. 6 (2019): 608–22; Padraic Kenna, *Housing and Housing Rights in the EU Charter of Fundamental Rights*, Housing Rights Must Be Respected and Promoted by EU Institutions for EU Citizens 1 (Galway: Centre for Housing Law, Rights and Policy, National University of Ireland, Galway, 2020).

assistance of good quality shall be provided for those in need.”⁵⁵ This instrument, however, does not have a binding character.⁵⁶

Finally, it is important to note that some national constitutional courts, in particular the South African and the Indian ones, have made significant contributions to the global discussion about the right to housing and what it entails for this right to be realised in local contexts.⁵⁷

Moving now to the content and scope of the right to housing, it can be said from the outset that this right is a crucial part of every person’s life and well-being. Deprived of their right to housing, individuals and families are subject to violence, intimidation, and harassment. They are exposed to multiple health risks arising from malnourishment, vulnerability to infectious diseases, and the lack of access to safe drinking water and sanitation. This threatens their ability to lead a life in dignity and excludes them from participating in society on equal terms with others.

In the words of the former UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to nondiscrimination in this context (SRAH), Leilani Farha, “lived experience illustrates that adequate housing, dignity, security and life are so closely intertwined as to be essentially inseparable.”⁵⁸

Figures and estimates reveal that more than one billion people worldwide live in informal settlements or in poverty housing, and that around a hundred million people are homeless.⁵⁹ Circa one third of the deaths worldwide are

⁵⁵ European Union, “Interinstitutional Proclamation on the European Pillar of Social Rights,” OJ C 428 (13 December 2017).

⁵⁶ See further Olivier De Schutter, *The European Pillar of Social Rights and the Role of the European Social Charter in the EU Legal Order* (Strasbourg: CoE-FRA-ENNHRI-Equinet Platform on Economic and Social Rights, 2018).

⁵⁷ See Hohmann, *The Right to Housing*, 94–119.

⁵⁸ United Nations, General Assembly, “Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context,” A/71/310 (8 August 2016), para. 27.

⁵⁹ United Nations, Human Rights Council, “Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context,” A/HRC/31/54 (30 December 2015), para. 11.

linked to poverty and inadequate housing, and the death rate of homeless people is two to ten times higher than that of people with a home.⁶⁰ Processes such as the globalisation of housing markets, the financialisation and commodification of housing, and the financial and housing crises have exacerbated this dire situation worldwide, as I further explore in Chapter 6.⁶¹

The right to housing, once equated to the right to have a roof over one's head, takes today a much more extensive meaning.⁶² It designates "the right of every woman, man, youth and child to gain and sustain a safe and secure home and community in which to live in peace and dignity."⁶³ It therefore has an individual and a social or community-based dimension.

The notion of "home" is here autonomous: from a human rights perspective, when an individual or a family have lived in the same place for a long time and have developed sufficiently close and regular links with it, this place constitutes their home regardless of whether their occupation is lawful in light of domestic norms.⁶⁴

Furthermore, the right to housing is a right to *adequate* housing. The realisation of this right is premised on several adequacy components, which I examine in more detail in the next section, as well as certain more general requirements.

In general terms, realising the right to housing means that individuals and families must be able to participate meaningfully in decisions related to

⁶⁰ United Nations, General Assembly, "Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context," A/71/310, para. 11.

⁶¹ See also Padraic Kenna, "Introduction," in *Contemporary Housing Issues in a Globalized World*, ed. Padraic Kenna, Law, Property & Society (Farnham and Burlington: Ashgate, 2014), 1–35.

⁶² United Nations, Committee on Economic, Social and Cultural Rights, "General Comment No. 4: The right to adequate housing (Art. 11 (1) of the Covenant)," E/1992/23 (13 December 1991), para. 7.

⁶³ United Nations, Human Rights Council, "Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context," A/HRC/7/16 (13 February 2008), para. 4.

⁶⁴ See European Court of Human Rights, Fifth Section, *Winterstein and Others v. France*, Application no. 27013/07 (17 October 2013).

housing and housing rights.⁶⁵ This requires a direct involvement in decision-making as well as the possibility to weigh in on decisions affecting or impinging on their right to housing.

The right to housing also demands monitoring and data collection duties on the part of public authorities and, where appropriate, private actors.⁶⁶ Statistics and data collection prove invaluable for the design and implementation of specific housing policies and practices, as they allow for an evaluation of their possible differential impact on various groups of population.⁶⁷

Furthermore, comprehensive legislative review should take place periodically, with any legislation or policies that negatively affect the realisation of the right to housing being modified or repealed.⁶⁸ States are required to ensure the full realisation of the right to housing through positive measures, including the adoption of a human rights based approach to all housing policies and the establishment of forms and levels of public expenditure that adequately reflect society's unmet housing needs.⁶⁹

Finally, the effective realisation of the right to housing requires that adequate legal remedies be available to enforce the legal guarantees attached to it.⁷⁰ Due process safeguards must be in place to ensure that the claimants' procedural position is not unduly restricted, and judicial avenues should be open to examine possible infractions of these guarantees.

⁶⁵ United Nations, Committee on Economic, Social and Cultural Rights, "General Comment No. 4: The right to adequate housing (Art. 11 (1) of the Covenant)," para. 9.

⁶⁶ "General Comment No. 4: The right to adequate housing (Art. 11 (1) of the Covenant)," para. 13.

⁶⁷ See Julie Ringelheim and Olivier De Schutter, *Ethnic Monitoring – The Processing of Racial and Ethnic Data in Anti-Discrimination Policies: Reconciling the Promotion of Equality with Privacy Rights*, Collection du Centre des droits de l'homme de l'Université catholique de Louvain 6 (Brussels: Bruylant, 2010).

⁶⁸ Leckie, "The Right to Housing," 156.

⁶⁹ Leckie, 157.

⁷⁰ United Nations, Committee on Economic, Social and Cultural Rights, "General Comment No. 4: The right to adequate housing (Art. 11 (1) of the Covenant)," para. 17.

1.4. Components of adequate housing

The right to housing can be better understood from a conceptual standpoint by considering each of its adequacy components separately, while bearing in mind that these elements interact dynamically with each other. This means that the right to housing must be understood as an aggregate of its components: to determine whether it has been realised, these elements should not be taken in isolation but as a coherent whole.

According to the CESCR, while adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors, it comprehends seven universal components: legal security of tenure; location; availability of services, materials, facilities and infrastructure; habitability; accessibility; cultural adequacy; and affordability.⁷¹

In addition to these, the aforementioned general requirements (participation in decision-making, monitoring and data collection, legislative review, due process guarantees) must also be present in order to consider that the right to adequate housing has been realised.

Firstly, as part of their right to housing, all persons are entitled to legal security of tenure. This extends to tenure modalities such as rental public and private accommodation, owner-occupation, and cooperative housing, but also to emergency housing and to the occupation of housing without a legal title.⁷² Legal security of tenure specifically translates into the protection

⁷¹ “General Comment No. 4: The right to adequate housing (Art. 11 (1) of the Covenant),” para. 8. In the European context, the European Committee of Social Rights has clarified that the right to adequate housing requires “a dwelling which is structurally secure, safe from a sanitary and health point of view and not overcrowded.” In order to qualify as such, a dwelling must possess all basic amenities such as water, heating, waste disposal, sanitation facilities, electricity, etc. See European Committee of Social Rights, “Conclusions 2003 - France - Article 31-1,” 2003/def/FRA/31/1/EN (30 June 2003).

⁷² According to the CESCR, “all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. This guarantee also applies to persons living in rental accommodation, whether public or private; such persons should enjoy the right to housing even when the lease expires.” Committee on Economic, Social and Cultural Rights, “Communication No. 5/2015,” *Ben Djazia et al. v. Spain*, E/C.12/61/D/5/2015 (21 July 2017), paras. 13.1–13.2.

against forced eviction and against harassment, domestic or family violence, and other threats.

The protection against forced eviction afforded by the right to housing entails first and foremost an obligation for states to implement measures designed to restrict the number of evictions, whatever the reasons for them.⁷³ Illegal occupation of a site or a dwelling may justify the eviction of the illegal occupants as long as the criteria to qualify this occupation as illegal are not unduly restrictive and given that all procedural safeguards protecting the rights of those affected are complied with.⁷⁴

No evictions may be carried out at night or during the winter, and a particular attention must be paid to the consequences of an eviction, notably when it might render the persons affected homeless.⁷⁵ Evictions must never leave individuals in a state of vulnerability to the violation of other human rights, and they must always be carried out in accordance with the principles of reasonableness and proportionality. Finally, no eviction should take place if the public authority has not found alternative rehousing options and

⁷³ See United Nations, Committee on Economic, Social and Cultural Rights, “General Comment No. 7: The right to adequate housing (art. 11 (1) of the Covenant): Forced evictions,” E/1998/22 (20 May 1997). See further Francisco Jiménez García, “Tomarse en serio el Derecho internacional de los derechos humanos: especial referencia a los derechos sociales, el derecho a la vivienda y la prohibición de los desalojos forzosos,” *Revista Española de Derecho Constitucional* 101 (2014): 79–124.

⁷⁴ These procedural safeguards include, among others, an opportunity for genuine consultation with those affected and an adequate and reasonable notice prior to the scheduled date of eviction. See further United Nations, Committee on Economic, Social and Cultural Rights, “General Comment No. 4: The right to adequate housing (Art. 11 (1) of the Covenant),” para. 15. See also Committee on Economic, Social and Cultural Rights, “Communication No. 2/2014,” *IDG v. Spain*, E/C.12/55/D/2/2014 (13 October 2015). I have analysed this case in detail in Juan Carlos Benito Sánchez, “The UN Committee on Economic, Social and Cultural Rights’ Decision in *I.D.G. v. Spain*: The Right to Housing and Mortgage Foreclosures,” *European Journal of Human Rights / Journal Européen Des Droits de l’homme* 2016, no. 3 (2016): 320–339. At the European level, see European Committee of Social Rights, *European Roma Rights Centre (ERRC) v. Greece*, Collective complaint no. 15/2003 (8 June 2005).

⁷⁵ See, at the European level, European Committee of Social Rights, *European Roma Rights Centre (ERRC) v. Bulgaria*; European Court of Human Rights, *Winterstein and Others v. France*.

explored all feasible alternatives in a meaningful consultation with the persons affected.⁷⁶

Secondly and thirdly, location and the availability of services, materials, facilities, and infrastructure are essential for both the individual-based and the community-based dimensions of the right to housing. If the physical location of the dwelling does not allow for access to natural and common resources, essential services, and basic infrastructure, it may not be sufficiently adequate to secure the individual needs of its inhabitants. Moreover, if the location of housing renders it isolated or unreachable and disconnected from the broader community, the social dimension of housing may be equally compromised.

Housing which is situated in the outer periphery of cities without access to employment options, health care, or schooling cannot be considered as adequate.⁷⁷ Housing should not be placed either on polluted sites or in the immediate proximity of pollution sources that may threaten the health of its occupants.⁷⁸ As explained in Chapter 5, this element is closely connected with segregation phenomena.

Fourthly, housing itself, as a physical structure, must be habitable. This means that the dwelling must be able to protect its inhabitants against “cold, damp, heat, rain, wind or other threats to health, structural hazards, and

⁷⁶ See United Nations, Committee on Economic, Social and Cultural Rights, “General Comment No. 7: The right to adequate housing (art. 11 (1) of the Covenant): Forced evictions,” para. 13; Committee on Economic, Social and Cultural Rights, “Communication No. 37/2018,” *López Albán et al. v. Spain*, E/C.12/66/D/37/2018 (11 October 2019); Committee on Economic, Social and Cultural Rights, “Communication No. 52/2018,” *Rosario Gómez-Limón Pardo v. Spain*, E/C.12/67/D/52/2018 (14 April 2020). At the European level, see European Committee of Social Rights, *European Roma Rights Centre (ERRC) v. Bulgaria*; European Court of Human Rights, Fourth Section, *Yordanova and Others v. Bulgaria*, Application no. 25446/06 (24 April 2012). See further Michel Vols, “European Law and Evictions: Property, Proportionality and Vulnerable People,” *European Review of Private Law* 2019, no. 4 (2019): 719–52.

⁷⁷ United Nations, Committee on Economic, Social and Cultural Rights, “General Comment No. 4: The right to adequate housing (Art. 11 (1) of the Covenant),” para. 8.(f).

⁷⁸ See European Court of Human Rights, Chamber, *López Ostra v. Spain*, Application no. 16798/90 (9 December 1994); European Court of Human Rights, Grand Chamber, *Öneryıldız v. Turkey*, Application no. 48939/99 (30 November 2004).

disease vectors.”⁷⁹ Housing must be able to protect and guarantee the health and well-being of its occupants, and it should be spacious enough to accommodate their needs, meaning that it should be of an adequate size for the structure of the household and that it must not be overcrowded.

Fifthly, housing must be accessible. Construction norms and guidelines must strive to render housing and the built environment accessible to all of its potential users. In the context of disability, this specifically means that existing housing structures must be transformed to accommodate the needs of persons with disabilities, including by financial incentives on the part of the state where necessary, and that new housing structures must be designed so as to allow for universal access. These obligations are further explored in Chapter 3.

Sixthly, housing policies must be compatible with the expression of diverse cultural identities.⁸⁰ This component is particularly important for ethnic and cultural minorities, who may conceive of housing in a different way than the majority of the population. In Europe, the failure to guarantee the cultural adequacy of housing is most visible with regard to Travellers, who live for the most part in mobile homes and not in “bricks and mortar” dwellings.⁸¹ I deal with this issue in depth in Chapter 3.

Lastly, the affordability element translates into the idea that the total financial costs associated with housing should not be excessively constraining so as to threaten or compromise the realisation of other human rights. States should ensure that the percentage of housing-related costs within the total disposable income of families remains reasonable.⁸²

⁷⁹ United Nations, Committee on Economic, Social and Cultural Rights, “General Comment No. 4: The right to adequate housing (Art. 11 (1) of the Covenant),” para. 8.(d).

⁸⁰ “General Comment No. 4: The right to adequate housing (Art. 11 (1) of the Covenant),” para. 8.(g).

⁸¹ See Nicolas Bernard, “Quel droit au logement pour les gens du voyage?,” *Les échos du logement* 1, no. 4 (2012): 3–18; Yvonne Donders, “Protecting the Home and Adequate Housing: Living in a Caravan or Trailer as a Human Right,” *International Human Rights Law Review* 5 (2016): 1–25.

⁸² United Nations, Committee on Economic, Social and Cultural Rights, “General Comment No. 4: The right to adequate housing (Art. 11 (1) of the Covenant),” para. 8.(c).

In this regard, states should establish housing benefits for those unable to obtain affordable housing in the private market and ensure the sufficient provision of public or social housing targeted in principle at these groups.⁸³ I further consider this component in Chapter 4, as regards socioeconomic disadvantage, as well as in Chapters 6 and 7, in the context of housing commodification and of decommodification policies.

In closing, having set out the requirements linked to the right to adequate housing in international and European human rights law and having discussed the legal and conceptual framework surrounding the right to nondiscrimination, I now present a brief approximation to the core subject-matter of my enquiry: housing discrimination.

1.5. Delving into housing discrimination

As advanced in the general introduction, the aim of this thesis is to examine, from a legal perspective, the conceptual and practical implications arising from the application of antidiscrimination law to the field of housing.

The first question to be asked after having explored the legal and conceptual framework for these two dimensions separately is to what extent they overlap or interact with one another. More questions arise along the same lines: What does an antidiscrimination law perspective add to the field of housing? What can we learn about existing antidiscrimination norms from the viewpoint of the right to adequate housing?

The starting point here is the observation that housing discrimination is a persistent and pervasive phenomenon in our societies. The former UN SRAH, Leilani Farha, recently noted that “discrimination, exclusion and inequality are at the heart of almost all violations of the right to housing.”⁸⁴

⁸³ In the European context, see European Committee of Social Rights, *European Federation of National Organisations working with the homeless (FEANTSA) v. France*.

⁸⁴ United Nations, Human Rights Council, “Guidelines for the Implementation of the Right to Adequate Housing. Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context,” A/HRC/43/43 (26 December 2019), para. 43.

This means that housing policies must be conceived of and implemented so as to mitigate the effects of discrimination against disadvantaged groups, taking account of their specific circumstances. Although many states have adopted antidiscrimination norms that apply to the housing sector, these norms have for the most part not been able to tackle structural patterns of discrimination in housing.⁸⁵

Housing discrimination is, moreover, a phenomenon which has not yet been the subject of a thorough academic legal analysis in the European context. This thesis provides such an analysis, by showing the multiple consequences arising from the application of antidiscrimination norms to the field of housing and exploring how housing prompts us to rethink certain aspects of existing antidiscrimination norms, notably their disconnection with discrimination based on socioeconomic disadvantage.

My argument is as follows. As a matter of principle, every person has the right not to be discriminated against in the access to and the enjoyment of important social goods like housing. At the same time, in order to be fully realised, the right to housing must be secured in a nondiscriminatory manner.⁸⁶

This means, on the one hand, that the right to housing of individuals and families cannot be made dependent on their belonging to a specific group defined by racial or ethnic origin, disability, gender, age, sexual orientation, political or religious beliefs, economic or other status, etc. On the other hand, facially neutral housing policies or practices that have a disproportionate negative impact on these groups cannot be adopted if they do not seek to achieve a legitimate aim or if they are not geared towards this aim in a strict relationship of proportionality.⁸⁷

⁸⁵ United Nations, Human Rights Council, “Guidelines for the Implementation of the Right to Adequate Housing. Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context,” A/HRC/43/43, para. 46.

⁸⁶ United Nations, Committee on Economic, Social and Cultural Rights, “General Comment No. 4: The right to adequate housing (Art. 11 (1) of the Covenant),” para. 6.

⁸⁷ See United Nations, Committee on Economic, Social and Cultural Rights, “General Comment No. 20: Non-discrimination in economic, social and cultural

Beyond this, I delve into the philosophical foundations of antidiscrimination law to determine the central aims that antidiscrimination norms ought to pursue. As developed in Chapter 2, I argue for a pluralistic account of antidiscrimination law linked to the idea of substantive equality.

I examine the most salient theories of justice to clarify the notion of substantive equality, concluding that it encompasses various dimensions like redistribution, recognition, participation, and transformation. Building on this understanding, I set out four central aims of antidiscrimination norms: eliminating hostility, prejudice, and stigma; recognising cultural diversity and avoiding misrecognition; adapting existing housing structures; and ensuring a fair distribution of important social goods like housing.

The first three aims of my account of antidiscrimination law (eliminating hostility, prejudice, and stigma; recognising cultural diversity and avoiding misrecognition; adapting existing housing structures) can be examined in a combined manner, as evidenced in Chapter 3.

These three aims all raise questions as to how to properly mobilise antidiscrimination legal concepts like direct discrimination, discriminatory harassment, indirect discrimination, reasonable accommodation and accessibility to ensure the realisation of the right to nondiscrimination and the right to adequate housing of disadvantaged individuals and groups.

My argument here is that those legal concepts permit to elaborate and expand on the rationale and implications of certain right to adequate housing components and that they allow us to address human rights concerns that cannot be sufficiently tackled through the right to housing alone.

On the one hand, antidiscrimination law leads to enriching certain adequacy components of the right to housing, like cultural adequacy or accessibility. While these notions are included as part of the right to adequate housing, they still lack concreteness regarding their rationale and their practical application in some cases. It is here where antidiscrimination law

rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights),” E/C.12/GC/20 (2 July 2009).

comes in, reinforcing the link of these components with substantive equality and further developing their implications.

Firstly, the misrecognition of certain population groups and the need for norms, policies, and practices to be culturally adequate has been largely developed in antidiscrimination law, mostly through the notion of indirect discrimination, and this beyond the housing context (including with regard to civil and political rights and to other social rights). Antidiscrimination law refocuses attention on the link between cultural adequacy and substantive equality, and to the fact that apparently neutral norms, policies, and practices may be discriminatory against certain disadvantaged groups by not sufficiently accommodating their situation and needs.

Secondly, the idea of accessibility and connected notions like reasonable accommodation have been thoroughly developed in antidiscrimination law, which has laid down in detail what these obligations entail in fields beyond housing and beyond disability (notably, in the field of employment and occupation or with regard to religion or belief), producing a rich body of law that can illustrate this component of the right to adequate housing and its implications in the housing context.

On the other hand, antidiscrimination law also allows us to address human rights concerns that cannot be adequately tackled through the right to adequate housing alone, notably breaches of the dignity and worth of individuals rooted in group-based prejudice, hostility and stigma leading to a violation of their substantive equality. In these cases, recognising a right to housing violation is not enough, insofar as these violations go beyond the material harm related to the nonrealisation of the right to adequate housing.

As I will explain, a symbolic harm is present in these cases deriving from the fact that the ability of disadvantaged groups to participate in society equally as others and to stand in relations of equality with their peers is negated or hindered. Antidiscrimination law comes in precisely to address this specific concern, particularly through concepts like direct discrimination and discriminatory harassment, allowing us to establish a strong link between the right to adequate housing and substantive equality.

The fourth aim (ensuring a fair housing distribution) leads me to discuss the incorporation of socioeconomic disadvantage as a prohibited ground of discrimination in antidiscrimination norms. As I show in Chapter 4, this ground is absent from some antidiscrimination provisions, and it is underused in those legal orders which do include socioeconomic criteria among the prohibited discrimination grounds. Beyond a mere formal recognition of this ground, I argue that it is essential to use the prohibition of socioeconomic disadvantage to tackle specific instances of discrimination as well as broader socioeconomic inequalities in society.

I resort to two case studies to further clarify the implications of applying an antidiscrimination law perspective to particular housing issues. I therefore look at processes of housing segregation, on the one hand, and processes of housing commodification and financialisation, on the other hand.

In Chapter 5, I show that housing segregation has important implications in terms of antidiscrimination law, and that the legal concepts proper to antidiscrimination norms can effectively be deployed to combat segregation in different instances: when states foster segregation, when states do not intervene to remedy a situation of de facto segregation, and when states implement desegregation policies.

In Chapter 6, I consider how the phenomena of housing commodification and financialisation have discriminatory consequences on disadvantaged groups, both along status-based and socioeconomic lines. I discuss the role and responsibility of states and of private actors in this regard, arguing that antidiscrimination law can be successfully mobilised to tackle these processes beyond an approach exclusively based on the right to housing.

Finally, I argue that the previous considerations ultimately point to the realisation that we must aim towards diversity-conscious, all-inclusive housing policies, elaborated while bearing all these insights in mind. These policies must be appropriately implemented and closely monitored so as to allow for the full realisation of the right to nondiscrimination and the right to housing for all. I explore this in Chapter 7, looking at procedural and substantive avenues to achieve diversity-conscious, all-inclusive housing policies.

1.6. Conclusion

In this chapter, I have presented the legal and conceptual frameworks relative to antidiscrimination law, on the one hand, and the right to housing, on the other hand. I have approached these two subjects in mostly descriptive terms, with the aim to contextualise the discussion that follows in subsequent chapters. I have also mentioned the core issues related to housing discrimination that I touch upon in my enquiry.

In summary, the most distinctive trait of antidiscrimination norms is their emphasis on the elimination of structural differences in treatment based on certain characteristics or elements deemed fundamental to a human existence lived in dignity. For its part, the right to housing is understood in international and European human rights law as a right to *adequate* housing. This means that certain adequacy components along with a series of more general requirements must be secured in order for this right to be realised.

In the next chapter, I rely heavily on political and legal philosophy to look at the philosophical foundations of antidiscrimination law, including through an exploration of the idea of substantive equality and salient theories of justice, and I reflect on what aims antidiscrimination norms ought to pursue.

Chapter 2

Philosophical foundations of antidiscrimination law

In this chapter, I explore the philosophical foundations of antidiscrimination law to elucidate the aims that antidiscrimination norms ought to pursue. I consider the most salient and relevant theories of justice to arrive at an understanding of substantive equality centred on the maxim that all individuals should be able to interact with one another as equals in society.

Putting the notion of substantive equality, understood in this sense, at the core of my account of antidiscrimination law, I argue that four specific aims should be pursued by antidiscrimination norms: eliminating hostility, prejudice, and stigma; recognising cultural diversity and avoiding misrecognition; adapting existing structures; and ensuring a fair distribution of certain important social goods.

Elaborating a comprehensive theory of antidiscrimination law is admittedly beyond the scope of my enquiry, and the present chapter is therefore restricted to sketching out some of the main characteristics of the account of antidiscrimination law I deploy as a basis for the analysis that ensues.

Consequently, I first present the main lines of my pluralistic account of antidiscrimination law, clarifying its connection to substantive equality (Section 2.1). I then look at selected theories of justice to elucidate this notion, focusing on redistribution, recognition, and participatory parity (2.2). I continue my examination of substantive equality as a foundational principle for my pluralistic account, introducing the four central aims that I consider antidiscrimination norms ought to pursue (2.3). Lastly, I advance some conceptual reflections as to how to ensure a fair housing distribution (2.4). A final section concludes (2.5).

2.1. A pluralistic account of antidiscrimination law

As advanced in the previous chapter, antidiscrimination law is concerned with a particular subset of inequalities: structural inequalities resulting from unfair treatment or particular disadvantage related to certain characteristics.

Inequalities are structural when they operate across multiple important spheres of life, as a result of deeply embedded patterns of disadvantage and exclusion. In this sense, antidiscrimination law embodies a transformative project seeking to “eliminate the meanings, practices and institutions which unjustifiably discriminate, stigmatise or disadvantage members of groups in important areas of social life.”⁸⁸

An overview of antidiscrimination law in international, European and national law raises, however, multiple questions. Whereas consensus exists in principle as to the moral condemnation of discrimination in the terms described above, the specifics of what constitutes discrimination or what acts and omissions ought to be prohibited by legal norms are the subject of discussion and debate, in particular when they seek to combat indirect or more subtle forms of discrimination.⁸⁹

As a matter of fact, antidiscrimination law is not limited to addressing overt prejudice and hostility towards certain population groups, but it “reflects a far more complex interplay of past and present discrimination, social and economic factors, and economically rational decisions.”⁹⁰ Generally speaking, what matters to most theorists of antidiscrimination law are

⁸⁸ Bamforth et al., *Discrimination Law*, 173. See further Alberto Raúl Coddou McManus, “A Transformative Approach to Anti-Discrimination Law in Latin America” (PhD Thesis, London, University College London, 2018).

⁸⁹ Julie Ringelheim, Ginette Herman, and Andrea Rea, “Introduction. Politiques antidiscriminatoires : interroger les effets d’une action publique transnationale,” in *Politiques antidiscriminatoires*, ed. Julie Ringelheim, Ginette Herman, and Andrea Rea, Ouvertures politiques. Recherches (Louvain-la-Neuve: De Boeck, 2015), 12.

⁹⁰ Cass R. Sunstein, “Three Civil Rights Fallacies,” *California Law Review* 79 (1991): 761.

concerns about the unequal availability of public goods and about the stigmatisation or marginalisation of certain individuals and groups.⁹¹

Different accounts of antidiscrimination law provide various reference points from which to assess the current iteration of antidiscrimination norms, suggesting a particular interpretation of those norms according to certain principles and guiding potential efforts for reform and evolution. To be sure, there is no agreement between antidiscrimination law scholars on a single account of antidiscrimination law: some commentators even consider that antidiscrimination norms are built on a more or less chaotic set of rules which does not respond to any coherent rationale.⁹²

I defend here a pluralistic account of antidiscrimination law which accommodates various elements that I consider integral to discriminatory phenomena. This choice is justified by the observation that discrimination responds to a multiplicity of “wrong-making characteristics,” which may only be completely apprehended by means of a wide, all-encompassing approach. Reducing these various elements to any given one may obscure some of those dimensions, neglecting and conflating them, leaving their specificities unrecognised, and denying the potential of antidiscrimination norms to effectively tackle these processes.

To clarify why discrimination is wrong, a reference can be made to Blum’s list of distinct “wrong-making characteristics” proper to discrimination. His enumeration includes demeaning, subordinating, and stigmatising individuals or groups; reinforcing social stereotypes; unfairness in the distribution of important social benefits; and impinging on the freedom to deliberate about important life decisions without having to take account of irrelevant factors.⁹³

⁹¹ See Deborah Hellman and Sophia Moreau, “Introduction,” in *Philosophical Foundations of Discrimination Law*, ed. Deborah Hellman and Sophia Moreau (Oxford: Oxford University Press, 2013), 2.

⁹² See George Rutherglen, “Concrete or Abstract Conceptions of Discrimination?,” in *Philosophical Foundations of Discrimination Law*, ed. Deborah Hellman and Sophia Moreau (Oxford: Oxford University Press, 2013), 115–137.

⁹³ Lawrence Blum, “Racial and Other Asymmetries: A Problem for the Protected Categories Framework for Anti-Discrimination Thought,” in *Philosophical*

Along the same lines, Eidelson recalls that some paradigmatic forms of wrongful discrimination humiliate, stigmatise, and demean. Other forms express a kind of disrespect or contempt for the equal worth of those who are disfavoured, failing to account for cultural diversity and causing misrecognition.⁹⁴

For Choudhry, antidiscrimination norms are best understood as measures to realise a commitment to distributive justice for individuals.⁹⁵ In his view, discrimination is unjust because it denies persons access to a material good or opportunity on the basis of reasons that are irrelevant to the distribution of that material good or opportunity.⁹⁶

I therefore build on the premise that there is a variety of elements which make discriminatory acts wrong or unfair, and consequently that the account of antidiscrimination law that should guide my analysis has to address these multiple elements by means of a pluralistic approach.

As I argue along this chapter, this pluralistic approach is premised on the idea of substantive equality as a foundational principle of antidiscrimination law. This concept allows antidiscrimination norms to address these multiple wrong-making characteristics in a holistic, complex, and nuanced manner, by aiming towards an idea of equality that encompasses different dimensions like redistribution, recognition, the elimination of hostility, prejudice, and stigma, and the transformation of existing structures.

To further explore this pluralistic account of antidiscrimination law and its connection to substantive equality, I now consider several salient theories of justice, which provide us with a philosophical grounding from which to assess competing ideas of equality. I will then discuss in more detail what I

Foundations of Discrimination Law, ed. Deborah Hellman and Sophia Moreau (Oxford: Oxford University Press, 2013), 188.

⁹⁴ Benjamin Eidelson, “Treating People as Individuals,” in *Philosophical Foundations of Discrimination Law*, ed. Deborah Hellman and Sophia Moreau (Oxford: Oxford University Press, 2013), 203.

⁹⁵ Sujit Choudhry, “Distribution vs. Recognition: The Case of Antidiscrimination Laws,” *George Mason Law Review* 9, no. 1 (2000): 145.

⁹⁶ Choudhry, 152–53.

understand by substantive equality and why this notion forms the backbone of the pluralistic account of antidiscrimination law I deploy in my enquiry.

2.2. Theories of justice

In this section, I firstly consider theories of justice based on redistribution, looking at two authors in particular: Rawls and Sen. Through Young's critique to the distributive paradigm of justice, I then look into theories of justice based on recognition, focusing on Taylor and Honneth. I finally resort to Fraser's notion of participatory parity as a way to reconcile these two paradigms, making a link to Anderson and Rosanvallon's idea of relational equality.

While many more theories of justice could be recalled, my aim here is to narrowly present the most well-known and relevant theories for my enquiry, allowing me to give meaning to the notion of substantive equality that serves as a basis for my pluralistic account of antidiscrimination law.

The philosophical discussion around theories of justice was rekindled following the publication of Rawls's book *A Theory of Justice* in 1971.⁹⁷ Although Rawls's thought evolved in his later works, this book constituted a breakthrough in political philosophy, prompting a renewed discussion around social justice which set the framework for the academic discussions that would take place from the 1970s to this day.⁹⁸

Rawls's theory of justice took some distance from the hegemonic utilitarianism of his time, aiming to synthesise the liberal emphasis on individual liberty with the egalitarianism of social democracy.⁹⁹ His theory sought to justify a certain level of redistribution on the basis of a moral

⁹⁷ John Rawls, *A Theory of Justice* (Cambridge, MA: The Belknap Press of Harvard University Press, 1971).

⁹⁸ See Katrina Forrester, *In the Shadow of Justice: Postwar Liberalism and the Remaking of Political Philosophy* (Princeton: Princeton University Press, 2019), 1–2.

⁹⁹ Nancy Fraser, "Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation," in *Redistribution or Recognition?: A Political-Philosophical Exchange*, by Axel Honneth and Nancy Fraser (London: Verso, 2003), 10.

account of social justice. Welfare state egalitarianism could be justified in a new manner, through an ethical theory of distribution.¹⁰⁰

Rawls thus developed a theoretical framework explaining how society ought to allocate important goods and burdens among individuals. For Rawls, the primary concern of justice is the way in which social institutions distribute fundamental rights and duties, determining the division of advantages and burdens flowing from social cooperation.¹⁰¹

Rawls argues that we are all committed to an ideal of what a good life is. This ideal differs for each person, but there are certain things that all of us need in order to pursue a good life, whatever its particular content. These necessary elements are called “primary goods,” which encompass social primary goods (directly distributed by social institutions: income and wealth, opportunities and powers, rights and liberties, self-respect, etc.), and natural primary goods (which refer to natural endowments: intelligence, health, imagination, talent, etc.).¹⁰²

Building on this premise, Rawls constructs his theory of justice in terms of the articulation between principles of distributive justice. His general idea of justice can be summarised in the maxim that “all social primary goods . . . are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favoured,” as long as equal basic liberties for all are guaranteed.¹⁰³

In their revised form, the two principles of justice defended by Rawls read as follows:

¹⁰⁰ See Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge, MA: The Belknap Press of Harvard University Press, 2018), 39–40. See also Stefan Gosepath, “Equality,” in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, 2011, <https://plato.stanford.edu/archives/spr2011/entries/equality/>; Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford: Oxford University Press, 1990), chap. 2; John E. Roemer, *Theories of Distributive Justice* (Cambridge, MA: Harvard University Press, 1998), chap. 4; Gerald Gaus and Fred D’Agostino, eds., *The Routledge Companion to Social and Political Philosophy* (New York: Routledge, 2013), chap. 29.

¹⁰¹ Rawls, *A Theory of Justice*, 1971, 4.

¹⁰² Rawls, 62. See also Kymlicka, *Contemporary Political Philosophy*, 64.

¹⁰³ Rawls, *A Theory of Justice*, 1971, 303.

- (a) Each person has the same infeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and
- (b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle).¹⁰⁴

Several years after Rawls first developed his theory, Sen would defend that the idea of “capabilities” is a more appropriate concept to assess inequalities between individuals.¹⁰⁵ Sen believed that Rawls’s theory failed to take sufficiently into account the relative abilities of individuals to convert primary goods into valued ends. It assumed without sufficient justification that everyone has the same physical needs and psychological capacities.¹⁰⁶

In practice, there are plenty of differences between individuals in their ability to convert means into ends. These differences can be personal, social, or environmental: capabilities are a function of traits and divisible resources, but also of social relations and norms, as well as the structure of opportunities, goods, and public spaces in a given society.¹⁰⁷

Sen uses the example of a person with a severe disability: if we were to use primary goods as the metric of justice, this person would be equally well-off as a peer with exactly the same social primary goods but no disability. The additional resources needed for a person with disabilities due to social and environmental barriers to convert income into utility are discounted in Rawls’s theory.¹⁰⁸

¹⁰⁴ John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge, MA: The Belknap Press of Harvard University Press, 2001), 42–43.

¹⁰⁵ Amartya Sen, “Equality of What?,” in *Tanner Lectures on Human Values*, vol. 1 (Cambridge: Cambridge University Press, 1980), 195–220.

¹⁰⁶ Silvina Ribotta, “Necesidades, igualdad y justicia. Construyendo una propuesta igualitaria de necesidades básicas,” *Derechos y Libertades* 24 (2011): 262.

¹⁰⁷ See Elizabeth S. Anderson, “What Is the Point of Equality?,” *Ethics* 109 (1999): 319.

¹⁰⁸ Sen, “Equality of What?,” 215. See also Harry Brighouse and Ingrid Robeyns, “Introduction: Social Primary Goods and Capabilities as Metrics of Justice,” in *Measuring Justice: Primary Goods and Capabilities*, ed. Harry Brighouse and Ingrid Robeyns (Cambridge: Cambridge University Press, 2010), 3–6. Faced

The capabilities theory thus shifts the focus from the space of means, in the form of commodities and resources, to capabilities, that is, “vectors of functionings, reflecting the person’s freedom to lead one type of life or another.”¹⁰⁹

I look now at the critiques formulated against distributive theories of justice, which are as diverse in nature as these theories themselves. Overall, critics have sought to propose alternative models of social justice that do not conceptualise justice in terms of the fair distribution of social goods between individuals in a society.

According to Young, the distributive paradigm of justice tends to ignore the socially structured institutional context that helps determine distributive patterns. Distributive theories should go beyond, she argues, and consider other elements of justice, such as decision-making power and procedures, the division of labour, or culture.¹¹⁰

Young considers that theories of justice focusing on distribution ignore the dynamics of oppression and domination present in society: these are structural or systemic phenomena which exclude individuals from participating in determining their actions or the conditions of their actions.¹¹¹ Young concludes that such unequal social relations generate distributive inequalities.

Other authors have developed the idea of recognition, which corresponds to inequalities in the mutual respect and concern that people have for one

with this objection, Rawls later acknowledged that his theory presumes needs and abilities “within the normal range,” and claimed that we must first work out a robust general theory of justice before trying to extend it to more complex cases. See John Rawls, *A Theory of Justice*, Rev. ed. (Cambridge, MA: The Belknap Press of Harvard University Press, 1999), 83–84; Rawls, *Justice as Fairness: A Restatement*, 170–76.

¹⁰⁹ Amartya Sen, *Inequality Reexamined*, Russell Sage Foundation (Oxford: Oxford University Press, 1992), 40.

¹¹⁰ Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990), 15.

¹¹¹ Young understands oppression as an institutional constraint on self-development, that is, on the development and exercise of one’s capacities or the expression of one’s experience. She understands domination as an institutional constraint on self-determination, that is, a structural or systemic phenomenon which excludes people from participating in determining their actions or the conditions of their actions. See Young, 38.

another in society.¹¹² Based on a Hegelian conception, recognition refers to “the central importance of inter-personal affirmation to our sense of who we are.”¹¹³ If identity is partially constructed through the way in which others value us, recognition wrongs will arise in the presence of denigration, humiliation, or otherwise the failure to value individuals sufficiently.

Recognition wrongs may not only arise from interpersonal conduct, but also from state action. Institutional bias, which the recognition dimension also seeks to counter, is likely to create misrecognition as “seen or detected in process, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and . . . stereotyping which disadvantage [certain groups].”¹¹⁴

For Taylor, the solution to misrecognition requires a “politics of difference” emphasising the uniqueness of specific characteristics, especially in cultural terms.¹¹⁵ In Honneth’s understanding, the necessary conditions must be guaranteed so as to provide everyone with the possibility to live the life they want in a social environment where this life is either adequately recognised or at least not looked upon negatively.¹¹⁶ These authors therefore argue that recognition, not redistribution, is at the basis of social justice.

I have briefly considered theories of justice based on distribution, looking at the theories of Rawls and Sen, as well as theories of justice based on recognition, considering the approaches of Taylor and Honneth. Some authors, however, have tried to reconcile these two approaches, without losing sight of the existing dynamics of domination and oppression highlighted by Young. It is notably the case of Fraser, whose concept of

¹¹² Fraser, “Social Justice in the Age of Identity Politics,” 29.

¹¹³ Fredman, *Discrimination Law*, 17.

¹¹⁴ Sir William Macpherson of Cluny, “The Stephen Lawrence Inquiry” (London: United Kingdom, Secretary of State for the Home Department, 1999), sec. 6.34.

¹¹⁵ Charles Taylor, “The Politics of Recognition,” in *Multiculturalism: Examining the Politics of Recognition*, ed. Amy Gutmann (Princeton: Princeton University Press, 1992), 37. See further Mattias Iser, “Recognition,” in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, 2019, <https://plato.stanford.edu/archives/sum2019/entries/recognition/>.

¹¹⁶ Axel Honneth, “Redistribution as Recognition: A Response to Nancy Fraser,” in *Redistribution or Recognition?: A Political-Philosophical Exchange*, by Axel Honneth and Nancy Fraser (London: Verso, 2003), 177.

“participatory parity” builds on the idea that justice requires social arrangements that permit all individuals to interact with each other as peers.¹¹⁷

This is strongly linked with the idea of relational equality, developed by authors like Anderson and Rosanvallon, which refers to the idea that all members of a democratic society have a just claim to stand in relations of equality with their fellow citizens.¹¹⁸ For Rosanvallon, we must primarily conceive of equality “as a relation, as a way of making a society, of producing and living in common.”¹¹⁹ By understanding equality as relational, we acknowledge that all members of society must have equal standing without domination or marginalisation, enjoying an equal access to the basic institutions of society.¹²⁰

Coming back to Fraser, at the core of her notion of social justice is the idea that material resources must be such as to ensure participants’ independence and voice, which connects with distributive justice, and at the same time that institutionalised patterns of cultural value must express equal respect for all and ensure equal opportunities to achieve social esteem, which links to the recognition dimension of justice.¹²¹

Fraser’s approach foregrounds that capitalist societies encompass two analytically distinct orders of subordination. On the one hand, there is class stratification, rooted in economic dynamics which create “social arrangements that institutionalize deprivation, exploitation, and gross disparities in wealth, income, and leisure time.”¹²² On the other hand, there

¹¹⁷ Fraser, “Social Justice in the Age of Identity Politics,” 36–37.

¹¹⁸ See Elizabeth Anderson, *The Imperative of Integration* (Princeton: Princeton University Press, 2010), 16–17; Pierre Rosanvallon, *La société des égaux* (Paris: Seuil, 2011), 21–22.

¹¹⁹ Quote from the English translation: Pierre Rosanvallon, *The Society of Equals*, trans. Arthur Goldhammer (Cambridge, MA: Harvard University Press, 2013), 10.

¹²⁰ Anderson, “What Is the Point of Equality?,” 313; Sophia Moreau, “Equality and Discrimination,” in *The Cambridge Companion to the Philosophy of Law*, ed. John Tasioulas (Cambridge: Cambridge University Press, 2020), 171–72.

¹²¹ Fraser, “Social Justice in the Age of Identity Politics,” 43.

¹²² Nancy Fraser, “Injustice at Intersecting Scales: On ‘Social Exclusion’ and the ‘Global Poor,’” *European Journal of Social Theory* 13, no. 3 (2010): 365.

is status hierarchy, based on institutionalised patterns of cultural value which label some actors as “inferior, excluded, wholly other, or simply invisible.”¹²³ The result is a two-dimensional conception of justice that encompasses both redistribution and recognition, without reducing either one to the other.¹²⁴

2.3. Defining substantive equality

The overview of selected theories of justice in the previous section elucidates the idea of substantive equality that I mobilise as a foundational concept for my pluralistic account of antidiscrimination law. In this section, I consider in more detail this notion of substantive equality and its relationship with my pluralistic account of antidiscrimination law, building on participatory parity and relational equality as guiding principles.

To further clarify what substantive equality means in this context, I rely on Fredman’s four-dimensional approach to substantive equality.¹²⁵ This approach allows me to connect the various dimensions of substantive equality with the multiple wrong-making characteristics of antidiscrimination law set out above. For Fredman, substantive equality translates into four dimensions: the redistributive dimension, the recognition dimension, the participative dimension, and the transformative dimension.

¹²³ Nancy Fraser, “Rethinking Recognition,” *New Left Review* 3, no. May June 2000 (2000): 113. See also Fraser, “Social Justice in the Age of Identity Politics,” 62–64.

¹²⁴ See Nancy Fraser, “Feminist Politics in the Age of Recognition: A Two-Dimensional Approach to Gender Justice,” *Studies in Social Justice* 1, no. 1 (2007): 23–35. In more recent writings, she adds a third dimension: political representation, which requires equal political voice for all social actors. See Fraser, “Injustice at Intersecting Scales.”

¹²⁵ See Fredman, *Discrimination Law*; Sandra Fredman, “Providing Equality: Substantive Equality and the Positive Duty to Provide,” *South African Journal on Human Rights* 21 (2005): 163–190; Sandra Fredman, “Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights,” *Human Rights Law Review* 16 (2016): 273–301; Sandra Fredman, “Substantive Equality Revisited,” *International Journal of Constitutional Law* 14, no. 3 (2016): 712–738.

Firstly, the redistributive dimension is essential since equality is closely connected with the distribution of important social goods. A substantive understanding of equality opposes a rigid formal equality approach requiring that morally irrelevant categories, such as racial or ethnic origin, gender, or disability, never have an impact in the outcome of decisions. Substantive equality aims to redress disadvantage rather than to prohibit classification, recognising that classifications might be necessary in order to compensate for previous disadvantage.¹²⁶

Secondly, the recognition dimension of substantive equality identifies with the goal of promoting respect for dignity and worth, and of countering hostility, prejudice, and stigma.¹²⁷ Misrecognition has at its origin a process whereby the characteristics associated with underprivileged groups are socially constructed as stigmatising and as inducing of stereotypes, prejudice, and discriminatory treatment.

At this point in the argument, a precision stemming from disability theory must be made. The social model of disability breaks away from the old medical model, which regarded the challenges faced by people with disabilities as resulting primarily or solely from their impairments. By contrast, the social model posits that most of the challenges faced by persons with disabilities result from a mismatch between their characteristics and the physical and social environment.¹²⁸ There is a multiplicity of physical, environmental, administrative, social, educational, and attitudinal barriers than create disabilities.¹²⁹

In this context, recognition takes a slightly different focus. Persons with disabilities should not (or not only) be recognised as members of a disadvantaged group created by the exclusionary practices of the majority population (this is the case, for instance, of institutionalisation, discussed in

¹²⁶ Fredman, *Discrimination Law*, 26.

¹²⁷ Fredman, 25.

¹²⁸ David Wasserman et al., “Disability: Definitions, Models, Experience,” in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, 2016, <https://plato.stanford.edu/archives/sum2016/entries/disability/>.

¹²⁹ See Luke Clements, “Disability, Dignity and the Cri de Coeur,” *European Human Rights Law Review* 2011, no. 6 (2011): 675–85.

Chapter 5), but also as individuals with particular physical or mental characteristics which differ as a matter of degree from those foreseen by established social norms.¹³⁰ Consequently, in the case of disability, recognition does not only seek to end exclusionary practices but also to create a more inclusive physical and social environment.

Thirdly, the participative dimension of substantive equality identifies with the goal of facilitating participation in society. Given that past discrimination and the functioning of social structures have blocked the avenues for the social participation of some individuals and groups, substantive equality requires their ability to participate meaningfully in processes of public reasoning and decision-making.¹³¹

Fourthly, the transformative dimension of substantive equality identifies with the goal of accommodating difference, including through structural change.¹³² This dimension builds on the premise that equality is not necessarily about sameness: on the contrary, equality should celebrate the diversity between individuals.¹³³ Different group identities should be protected, as should different identities within groups, through the accommodation and transformation of certain social structures. This connects again with the considerations made above with regard to disability.

Finally, as a transversal element to all four dimensions, substantive equality must incorporate the idea of intersectionality.¹³⁴ As advanced in Chapter 1,

¹³⁰ Daniel Putnam et al., “Disability and Justice,” in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, 2019, <https://plato.stanford.edu/archives/fall2019/entries/disability-justice/>.

¹³¹ Fredman, *Discrimination Law*, 31. See also John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980); Nancy Fraser, “Distorted Beyond All Recognition: A Rejoinder to Axel Honneth,” in *Redistribution or Recognition?: A Political-Philosophical Exchange*, by Axel Honneth and Nancy Fraser (London: Verso, 2003), 198–236; T. H. Marshall, *Citizen and Social Class* (Cambridge: Cambridge University Press, 1950). See also T. M. Scanlon, *Why Does Inequality Matter?* (Oxford: Oxford University Press, 2018), chap. 6.

¹³² Fredman, *Discrimination Law*, 30.

¹³³ Fredman, “Emerging from the Shadows,” 12.

¹³⁴ See Beth Goldblatt, “Intersectionality in International Anti-Discrimination Law: Addressing Poverty in Its Complexity,” *Australian Journal of Human Rights* 21, no. 1 (2015): 47–70; Dagmar Schiek, “Revisiting Intersectionality for EU Anti-

intersectionality refers to the situation whereby certain people experience discrimination on a number of grounds in such a manner that the harm they suffer is greater than the sum of the harms derived from those grounds taken in isolation. In other words, these individuals experience an additional harm occurring at the intersection of those grounds.¹³⁵

All in all, Fredman's four-dimensional framework appears to assume that the four different dimensions relate to and complement each other harmoniously, without there being any notable contradictions or tensions between them. In more recent works, she acknowledges that conflicts may arise, but she still argues that most of those conflicts can readily be solved within this framework.¹³⁶ Consequently, her framework does not foresee any explicit system whereby any potential conflicts between these four dimensions can be solved.

Understood in this multidimensional manner, substantive equality maps onto the wrong-making characteristics of discriminatory acts evoked at the beginning of this chapter. Substantive equality serves as a foundational concept allowing antidiscrimination norms to effectively target those multiple wrong-making characteristics through these various dimensions, including the intersections between dimensions. As such, substantive equality constitutes the backbone of my pluralistic account of antidiscrimination law.

At the same time, this concept allows me to formulate four objectives that, in my opinion, antidiscrimination norms ought to pursue in order to achieve substantive equality. Before considering these four objectives more specifically, some additional considerations can be advanced.

Importantly, I consider that for substantive equality to be adequately secured it is not sufficient to guarantee fair conditions under which

Discrimination Law in an Economic Crisis—A Critical Legal Studies Perspective,” *Sociologia Del Diritto* 2016, no. 2 (2016): 23–44.

¹³⁵ See Crenshaw, “Demarginalizing the Intersection of Race and Sex”; Crenshaw, “Mapping the Margins.”

¹³⁶ Fredman, “Substantive Equality Revisited,” 734–38.

distributive processes may freely operate.¹³⁷ In my view, certain substantive outcomes must be ensured so that participatory parity and relational equality are effectively safeguarded in light of persistent material inequalities and misrecognition.

I thus foreground in my enquiry the importance of achieving substantive outcomes beyond ensuring fair processes: while I deal with procedural aspects in certain sections (notably the discussion about equality duties in Chapter 7), most of my analysis is focused on outcomes and on substantively transforming existing norms, policies, and structures.

A question arises as to whether these outcomes should be directed towards rendering the degree of human rights realisation more equal across the board for all individuals or rather they should aim to equalise the level of enjoyment of those rights in such a way that everyone reaches a minimum sufficient threshold of realisation.

One possible model for evaluating the desirability of the outcomes yielded by substantive equality is concerned with equality of relevant benefits. This approach asserts that a just moral order depends on everybody more or less having the same amount of goods, including material goods but also other goods like dignity and political power.¹³⁸ In this sense, egalitarianism entails a comparative exercise: equality is evaluated by reference to what others have or do not have.

By contrast, a sufficientarian model of equality requires everyone to equally receive an adequate minimum of the goods necessary to lead a good life. This approach is unconcerned with relative endowments, making sure instead that every individual meets some minimal threshold with respect to the goods in question. This sufficiency threshold should be determined with regard to a particular community, according to local parameters and contexts.

¹³⁷ See Olivier De Schutter, “Three Models of Equality and European Anti-Discrimination Law,” *Northern Ireland Legal Quarterly* 57, no. 1 (2006): 56.

¹³⁸ Denise Réaume, “Dignity, Equality, and Comparison,” in *Philosophical Foundations of Discrimination Law*, ed. Deborah Hellman and Sophia Moreau (Oxford: Oxford University Press, 2013), 8.

I argue that the notions of participatory parity and relational equality can be used to reconcile these two models. In light of these notions, substantive equality should aim to reduce overall inequalities to combat social arrangements institutionalising gross disparities in wealth and income. At the same time, and in parallel, substantive equality should be articulated in such a way that it ensures sufficient material conditions for everyone, to combat deprivation and exploitation. It is only by reducing relative inequalities and ensuring a minimum threshold for all at the same time that individuals will be able to ultimately stand in terms of equality with one another in society.

For example, the discussion of decommodification policies developed in Chapter 7 shows how these policies ought to ensure a sufficient level of housing realisation for individuals and groups who are excluded from housing markets because of status-based or socioeconomic reasons, but also to equalise the level of realisation of this right across the board, by setting up mechanisms to withdraw housing from the market and which protect housing from speculation and financialisation, thus reducing overall inequalities.

Conflicts in particular distributive instances are bound to arise, and I do not believe that this framework in itself is sufficient to provide solutions in hard cases. Other points of reference, such as local contexts and needs, or perhaps human rights law standards in relation to other substantive human rights, need to be used to resolve these tensions.

Building on all these considerations, I propose four central aims that antidiscrimination norms ought to be geared towards and which are rooted in the idea of substantive equality underpinning my pluralistic account of discrimination: eliminating hostility, prejudice, and stigma; respecting cultural diversity and avoiding misrecognition; transforming existing structures; and ensuring a fair distribution of certain important goods.

The first central aim that antidiscrimination norms ought to pursue is eliminating hostility, prejudice, and stigma. When certain individuals and groups are treated in a derogatory and humiliating manner, when structural bias against them persists, and when they are ascribed negative traits and

labelled as inferior, antidiscrimination law must seek to introduce or restore substantive equality. Through this aim, antidiscrimination norms seek to combat conduct that undermines the preconditions of participatory parity by denying the equal worth of some individuals and groups.

The second central aim is respecting cultural diversity and avoiding misrecognition. When there is no acknowledgement that certain individuals and groups may legitimately harbour identities and cultural practices which deserve legal recognition, antidiscrimination law must intervene to counter these instances of misrecognition. Through this aim, antidiscrimination norms cast light on the fact that many norms and practices are designed to conform with the understanding and the lived experience of the majority of the population, leaving aside alternative epistemologies and modes of living that are not always aligned with these majority conceptions.

The third central aim is to transform existing physical, social, and legal structures. When prevailing structures are not sufficiently able to ensure the access and participation of certain individuals and groups, antidiscrimination law must commit to the transformation of those structures in such a way that renders them inclusive and mindful of personal and collective differences. Through this aim, antidiscrimination norms evidence that the prevailing physical, social, and legal structures are not always universal in terms of the ability of all individuals and groups to access them or to realise their human rights on this basis.

The fourth central aim is to ensure a fair distribution of certain important goods. When the distribution of primary goods systematically excludes or disadvantages some individuals and groups, rendering them unable to exercise their fundamental rights, to satisfy their needs, or to pursue their valued ends, antidiscrimination law must seek to rectify these distributive inequalities and to promote distributive outcomes allowing everyone to stand as an equal with their fellow citizens. Through this aim, antidiscrimination norms call into question the existing distribution of certain goods that are necessary to live a life in dignity, demonstrating that current distributive processes and outcomes structurally exclude certain individuals and groups on both status-based and socioeconomic grounds.

Having set out these four core principles that antidiscrimination norms ought to pursue, which derive from an examination of the idea of substantive equality in light of relevant theories of justice and in the context of a pluralistic account of antidiscrimination law, I now turn to the implications of applying this overarching philosophical framework to the field of housing.

In the coming chapters, I rely on these four objectives to conduct a comprehensive examination of the legal and practical consequences of applying antidiscrimination norms to the field of housing. As I will show, my account of antidiscrimination law does not only seek to accommodate difference, but also to effectively transform social structures and processes so as to successfully achieve substantive equality and the underpinning values of participatory parity and relational equality. To close this chapter, I offer some brief considerations regarding what it means to ensure a fair distribution in the housing context.

2.4. Ensuring a fair housing distribution

Some preliminary considerations can be advanced concerning the application of the described philosophical framework to the housing context, especially with regard to the fair distribution of housing. In this section, I put forward some reflections about the distributive rules and criteria that antidiscrimination norms should reflect in their operation whenever housing is concerned. As already noted, the operation of these rules and criteria must be geared towards achieving substantive equality, understood as anchored in participatory parity and relational equality.

To be sure, most of the considerations presented in this section will likely be also applicable in relation to other human rights, in particular social rights such as the right to food, the right to water, the right to health, or the right to education. Nevertheless, without prejudice to these possible linkages, I restrict my analysis here to the right to housing, and I do not intend to make any universal claims beyond this field.

Looking at distributive justice in the housing context, a key question arises as to the distributive rules and criteria that antidiscrimination norms should mirror in their operation. I resort to the notions of “spheres of justice” and

“local justice” to evidence that a heterogeneity in distributive criteria between different goods and between local contexts is fundamentally desirable.

A clarification must be made at the outset. In the following discussion, I do not refer to particular instances of distribution, that is, to the entitlement of specific individuals or groups to specific dwellings in defined local contexts. I rather look at the distribution of housing in philosophical terms and from a social justice perspective, to elucidate the criteria that should, at this level of analysis, legitimately guide the distribution of housing as an important social good.

In his book *Spheres of Justice*, Walzer argues that the distributive principles that should be taken into account to allocate social goods need not be uniform across the board.¹³⁹ By contrast, different distributive principles may be the most appropriate for any given good in light of diverse circumstances: different principles should guide the distribution of various social goods in different “spheres of justice.”

From the idea of the autonomy of distributions, Walzer claims that, although the market has been one of the most important mechanisms for distributing social goods, it has never been (and it is not today) a complete distributive system.¹⁴⁰

In Walzer’s view, these differences derive from contrasting social understandings of these goods. Most societies are organised on the basis of one good or one set of goods which is dominant and determinative of value in all spheres of distribution. However, distributing goods belonging to one sphere based on distributive criteria proper to another sphere may lead to tyranny and domination. Social goods have social meanings, and we find our way to distributive justice through an interpretation of those meanings and the choice for the appropriate distributive criterion for each good.¹⁴¹

¹³⁹ Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983).

¹⁴⁰ Walzer, 4.

¹⁴¹ Walzer, 10–13.

This idea can be complemented by means of Elster's notion of "local justice."¹⁴² Elster makes a distinction between global and local justice, advancing that different institutions use different substantive principles for the allocation of social goods. Even though we tend to think of distributive justice in global terms, local institutions distribute primary goods based on diverging criteria, depending on local configurations.¹⁴³ This means that every substantive account of distributive justice is ultimately a local and context-based account.

These insights refocus our discussion in the sense that distributive principles may well vary depending on the social meanings ascribed to different social goods, but also between instances of local justice, meaning that those goods need not be distributed identically in diverse local contexts.

Applying this to our enquiry, that means, firstly, that housing must not be distributed according to an extraneous criterion, but rather in line with the most appropriate criterion considering the meaning and characteristics ascribed by society to this good. Secondly, the general criterion for the distribution of housing must then be adapted to particular local contexts and circumstances.¹⁴⁴

The question now becomes how to determine the general distributive criterion supported by the characteristics and the social meaning of housing. This criterion will represent the guiding principle on the basis of which antidiscrimination norms ought to operate whenever the distribution of housing is concerned. To be sure, once this general criterion is determined, it will need to be applied and concretised according to local contexts and practices. I provide here some general considerations, without prejudging how these may be localised and implemented in particular settings.

Elster lists a series of potential criteria that could be used to distribute important social goods: need, desert, skills, intensity of preference,

¹⁴² Jon Elster, *Local Justice: How Institutions Allocate Scarce Goods and Necessary Burdens* (New York: Russell Sage Foundation, 1992).

¹⁴³ See Roemer, *Theories of Distributive Justice*, 166.

¹⁴⁴ See Karina Gomes da Silva, "The New Urban Agenda and Human Rights Cities: Interconnections between the Global and the Local," *Netherlands Quarterly of Human Rights* 36, no. 4 (2018): 290–310.

citizenship, wealth, religion, gender, race, etc.¹⁴⁵ It becomes clear by reading this enumeration that many of those criteria are not capable of grounding, from a human rights perspective, a fair or legitimate housing distribution. I first advance some brief considerations around the notion of desert, to then argue that *need* should be the general criterion guiding a fair distribution of housing.

In our contemporary societies, we consider in many instances that goods and positions should be assigned to the individual who deserves them the most because of the effort, skills, or experience they have acquired. In the field of work, the reliance on desert or merit stems from the intuition that the tasks relevant for each position should be carried out by those who will be able to execute them more effectively and efficiently.¹⁴⁶ To gauge their suitability, we focus on external indicators of past and future performance, such as productivity, excellence, or quality.

Once we critically turn to the concept of desert, however, we can observe that this criterion encounters many shortcomings. Desert ultimately refers to a value standard whose normative reference point is the economic activity of the independent, middle-class, male bourgeois.¹⁴⁷

For Honneth, this principle is ultimately used to justify the extremely unequal distribution of life chances and goods.¹⁴⁸ Hepple has similarly argued that the problem of merit resides in applying an unchallenged understanding of merit to people who have been deprived of the opportunity to acquire merit in this narrow sense.¹⁴⁹ Inequalities in the market are often a result of discrimination outside the market, meaning that an excessive

¹⁴⁵ Elster, *Local Justice*, 69.

¹⁴⁶ See Hugh Collins, “Discrimination, Equality and Social Inclusion,” *The Modern Law Review* 66, no. January 2003 (2003): 16–43.

¹⁴⁷ Honneth, “Redistribution as Recognition,” 141; Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford: Oxford University Press, 2015), 186.

¹⁴⁸ Honneth, “Redistribution as Recognition,” 147–148.

¹⁴⁹ Bob Hepple, “Discrimination and Equality of Opportunity—Northern Irish Lessons,” *Oxford Journal of Legal Studies* 10, no. 3 (1990): 411; Fredman, *Discrimination Law*, 19.

reliance on merit may reinforce existing societal discrimination and strengthen discriminatory assumptions.¹⁵⁰

Housing presents a very different distributive scenario. The idea of desert, understood in the sense described above, becomes impracticable when applied to the field of housing: the notion that candidates who have the most relevant experience and skills should be given priority in the distribution of housing is intuitively wrong. I argue instead that the most appropriate criterion to distribute housing is need.

In particular, as I further develop in Chapter 6, housing is for the most part distributed in our contemporary societies on the basis of the ability of individuals and families to access housing markets, that is, based on their purchasing power. This means that individuals and families who are excluded in practice from those markets due to status-based discrimination or due to socioeconomic inequalities are unable to effectively realise their right to housing in terms of equality and nondiscrimination. This state of things owes much to the processes of housing commodification and financialisation that I explain in that chapter.

In contrast to this system, I argue that the exclusion experienced by disadvantaged individuals and groups in housing markets can be challenged by aiming towards a fair distribution of housing based on need. Using need as a distributive criterion casts light on the inadequacy of purchasing power to allocate housing in society, and the fact that the existing distributive rules hinder the realisation of the right to housing for many individuals and families under nondiscriminatory conditions.

In the face of this situation, I claim that the concept of need can be leveraged to counter these practices and to reclaim the centrality of equality and nondiscrimination in ensuring a fair housing distribution. I advance here some conceptual notes surrounding the notion of need, linking it further in Chapters 6 and 7 to the existing distributive dynamics in housing markets and the role of the state in ensuring a fair housing distribution through

¹⁵⁰ Fredman, *Discrimination Law*, 144. See also De Schutter, “Three Models of Equality and European Anti-Discrimination Law”; François Dubet, *Les places et les chances: Repenser la justice sociale*, La république des idées (Paris: Seuil, 2010).

decommodification policies. In Chapter 4, I explain how the idea of a fair housing distribution on the basis of need prompts us to rethink the role of socioeconomic disadvantage in antidiscrimination law.

Need as a distributive criterion is generally understood in a complex manner.¹⁵¹ As discussed when examining distributive theories of social justice, and the capabilities theory in particular, the different ability of individuals to convert means and resources into valuable ends should be taken into account when evaluating particular needs. For instance, persons with disabilities might need more resources or a particular version of certain social goods in order to achieve the same level of welfare as their peers. In this sense, it is not unequal to assign different resources in order to equally realise everyone's needs.¹⁵²

For Miller, needs are anchored in society, and there is a core of human needs that does not vary depending on place and time.¹⁵³ These central needs are universal and objective, but they are always context-specific in terms of the particular cultural, ecological, historical, economic, and social environment.¹⁵⁴ Besides these universal needs, whose interpretation is nevertheless contextual, there are some relative social, cultural, and context-

¹⁵¹ See further Gillian Brock and David Miller, "Needs in Moral and Political Philosophy," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, 2019, <https://plato.stanford.edu/archives/sum2019/entries/needs/>; Gillian Brock, "Needs and Distributive Justice," in *The Routledge Companion to Social and Political Philosophy*, ed. Gerald Gaus and Fred D'Agostino (New York: Routledge, 2013), 444–55; David Braybrooke, *Meeting Needs* (Princeton: Princeton University Press, 1987); Harry G. Frankfurt, "Necessity and Desire," in *Necessary Goods: Our Responsibilities to Meet Others' Needs*, ed. Gillian Brock (Oxford: Rowman & Littlefield, 1998), 19–32.

¹⁵² David Miller, *Social Justice* (Oxford: Clarendon Press, 1976), 149. See Ribotta, "Necesidades, igualdad y justicia. Construyendo una propuesta igualitaria de necesidades básicas," 271.

¹⁵³ See Martin Hapla, "Theory of Needs as Justification of Human Rights: Current Approaches and Problems of Uncertainty and Normativeness," *The Age of Human Rights Journal* 10 (2018): 1–21.

¹⁵⁴ Silvina Ribotta, *Las desigualdades económicas en las teorías de la justicia. Pobreza, redistribución e injusticia social*, El Derecho y la Justicia (Madrid: Centro de Estudios Políticos y Constitucionales, 2010), 368.

dependent needs.¹⁵⁵ Furthermore, needs can be physical, psychological, or social in nature.

Individuals must play a central role in defining their needs, including through collective processes allowing for their meaningful participation. On the one hand, social needs are defined collectively, in the sense that each society agrees upon what counts as a reasonable need in that particular society and the level of fulfilment that individuals must generally attain in order to consider that their needs have been sufficiently satisfied. This is where the localisation element evoked above becomes especially important.

On the other hand, there must also be room for individuals to contest these collective definitions and to vindicate their particular needs, which may deviate from the established norm for a number of reasons, including hostility, prejudice and stigma, misrecognition, and the inadequacy of existing physical, social, and legal structures.

To secure the distribution of housing in a way that is fully compatible with substantive equality, anchored in participatory parity and relational equality, needs must be therefore assessed in a collective and individual manner, ideally by looking at the other three aims of antidiscrimination norms presented in this chapter and including the intersections between all these dimensions.

In sum, I argue that we can ensure a better realisation of the foundational principle of substantive equality underpinning my account of antidiscrimination law by taking need as the general criterion on which a fair housing distribution should be grounded. This general distributive criterion will have to be concretised and localised in light of particular cultural, ecological, historical, economic, and social contexts.

¹⁵⁵ See Ribotta, “Necesidades, igualdad y justicia. Construyendo una propuesta igualitaria de necesidades básicas,” 287.

2.5. Conclusion

In this chapter, I have gone beyond the legal and conceptual framework introduced in Chapter 1 by means of an exploration of the philosophical foundations of antidiscrimination law.

This has allowed me to identify four central aims that antidiscrimination norms ought to pursue (eliminating hostility, prejudice, and stigma; respecting cultural diversity and avoiding misrecognition; transforming existing structures; and ensuring a fair distribution of certain important social goods). These four central aims guide my enquiry in subsequent chapters about the legal and practical implications of applying antidiscrimination law to the field of housing.

To reach these four aims, I have first identified a number of wrong-making characteristics of discriminatory acts. Acknowledging that there is not one single characteristic rendering discrimination wrong, I have opted for a pluralistic account of antidiscrimination law that encompasses all these aspects.

Substantive equality serves as a foundational principle of this account, insofar as it allows us to address discriminatory conduct in a holistic, complex, and nuanced manner, encompassing different dimensions like redistribution, recognition, the elimination of hostility, prejudice, and stigma, and the transformation of existing structures.

I have clarified these dimensions by means of a reference to relevant theories of social justice and to the four-dimensional approach to substantive equality developed by Fredman. I have also concluded that substantive equality must be understood in line with the notions of participatory parity and relational equality, aiming towards a situation where all individuals have equal standing as peers in society. I have then advanced some theoretical considerations regarding what a fair distribution of housing means under this framework.

In Chapter 3, I look at how the first three aims identified in this chapter (eliminating hostility, prejudice, and stigma; respecting cultural diversity and avoiding misrecognition; transforming existing structures) can be

achieved by antidiscrimination law in the field of housing. To do so, I use the antidiscrimination legal concepts set out in Chapter 1, considering to what extent they can be mobilised to achieve these aims in the context of housing, and what legal changes, if any, should be operated in order to best realise those objectives.

Chapter 3

Applying antidiscrimination law to housing

In the previous chapter, I examined the philosophical foundations of antidiscrimination law, setting out four central aims that antidiscrimination norms ought to pursue: eliminating hostility, prejudice, and stigma; recognising cultural diversity and avoiding misrecognition; adapting existing housing structures; and ensuring a fair distribution of important social goods.

In this chapter, I focus on the first three aims to show the value of antidiscrimination law when applied to the field of housing. I argue that antidiscrimination law is essential to complement and enrich certain components of the right to adequate housing, and that it also allows us to address certain dimensions which cannot be fully tackled through the right to housing alone.

Firstly, I consider the first aim, that of eliminating hostility, prejudice, and stigma (Section 3.1), focusing on direct discrimination against Roma (3.2). I then look at the underdeveloped concept of discriminatory harassment as another important element to achieve this first aim (3.3). Secondly, I move to the second aim, that of recognising cultural diversity and avoiding misrecognition (3.4). I consider in particular the case of indirect discrimination against Travellers (3.5). Thirdly, I look into the third aim, which concerns the transformation of existing housing structures, mostly in the context of disability (3.6). In this connection, I focus on the concepts of reasonable accommodation and accessibility (3.7). A final section concludes (3.8).

3.1. Eliminating hostility, prejudice, and stigma

The most straightforward way in which the first identified aim of antidiscrimination norms, that of eliminating hostility, prejudice, and

stigma, comes into play is when someone is treated less favourably than another person is treated, or would be treated, in their access to or their enjoyment of housing on the basis of a prohibited ground of discrimination. As advanced in Chapter 1, this will constitute direct discrimination.

Direct discrimination expresses a disregard for the equal dignity and worth of individuals. Whereas some of these acts can be attributed to outright hostility, some other stem from the stigma individually and socially constructed against certain groups.

Stigma refers in this context to a condition engendering prejudice and discrimination which resides in the structure and relations of society.¹⁵⁶ Prejudice, by contrast, resides in the minds of individuals, and refers to “a negative generalised attitude towards members of a majority or minority social group for any reason that appears reasonable in the mind of the prejudiced person,” regardless of whether this reason is actually supported by society.¹⁵⁷ In Chapter 5, I develop these ideas further in the context of housing segregation, through the notion of “territorial stigmatisation.”

The paradigmatic case of housing discrimination based on hostility, prejudice, and stigma is the refusal by an owner or a landlord to sell or to rent out to a particular individual or family because of a prohibited discrimination ground like their racial or ethnic origin.¹⁵⁸ Far from a mere textbook example, this type of discrimination is still very present in our societies and it is routinely documented by national equality bodies in their reported cases.¹⁵⁹

¹⁵⁶ Iyiola Solanke, *Discrimination as Stigma: A Theory of Anti-Discrimination Law* (Oxford: Hart Publishing, 2017), 20–21.

¹⁵⁷ Solanke, 21.

¹⁵⁸ See, for instance, Julie Le Gallo et al., “Les Discriminations Dans l’accès Au Logement En France : Un Testing de Couverture Nationale” (TEPP Rapport de recherche, 2017–11, 2017). See also Bernard, “Les lois anti-discrimination et le secteur du logement (privé et social).”

¹⁵⁹ See, for a recent example in 2020, Matthias Mahlmann, “Discrimination by Large Building Society” (European Network of Legal Experts in Gender Equality and Non-Discrimination, 22 April 2020), <https://www.equalitylaw.eu/downloads/5115-germany-discrimination-by-large-building-society-73-kb>.

Although I mostly discuss racial or ethnic origin in this section, direct discrimination also occurs on the basis of gender and gender identity,¹⁶⁰ sexual orientation,¹⁶¹ religion,¹⁶² nationality and residence,¹⁶³ language,¹⁶⁴ family status,¹⁶⁵ migrant status,¹⁶⁶ and other grounds.¹⁶⁷

¹⁶⁰ Jean Jacqmain, “‘Girls Only’ Housing Illegal” (European Network of Legal Experts in Gender Equality and Non-Discrimination, 14 April 2015), <https://www.equalitylaw.eu/downloads/2743-13-be-ge-girls-only-housing-illegal>. See also France, Défenseur des droits, [Refusal to rent out on the basis of gender identity], 2019-026 (31 January 2019), <https://juridique.defenseurdesdroits.fr/eli/decision/2019/01/31/00026/aa/texte>.

¹⁶¹ Belgium, Unia, [Homosexual couple rejected because the landlord wishes to rent out to a “traditional couple”] (19 April 2005), <https://www.unia.be/fr/jurisprudence-alternatives/jurisprudence/refere-premiere-instance-nivelles-19-avril-2005>.

¹⁶² Belgium, Unia, [Woman wearing a headscarf rejected during an apartment visit] (14 February 2011), <https://www.unia.be/fr/jurisprudence-alternatives/jurisprudence/tribunal-correctionnel-de-dendermonde-14-fevrier-2011>.

¹⁶³ See Ringelheim and Bernard, *Discrimination in Housing*, 58. For an example of a restriction on the purchase of housing requiring a “sufficient connection” with the corresponding municipality, see Court of Justice of the European Union, Judgment of 8 May 2013, *Libert and Others*, C-197/11 and C-203/11, EU:C:2013:288.

¹⁶⁴ For instance, social housing applicants in Flanders must prove that they are willing to learn the local language, Dutch. See the discussion in Ringelheim and Bernard, 58–59. See also Nico Moons, “The Right to Housing in Flanders-Belgium: International Human Rights Law and Concepts as Stepping Stones to More Effectiveness” (PhD Thesis, Antwerp, University of Antwerp, 2016), para. 221.

¹⁶⁵ France, Défenseur des droits, [Refusal to rent out based on the family situation of the claimant], 2017-259 (15 September 2017), https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=22773.

¹⁶⁶ For example, in the UK landlords are required to check the immigration status of tenants and to reject candidates who cannot prove that they are legal residents in the country. See Kim Mckee et al., “Redrawing the Border through the ‘Right to Rent’: Exclusion, Discrimination and Hostility in the English Housing Market,” *Critical Social Policy*, 2020.

¹⁶⁷ Homeless persons are often targeted by anti-vagrancy laws and ordinances regulating minor incivilities in public spaces (for instance, fines for putting up makeshift shelters or tents, washing themselves, urinating, etc.). See Jeremy Waldron, “Homelessness and the Issue of Freedom,” *UCLA Law Review* 39 (1991): 295–324; Terry Skolnik, “Homelessness and Unconstitutional Discrimination,” *Journal of Law & Equality* 15, no. 1 (2019): 69–94. In the most extremes cases, homeless persons have been targeted through the criminalisation of rough sleeping. See Leilani Farha, “Open Letter to Hungary on Criminalization of Homeless People” (Special Rapporteur on the right to adequate housing, 20 June 2018),

Direct discrimination may take various forms, from more overt to more covert ones. Overt forms of direct discrimination can be fairly explicit, like a landlord stating that they do not rent out to Roma, Black, or foreign candidates,¹⁶⁸ or a landlord stating that they only rent out to candidates aged 20–26 and “with Belgian parents.”¹⁶⁹

More covert forms of direct discrimination may involve, for example, a real estate agency setting stricter requirements for foreign candidates as compared to national candidates when looking for tenants,¹⁷⁰ or a landlord rejecting a single mother willing to lease an apartment because they prefer couples.¹⁷¹

Many direct discrimination cases are also articulated by means of an instruction to discriminate. For instance, a landlord may tell a potential Roma candidate that they personally have no problem renting out to them,

https://www.ohchr.org/Documents/Issues/Housing/OL_HUN_4_2018.pdf. See further Guillem Fernández Evangelista, “Penalising Homelessness in Europe,” in *Absolute Poverty in Europe: Interdisciplinary Perspectives on a Hidden Phenomenon*, ed. Helmut P. Gaisbauer, Gottfried Schweiger, and Clemens Sedmak (Bristol: Policy Press, 2019), 321–23.

¹⁶⁸ See Rainer Hiltunen, “Discrimination in Housing between Private Individuals Prohibited” (European Network of Legal Experts in Gender Equality and Non-Discrimination, 21 March 2014), <https://www.equalitylaw.eu/downloads/1457-fi-8-housing-discrimination>. See also Belgium, Unia, [A real estate agent explicitly rejects a candidate due to their foreign origin] (23 June 2010), <https://www.unia.be/fr/jurisprudence-alternatives/jurisprudence/tribunal-de-1ere-instance-danvers-23-juin-2010>; Belgium, Unia, [Refusal to rent out to “Blacks, non-Belgians, and insolvent persons”] (6 May 2014), <https://www.unia.be/fr/jurisprudence-alternatives/jurisprudence/tribunal-de-premiere-instance-liege-6-mai-2014>; Belgium, Unia, [Refusal of a potential tenant due to the colour of their skin] (7 May 2018), <https://www.unia.be/fr/jurisprudence-alternatives/jurisprudence/tribunal-premiere-instance-bruxelles-7-mai-2018>.

¹⁶⁹ Belgium, Unia, [A landlord requires that candidates are students, have Belgian parents, and are aged 20–26] (28 March 2018), <https://www.unia.be/fr/jurisprudence-alternatives/jurisprudence/tribunal-premiere-instance-gand-28-mars-2018>.

¹⁷⁰ France, Défenseur des droits, [Discriminatory rental advertisement imposing more strict conditions to foreign candidates], 2018-020 (9 March 2018), <https://juridique.defenseurdesdroits.fr/eli/decision/2018/03/09/00020/aa/te>.

¹⁷¹ Frances Meenan, “Access to Housing” (European Network of Legal Experts in Gender Equality and Non-Discrimination, 16 June 2017), <https://www.equalitylaw.eu/downloads/4223-ireland-access-to-housing-pdf-23-kb>.

but that the owners' association agreed to exclude "Gypsies,"¹⁷² or real estate agents may implement discriminatory orders from homeowners when looking for potential tenants.¹⁷³ It is important to recall that in these situations both the person giving the instruction and the person carrying out the instruction will be liable for discrimination under EU law.

Besides private actors, public authorities may also incur in direct discrimination against individuals and families. It is the case, for example, of a municipal resolution in Slovakia prohibiting Roma families from settling in a village and threatening them with expulsion.¹⁷⁴ In the wake of the 2020 COVID-19 pandemic, it was reported that some municipalities in Bulgaria had locked down targeted neighbourhoods where the majority of residents are Roma, as a purported measure to prevent the spread of the virus.¹⁷⁵ In the most extreme cases, states have failed to protect Roma communities from acts of violence such as lynching or the burning and destruction of their homes.¹⁷⁶

¹⁷² See Inmaculada Llorente San Segundo, "La prohibición de discriminación en el acceso a la vivienda residencial," *Revista General de Legislación y Jurisprudencia* 2017, no. 2 (2017): 279.

¹⁷³ Belgium, Unia, [Refusal to rent out to a couple because they are of foreign origin and the landlord fears the reaction of other residents] (18 March 2016), <https://www.unia.be/fr/jurisprudence-alternatives/jurisprudence/tribunal-correctionnel-anvers-18-mars-2016>. See further Pieter-Paul Verhaeghe et al., *Discrimbrux — Discriminatie door vastgoedmakelaars op de private huurwoningmarkt van het Brussels Hoofdstedelijk Gewest* (Ghent: Vakgroep Sociologie, Universiteit Gent, 2017), <https://biblio.ugent.be/publication/8522418/file/8523845.pdf>.

¹⁷⁴ Committee on the Elimination of Racial Discrimination, "Communication No. 13/1998," *Koptova v. Slovakia*, CERD/C/57/D/13/1998 (1 November 2000).

¹⁷⁵ *Coronavirus Pandemic in the EU — Fundamental Rights Implications*, Bulletin #1 (Luxembourg: European Union Agency for Fundamental Rights, 2020), 32, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin_en.pdf.

¹⁷⁶ See European Court of Human Rights, Fourth Section, *Burlya and Others v. Ukraine*, Application no. 3289/10 (6 November 2018); European Court of Human Rights, Third Section, *Lăcătuș and Others v. Romania*, Application no. 12694/04 (13 November 2012); European Court of Human Rights, Former Second Section, *Moldovan and Others (no. 2) v. Romania*, Application nos. 41138/98 and 64320/01 (12 July 2005). See also Dilek Kurban, "Forced Displacement of a Roma Community Who Had Been Subject to Hate-Driven Mob Attacks by Their Neighbours" (European Network of Legal Experts in the Non-Discrimination Field, 30 May 2016), <https://www.equalitylaw.eu/downloads/3841-turkey-lower-court-which-on->

Another example of direct housing discrimination would be the lack of sufficient protection for women against gender-based violence, which has undeniable links with housing and the domestic realm.¹⁷⁷ Direct discrimination arises, for instance, in the case of women abused by their male partners or ex-partners who are unable to escape this violence because no shelter is equipped to host them along with their children.¹⁷⁸

Indirect discrimination is also applicable in some cases involving hostility, prejudice, and stigma, when these are hidden behind an apparently neutral criterion to try to circumvent the prohibition against direct discrimination. It is the case of criteria to access social housing which disproportionately excluded Roma applicants in Bucharest,¹⁷⁹ or restrictions in the ability to swap social housing units across different neighbourhoods that disproportionately affected Roma residents in the Slovak town of Prešov.¹⁸⁰

23-december-2015-had-issued-unprecedentedly-high-sentences-for-hate-crimes-against-the-roma-published-its-judgment-pdf-93-kb.

¹⁷⁷ European Court of Human Rights, Third Section, *Opuz v. Turkey*, Application no. 33401/02 (9 June 2009); European Court of Human Rights, Third Section, *Eremia v. the Republic of Moldova*, Application no. 3564/11 (28 May 2013); European Court of Human Rights, Third Section, *Volodina v. Russia*, Application no. 41261/17 (9 July 2019). See further, for an account of the right to housing and women, Ingrid Westendorp, *Women and Housing: Gender Makes a Difference*, Human Rights Research Series 23 (Antwerp: Intersentia, 2007); Nicolas Bernard, “Femmes et (mal-)logement : le rôle du droit,” *Les échos du logement* 126 (2019): 13–15.

¹⁷⁸ Committee on the Elimination of Discrimination against Women, “Communication No 2/2003,” *A.T. v Hungary*, CEDAW/C/32/D/2/2003 (26 January 2005).

¹⁷⁹ Romanița Iordache, “Court of Appeal Maintains NCCD Decision on Social Housing Criteria Leading to Discrimination” (European Network of Legal Experts in Gender Equality and Non-Discrimination, 31 January 2018), <https://www.equalitylaw.eu/downloads/4547-romania-court-of-appeal-maintains-nccd-decision-on-social-housing-criteria-leading-to-discrimination-pdf-139-kb>. See also Thomas Kirszbaum, “Le facteur racial dans les politiques du logement social,” in *De l'autre côté du miroir: Comparaisons Franco-Américaines*, ed. Daniel Sabbagh and Maud Simonet (Rennes: Presses universitaires de Rennes, 2018).

¹⁸⁰ Vanda Durbakova, “The Constitutional Court Dismissed a Complaint on Failures of Public Prosecution Offices to Assess the Discriminatory Impact of the Municipal Binding Regulation” (European Network of Legal Experts in Gender Equality and Non-Discrimination, 27 September 2018), <https://www.equalitylaw.eu/downloads/4678-slovakia-the-constitutional-court-dismissed-a-complaint-on-failures-of-public-prosecution-offices-to-assess-the-discriminatory-impact-of-the-municipal-binding-regulation-pdf-133-kb>.

In all these cases, antidiscrimination law has an added value insofar as it casts light on the group-based dimension of the hostility, prejudice, and stigma suffered by these individuals. This dimension would remain obscured if we were to consider these actions from the perspective of the right to housing alone, as right to housing violations do not sufficiently capture the harm suffered when individuals are denied equal dignity and worth on this basis.

In fact, in all of the aforementioned situations, even though the harm suffered may be located at the individual level, the hostility, prejudice, and stigma at the root of these actions are rather located at the group level. Individuals are here prevented from interacting with others in society on equal terms on the basis of their belonging to a group defined by a prohibited ground.

Consequently, finding only a right to housing violation in these cases and not acknowledging the violation of the right to nondiscrimination leaves this specific symbolic harm to substantive equality unaddressed, even in those cases where the final result would be materially similar.

The harm to the dignity and worth of these individuals on the basis of a prohibited ground prevents them from participating in society as equals and to develop equal standing relationships with their peers, violating their rights in a way that goes beyond the limits of the right to adequate housing, as a symbolic harm is present here besides the material harm stemming from being deprived of adequate housing.

To continue the discussion about this first identified aim of antidiscrimination norms, I focus now on the paradigmatic case of direct discrimination against Roma in Europe.

3.2 Direct discrimination against Roma

The clearest example of a group suffering structural housing discrimination in Europe as a result of hostility, prejudice, and stigma is that of Roma.

I use “Roma” here as an umbrella term to refer to heterogeneous groups who have in common a history of persistent marginalisation in European

societies.¹⁸¹ They are the largest ethnic minority in Europe and they are generally among the most deprived, experiencing social exclusion, discrimination, and unequal access to housing.¹⁸² In this section, I mostly refer to direct discrimination, although indirect discrimination also plays an important role to combat instances of discrimination against Roma.

While I take here a predominantly ethnic-related criterion to define this group, I want to be mindful of differences within the general category of “Roma.” These differences are manifest when comparing heterogeneous groups encompassed by this term, but also within those groups across many axes like gender, age, place of residence, and socioeconomic disadvantage.¹⁸³ Absent the recognition of these different identities and situations, the risk is run to essentialise what it means to be Roma.¹⁸⁴ Across all these different situations and experiences, we can nonetheless

¹⁸¹ This umbrella term includes “Roma, Sinti, Kale, Romanichals, Boyash/Rudari, Balkan Egyptians, Eastern groups (Dom, Lom and Abdal) and groups such as Travellers, Yenish and the populations designated under the administrative term *Gens du voyage*, as well as persons who identify themselves as Gypsies.” See *Fundamental Rights Report 2019* (Luxembourg: European Union Agency for Fundamental Rights, 2019), 111, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-fundamental-rights-report-2019_en.pdf.

¹⁸² *Roma Survey – Data in Focus. Poverty and Employment: The Situation of Roma in 11 EU Member States* (Luxembourg: European Union Agency for Fundamental Rights, 2011), https://fra.europa.eu/sites/default/files/fra-2014-roma-survey-employment_en.pdf. See further *Second European Union Minorities and Discrimination Survey: Roma – Selected Findings* (Luxembourg: European Union Agency for Fundamental Rights, 2016), https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-eu-minorities-survey-roma-selected-findings_en.pdf; *Human Rights of Roma and Travellers in Europe* (Strasbourg: Council of Europe, Commissioner for Human Rights, 2012), <https://rm.coe.int/the-human-rights-of-roma-and-travellers-in-europe/168079b434>.

¹⁸³ See *Second European Union Minorities and Discrimination Survey: Roma – Selected Findings*; *Second European Union Minorities and Discrimination Survey: Roma Women in Nine EU Member States* (Luxembourg: European Union Agency for Fundamental Rights, 2019), https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-eu-minorities-survey-roma-women_en.pdf.

¹⁸⁴ See Annabel Tremlett, “Making a Difference without Creating a Difference: Super-Diversity as a New Direction for Research on Roma Minorities,” *Ethnicities* 14, no. 6 (2014): 830–48.

observe that Roma disadvantage is pervasive, intergenerational, and multifaceted.¹⁸⁵

Roma suffer from hostility, prejudice, and stigma in many fields, ranging from employment to education, health care, and access to goods and services more broadly. In the field of housing, many Roma live in inadequate conditions and suffer from residential segregation in a substantially higher proportion than the general population.¹⁸⁶

Given this situation of disadvantage and discrimination, a series of recommendations have been adopted at the European level raising attention to the need to ensure integrated and appropriate housing policies focused on Roma individuals.¹⁸⁷

Several cases before international and European treaty-monitoring bodies and courts can be highlighted concerning housing discrimination against

¹⁸⁵ See Morag Goodwin, “Romani Marginalisation after the Race Equality Directive,” in *EU Anti-Discrimination Law Beyond Gender*, ed. Uladzislau Belavusau and Kristin Henrard (Oxford: Hart Publishing, 2019), 161–82.

¹⁸⁶ See *Second European Union Minorities and Discrimination Survey: Roma – Selected Findings*, 31–35; *Housing Conditions of Roma and Travellers in the European Union: Comparative Report* (Luxembourg: European Union Agency for Fundamental Rights, 2009), https://fra.europa.eu/sites/default/files/fra_uploads/703-Roma_Housing_Comparative-final_en.pdf. See also Council of Europe, Ad Hoc Committee of Experts on Roma Issues, “Thematic Report on Social Housing for Roma,” CAHROM (2012)8 (28 November 2012); Council of Europe, Ad Hoc Committee of Experts on Roma Issues, “Thematic Report on Encampment Areas and Other Issues Relating to Travellers,” CAHROM (2013)6 (30 April 2013); Council of Europe, Ad Hoc Committee of Experts on Roma Issues, “Thematic Report on Social Housing for Roma and Legalisation of Roma Settlements and Houses,” CAHROM 2013(18) (29 October 2013); Council of Europe, Ad Hoc Committee of Experts on Roma Issues, “Thematic Report on (Re-) Housing Solutions for Roma and Alternative Measures to (Forced) Evictions,” CAHROM (2014)4 (5 October 2014).

¹⁸⁷ Council of Europe, Committee of Ministers, “Recommendation on Improving the Housing Conditions of Roma and Travellers in Europe,” Rec(2005)4 (23 February 2005). See also Council of Europe, Parliamentary Assembly, “The Situation of Roma in Europe and Relevant Activities of the Council of Europe,” 1740 (2010) (22 June 2010); Council of Europe, Commissioner for Human Rights, “Document de synthèse sur les droits de l’homme des Roms,” CommDH/Position Paper(2010)3 (15 September 2010). At the European Union level, see among others Council of the European Union, “Council Recommendation on Effective Roma Integration Measures in The Member States,” 2013/C 378/01 (9 December 2013). See further Silvia Cittadini, “Roma, Adequate Housing, and the Home: Construction and Impact of a Narrative in EU Policy Documents,” *Critical Romani Studies* 1, no. 2 (2018): 40–56.

Roma. As I will show, the UN Human Rights Committee (HRC) and the European Court of Human Rights (ECtHR) have found violations of the right to housing of Roma in a number of cases, but they are reluctant to make findings of discrimination alongside those violations. By contrast, the ECSR has recognised the existence of discrimination in this context. In light of these cases, my argument that a right to adequate housing approach is sometimes not enough to fully address the harm suffered by individuals and groups will become more evident.

At the international level, the case of *I Elpida* before the HRC concerned the forced eviction and demolition of dwellings in a long-standing Roma community after a declaration that housing in that area was illegal, in a situation where adequate alternative accommodation was not immediately available.¹⁸⁸ The HRC found that the settlement had existed unchallenged by the authorities for decades, and that the houses had been de facto tolerated by public authorities.¹⁸⁹

It rejected, however, the claim of discrimination, considering that this argument had not been sufficiently raised during the domestic proceedings. In other similar cases before this body, antidiscrimination claims were found to be unsubstantiated or not sufficiently proven.¹⁹⁰ This stance can be contested, as there were sufficient elements in these cases indicating discrimination.

These cases all showed differences in treatment between Roma and other groups, with relocation procedures for Roma settlements being delayed for years while faster procedures were available in other cases, or with forced evictions being enforced only in predominantly Roma areas. This must be considered against the backdrop of structural and persistent patterns of

¹⁸⁸ Human Rights Committee, “Communication No. 2242/2013,” *I Elpida v. Greece*, CCPR/C/118/D/2242/2013 (3 January 2017).

¹⁸⁹ Human Rights Committee, *I Elpida v. Greece*, para 12.5.

¹⁹⁰ See also Human Rights Committee, “Communication No 1799/2008,” *Georgopoulos et al. v Greece*, CCPR/C/99/D/1799/2008 (14 September 2010); Human Rights Committee, “Communication No. 2073/2011,” *Liliana Assenova Naidenova et al. v Bulgaria*, CCPR/C/106/D/2073/2011 (27 November 2012); Human Rights Committee, “Communication No. 1926/2010,” *S.I.D. et al. v. Bulgaria*, CCPR/C/111/D/1926/2010 (29 September 2014).

racial discrimination against the Roma population in many European countries.

This unequal realisation of the right to housing based on the racial or ethnic origin of certain groups, which is rooted in hostility, prejudice, and stigma, cannot be apprehended in its entirety through the right to housing alone, but it requires an antidiscrimination law approach that fully addresses this symbolic harm beyond the breach of their right to housing. Antidiscrimination law allows us to consider the specific harm suffered by these individuals because of their group-based identity, leading to a breach of their dignity and worth and jeopardising their ability to interact in society on an equal footing with others.

Looking at the ECtHR case law, *Yordanova* is the key case concerning housing discrimination against settled Roma.¹⁹¹ The applicants lived in homes built with no permit in a Roma settlement established in the 1960s and were served an eviction order. Authorities had de facto tolerated this settlement for decades, which resulted in the applicants building a community and developing strong links with each other. Since the authorities did not take this dimension into account and did not consider the risk of the applicants becoming homeless once evicted, the Court found a violation of their right to private and family life (Article 8 ECHR).

However, although the Court acknowledged that the disadvantaged position of the Roma as a group should have been taken into consideration, it did not find a separate violation of their right to nondiscrimination (Article 14 ECHR). The Court refused to examine the alleged violation of this article as regards the potential enforcement of the eviction order, considering that this was a hypothetical matter.

With regard to the contention that the authorities were unduly influenced by hostile attitudes and complaints from neighbours, the Court stated that those aspects had been sufficiently dealt with under the proportionality

¹⁹¹ European Court of Human Rights, *Yordanova and Others v. Bulgaria*. See further Adélaïde Remiche, “Yordanova and Others v Bulgaria: The Influence of the Social Right to Adequate Housing on the Interpretation of the Civil Right to Respect for One’s Home,” *Human Rights Law Review* 12, no. 4 (2012): 787–800.

analysis linked to the violation of the right to private and family life, and that they deserved no separate examination.¹⁹² While the ECtHR had enough elements to make a finding of discrimination, this dimension went unrecognised.

It is important to explain again why recognising a nondiscrimination violation has an added value when compared to a finding of violation of the right to private and family life in this context. The applicants had pointed in this case to the racial prejudice expressed by the government, who had admitted that it sought to avoid large concentrations of Roma individuals and that it was thereby respecting the rights of non-Roma residents.

This approach by public authorities reveals something more than the infliction of a material harm consisting in being deprived of one's home, for it represents a violation of the dignity and worth of Roma individuals, who see their relational equality and their participatory parity negated or diminished as a result of this prejudiced stance.

This specific symbolic harm transcends the idea of adequate housing and constitutes a violation of substantive equality, which should therefore be addressed through antidiscrimination law avenues. I develop this idea further in Chapter 5, when discussing the discriminatory implications of housing segregation.

By contrast, the ECSR has ruled on a number of cases involving housing discrimination against Roma, finding explicit violations of the nondiscrimination clause contained in Article E RESC.¹⁹³

¹⁹² European Court of Human Rights, *Yordanova and Others v. Bulgaria*, paras. 147–48. See also the *Bagdonavicius* case, involving the forced eviction and demolition of the dwellings of six Roma families, where the potential violation of Article 14 ECHR was not examined either. European Court of Human Rights, Third Section, *Bagdonavicius and Others v. Russia*, Application no. 19841/06 (11 October 2016). This last judgment contains a dissenting opinion by Judge Keller arguing that a violation of Article 14 should have been found in this case. See also, very recently, the *Hirtu* case, where the nondiscrimination dimension was not considered either. European Court of Human Rights, Fifth Section, *Hirtu and Others v. France*, Application no. 24720/13 (14 May 2020).

¹⁹³ In the case of countries who have not ratified the RESC, discrimination issues are dealt with under the 1961 European Social Charter Preamble nondiscrimination clause.

The ECSR found discrimination in light of the living conditions in camps, the forced removal of Roma families, and the fact that there were financial resources available which had not been directed at improving access to social housing without discrimination for Roma individuals.¹⁹⁴ It also deemed that the failure to consider the different situation of Roma and to introduce measures specifically aimed at improving their housing conditions breached their right to nondiscrimination, finding, in this case, an instance of indirect discrimination.¹⁹⁵

In this regard, antidiscrimination law has an added value when compared to a right to adequate housing approach, because it highlights the structural inequalities experienced by Roma and the need to restore substantive equality by means of a tailored approach that is rooted in nondiscrimination principles, beyond adequate housing.

As we can see, whereas certain bodies like the ECSR tend to recognise the discriminatory dimensions of these cases, finding violations of the right to nondiscrimination, other bodies such as the HRC or the ECtHR are still far from this position.

It is essential that international and regional treaty-monitoring bodies and courts take housing discrimination based on hostility, prejudice, and stigma seriously. By discounting this specific group-based discriminatory dimension and reducing it to one more aspect of the right to housing, these bodies neglect the importance of substantive equality and participatory parity for Roma individuals, rendering their lived experience invisible.

It is thus important to recall the added value of antidiscrimination law in protecting disadvantaged groups against hostility, prejudice, and stigma. Building on the cases presented in this and the previous sections, it becomes clear that the right to housing alone does not always suffice to address the collective and group-based dimension that antidiscrimination law focuses

¹⁹⁴ European Committee of Social Rights, *Centre on Housing Rights and Evictions (COHRE) v. Italy*, Collective complaint no. 58/2009 (25 June 2010).

¹⁹⁵ European Committee of Social Rights, *European Roma Rights Centre (ERRC) v. Italy*, Collective complaint no. 27/2004 (7 December 2005); European Committee of Social Rights, *European Roma Rights Centre (ERRC) v. Portugal*, Collective complaint no. 61/2010 (30 June 2011).

on, and therefore that antidiscrimination law has additional merits when compared to a right to adequate housing approach in this regard.

This protection will be mostly achieved through direct discrimination and through indirect discrimination in some cases. Furthermore, there is an additional, underused antidiscrimination law concept that can also be mobilised to effectively tackle hostility, prejudice, and stigma: discriminatory harassment.

3.3. Housing harassment as discrimination

Discriminatory harassment is a powerful concept to address certain types of discrimination that may be difficult to subsume within other antidiscrimination legal concepts and which are especially prevalent in the housing context.

As advanced in Chapter 1, the particularity of harassment is that it does not require a comparative element, unlike direct and indirect discrimination. Discriminatory harassment focuses on the existence of a persistent undesirable conduct linked to one of the prohibited grounds, with the aim to harm dignity or to create an intimidating, hostile, degrading, or offensive environment that impedes the full exercise or realisation of human rights.

Housing harassment is characterised by the perpetrator's intent to obstacle or to impede the realisation of the right to housing in connection with a prohibited ground. It must be persistent, involving the repetition of an action or a series of actions over time. The most common instance of housing harassment occurs when a landlord tries to expel a tenant through unlawful means in order to conclude a new rental agreement, often because they can charge a higher rent or because less stringent regulations will apply to the new contract.¹⁹⁶

If this conduct can be linked to a prohibited discrimination ground, it will fall under the scope of antidiscrimination norms and constitute prohibited

¹⁹⁶ See Juli Ponce Solé, "La lucha contra la discriminación residencial y el acoso inmobiliario," in *El derecho de la vivienda en el siglo XXI: sus relaciones con la ordenación del territorio y el urbanismo*, ed. Juli Ponce Solé and Domènec Sibina Tomàs (Madrid: Marcial Pons, 2008), 493–511.

discriminatory harassment. Since this conduct cannot be sufficiently addressed through the right to housing alone, antidiscrimination law proves again its usefulness when compared to an approach exclusively based on the right to housing.

Several cases can be highlighted to further illustrate the idea of discriminatory housing harassment. In the *L.K.* case before the UN Committee on the Elimination of Racial Discrimination (CERD),¹⁹⁷ a Moroccan citizen in the Netherlands willing to rent a municipal subsidised house was met by local residents shouting xenophobic remarks and repeatedly and persistently threatening him with damage to his property. Although the CERD analysed the situation from the perspective of incitement to racial discrimination and acts of violence, this situation could have certainly been qualified as discriminatory harassment.

Discriminatory harassment has been explicitly acknowledged by national courts and equality bodies in some cases. A notable example is the Miskolc saga of cases in Hungary. These cases regard the municipality of Miskolc, which offered financial compensation for “low-comfort tenants” (in practice, almost exclusively Roma tenants) if they agreed to move out of the municipal borders, so that they would fall under the responsibility of another local entity for the purposes of social benefits. Miskolc had also been carrying out targeted public health and child protection inspections almost exclusively in predominantly Roma neighbourhoods. These practices were all qualified as harassment based on ethnicity by the regional court and by the court of appeal.¹⁹⁸

¹⁹⁷ Committee on the Elimination of Racial Discrimination, “Communication No. 4/1991,” *L.K. v. the Netherlands*, CERD/C/42/D/4/1991 (16 March 1993).

¹⁹⁸ András Kádár, “Curia Quashes Local Council’s Discriminative Decree on Housing” (European Network of Legal Experts in Gender Equality and Non-Discrimination, 28 May 2015), <https://www.equalitylaw.eu/document?task=document.viewdoc&id=2762>; András Kádár, “First Instance Court Decision on the Harassing Practices of the Municipality of Miskolc” (European Network of Legal Experts in Gender Equality and Non-Discrimination, 26 February 2019), <https://www.equalitylaw.eu/downloads/4846-hungary-first-instance-court-decision-on-the-harassing-practices-of-the-municipality-of-miskolc-pdf-127-kb>; András Kádár, “Second Instance Court Decision on the Harassing Practices of the Municipality of Miskolc” (European Network of Legal Experts in Gender Equality and Non-Discrimination, 19 July 2019),

The Hungarian national equality body also found discriminatory harassment in the actions of the mayor of the municipality of Mezőkeresztes, who published an open letter to local residents in the municipal council's bulletin asking them to refrain from selling real estate to Roma people.¹⁹⁹ For its part, the Romanian national equality body found discriminatory harassment in the decision of the municipality of Baia Mare to build a concrete wall between a Roma neighbourhood and the main city road, assessment which was then upheld by the Romanian Supreme Court.²⁰⁰

Taking a final example, the notion of housing harassment has recently started to be mobilised by the Barcelona City Council. This is an innovative, forward-thinking use of this concept, supported by the Catalan Right to Housing Act.²⁰¹

This Act explicitly prohibits housing harassment, defined as any action or omission with the aim of disturbing a person in the peaceful enjoyment of their dwelling and of creating a hostile environment, be it in the material, personal, or social dimensions, with the ultimate aim of forcing them to adopt an unwanted decision regarding their legal right to occupy that dwelling.²⁰² According to this Act, housing harassment constitutes discrimination.

<https://www.equalitylaw.eu/downloads/4933-hungary-second-instance-court-decision-on-the-harassing-practices-of-the-municipality-of-miskolc-pdf-78-kb>.

¹⁹⁹ András Kádár, “Mayor Found to Have Committed Harassment When Calling on Local Residents Not to Sell Real Estates to Roma People” (European Network of Legal Experts in Gender Equality and Non-Discrimination, 10 January 2017), <https://www.equalitylaw.eu/downloads/4005-hungary-mayor-found-to-have-committed-harassment-when-calling-on-local-residents-not-to-sell-real-estates-to-roma-people-pdf-136-kb>.

²⁰⁰ See *Country Report – Non-Discrimination: Romania 2016* (Brussels: European Network of Legal Experts in Gender Equality and Non-Discrimination, 2016), 47–48, <https://www.equalitylaw.eu/downloads/3712-2016-ro-country-report-nd>. See, recently, Romanița Iordache, “New Sanction Issued by the NCCD for the Segregation Wall in Baia Mare” (European Network of Legal Experts in the Non-Discrimination Field, 14 February 2020), <https://www.equalitylaw.eu/downloads/5085-romania-new-sanction-issued-by-the-nccd-for-the-segregation-wall-in-baia-mare-73-kb>.

²⁰¹ Spain, Catalonia, Law 18/2007, of 28 December, of the right to housing, BOE-A-2008-3657 (28 December 2007).

²⁰² Spain, Catalonia, Law 18/2007, art. 45(3).

In the administrative practice of the Barcelona City Council, a series of elements are considered to be indicators of potential housing harassment. Some of these indicators include: the unjustified refusal of landlords to receive rental payments by tenants; the lack of maintenance in the building and the refusal to conduct conservation or rehabilitation works; verbal harassment, threats, deception, or psychological pressure against tenants in order to make them leave the building; renting out a unit in the same building to persons who behave antisocially or create nuisance; and interrupting the water, electricity, or gas supplies, or manipulating them to provoke a wasteful consumption.²⁰³

If one or more of these elements are present in a particular case, administrative sanctioning proceedings may be brought by the corresponding body. This procedure can lead to significant fines and it is independent of any potential criminal charges brought by public prosecutors under criminal law.

So far, housing harassment has been used by the Barcelona City Council in a case where the tenant had been living in an apartment for forty-three years without a written rental contract, on the basis of a verbal agreement. Following the sale of the building, the new owner refused to recognise this agreement and sign a written contract, rejecting all rental payments from the tenant.²⁰⁴ In another case, the owner had refused to do the necessary works in terms of sanitation.²⁰⁵ In a third case, the owner had deliberately kept the building in a state of disrepair for years, and had then decided to carry out some works without the necessary permits and putting at risk the health of some of the tenants.²⁰⁶

However, the Catalan Act fails to link housing harassment with any prohibited discrimination grounds. This approach makes such a prohibition

²⁰³ Spain, Barcelona City Council, “Administrative sanctions regarding harassment,” (5 March 2018) [unpublished internal memo].

²⁰⁴ Spain, Barcelona City Council, “Legal report on discrimination in the enjoyment of housing,” (10 October 2018) [unpublished internal document].

²⁰⁵ Spain, Barcelona City Council, “Legal report on discrimination in the enjoyment of housing,” (24 October 2018) [unpublished internal document].

²⁰⁶ Spain, Barcelona City Council, “Legal report on discrimination in the enjoyment of housing,” (8 October 2018) [unpublished internal document].

resemble more of a general safeguard for the realisation of the right to housing than a specific antidiscrimination legal concept in its own right.

Discriminatory harassment can serve as a powerful legal concept to tackle housing discrimination, but it must be properly conceptualised and applied without neglecting its discriminatory dimension. More general civil and criminal law provisions should protect individuals against harassment, including in the field of housing, but discriminatory harassment falls under antidiscrimination law and should be regulated in such a way that it offers specific protection to victims of these acts when those acts relate to prohibited discrimination grounds.

In doing so, antidiscrimination law shows once again its added value with regard to the legal guarantees surrounding the right to housing, as it addresses a specific symbolic harm that general right to housing provisions cannot sufficiently address.

More specifically, it allows us to tackle not only the material harm produced to rightsholders when they are forced to take unwanted decisions relating to their right to adequate housing, but also the additional symbolic harm caused when this is linked to group-based hostility, prejudice, and stigma based on a prohibited discrimination ground. When this additional dimension is present, the right to housing violation is coupled with a violation of substantive equality, which transcends the limits of a right to adequate housing approach.

Although this section has explored discriminatory harassment in relation to status-based grounds, in light of the analysis deployed in Chapter 4 an argument could tentatively be made as to the possibility of prohibiting discriminatory harassment on the basis of socioeconomic disadvantage. This could prove very useful in cases of harassment linked to housing precarity and poverty, since other antidiscrimination law concepts may not be sufficiently well-equipped under existing norms to adequately deal with these situations.

In summary, discriminatory harassment is a powerful tool to realise the first identified aim of antidiscrimination norms: eliminating hostility, prejudice, and stigma. I move now to consider the second identified aim, that of

respecting cultural diversity and avoiding misrecognition. A special focus will be put on Travellers, whose conception of housing differs from that of the majority population, with the consequence that prevailing housing norms may neglect this cultural identity and have a discriminatory impact on this group.

3.4. Respecting cultural diversity and avoiding misrecognition

The second identified aim that antidiscrimination norms ought to pursue according to my account of antidiscrimination law is that of respecting cultural diversity and avoiding misrecognition.

In Chapter 1, I presented cultural adequacy as one of the components of the right to adequate housing in international and European human rights law. Taking a step further, from an antidiscrimination law perspective it can be said that realising nondiscrimination for disadvantaged groups also requires that legislators and policy makers actively take the particular identities and needs of these groups into account when designing and implementing housing laws and policies.

In this way, antidiscrimination law enriches and complements a right to adequate housing approach, insofar as it permits to elaborate and expand on its cultural adequacy component, which currently lacks concreteness in some respects. Antidiscrimination law renders this element more concrete by highlighting its substantive equality rationale, linked to participatory parity and relational equality, and by drawing on longstanding developments in other fields beyond housing (including civil and political rights and other social rights) where the idea of cultural adequacy has been dealt with through the concept of indirect discrimination. These developments can then be used to flesh out the content of the cultural adequacy dimension in the specific housing context.

Antidiscrimination law refocuses here our attention to the link between cultural adequacy and substantive equality, and to the idea that apparently neutral laws, policies, and practices may be discriminatory against certain disadvantaged groups by not sufficiently considering their situation and needs without adequate justification. This chiefly occurs through

misrecognition, due to structural disadvantage arising from the assumed neutrality of majority representations and norms and the lack of consideration for other identities and circumstances.

This entails a commitment towards inclusive and diversity-conscious representations of what social goods mean for different groups, acknowledging that the default conception at the root of most norms and practices is based on majority representations, without much room for alternative understandings of those social goods. This also mirrors the reflections advanced in Chapter 2 about local justice and different spheres of justice.

In the field of housing, this chiefly means expanding the legal meaning of “home” so that it encompasses alternative forms of housing not falling under the majoritarian representation of a “bricks and mortar” apartment or house which is spatially fixed. This conception tends to be used as a reference for determining other legal notions like domicile and residence, allowing or refusing the access of individuals to social services and other relevant benefits.

To better put this idea in context, we can look in detail at the situation of Travellers.²⁰⁷ The Traveller population is especially relevant in countries like Belgium, France, Ireland, the Netherlands, and the United Kingdom.²⁰⁸ This group is especially affected by discrimination in housing, precisely as a consequence of their housing needs not being properly recognised and taken into account by existing legal provisions and practices.

As mentioned above with regard to the term “Roma,” I use “Travellers” as an umbrella notion, conflating individuals who have various ethnic backgrounds and with marked differences with each other in terms of customs, language, socioeconomic position, etc. Nevertheless, the common

²⁰⁷ See, for a general overview, Céline Romainville and Nicolas Bernard, “Le droit à l’habitat des gens du voyage,” in *Le droit et la diversité culturelle*, ed. Julie Ringelheim, Collection du Centre des droits de l’homme de l’Université catholique de Louvain (Brussels: Bruylant, 2011), 745–818; Bernard, “Quel droit au logement pour les gens du voyage?”; Nicolas Bernard, “La lancinante question de l’expulsion des Roms (et autres considérations),” *Revue trimestrielle des droits de l’homme* 96 (2013): 909–943.

²⁰⁸ Ringelheim and Bernard, *Discrimination in Housing*, 37.

denominator to all of them is a particular attachment to travel or nomadism as a way of life and as part of their cultural identity, be it in practice or in a more symbolic way.

Most Travellers conceive indeed of their housing in a different manner than the majority of the population, which often leads to significant gaps between the type of housing these groups require, consistent with their specific cultural identity and needs, and what housing policies generally foresee.²⁰⁹

Notably, Travellers usually live in mobile homes, rather than “bricks and mortar” apartments or houses. These mobile homes often physically consist of a caravan, roulotte, or some other similar type of vehicle. While some Travellers move between locations regularly, others are mostly sedentary and move only (if at all) for a few weeks each year, yet they still live in mobile homes as part of their cultural identity.

Historically across Europe, state action has tried to force these groups to assimilate to majority-dominated understandings of housing, refusing to recognise the specificities of their cultural identity and practices. States have for the most part been reluctant to put in place policies that guarantee the access of these groups to adequate, culturally appropriate housing.

International human rights instruments currently require states to ensure the legal recognition of Travellers’ mobile homes or other places of residence as conferring the same rights as those attached to spatially fixed housing.²¹⁰ Moreover, states must provide for areas equipped with minimum facilities

²⁰⁹ See Nicolas Bernard, “Actualités du droit au logement des Roms et gens du voyage en Belgique,” *Revue de droit communal* 2017, no. 2 (2017): 3; Ahmed Ahkim, “L’habitat mobile des gens du voyage,” in *La norme à l’épreuve de l’habitat alternatif*, ed. Nicolas Bernard (Bruxelles: La Charte, 2012), 29–36; Samantha Morgan-Williams, “Reality versus Rhetoric: An Analysis of the Implementation Gap in Provision of Traveller-Specific Housing in Ireland,” in *Housing, Homes and the Law*, ed. Michel Vols and Christoph U. Schmid, *Studies in Housing Law* 3 (The Hague: Eleven International Publishing, 2019), 106.

²¹⁰ See Council of Europe, Committee of Ministers, “Recommendation on the Movement and Encampment of Travellers in Europe,” Rec(2004)14 (1 December 2004). In *Ory v. France*, the HRC examined the conviction of a Traveller for lacking a vehicle insurance and a travel permit, finding this requirement disproportionate and discriminatory. See Human Rights Committee, “Communication No. 1960/2010,” *Claude Ory v. France*, CCPR/C/110/DR/1960/2010 (20 May 2014).

where Travellers may stop, be it permanently, semi-permanently, or temporarily.

This should be done by engaging in a meaningful consultation with these groups and by taking their needs into account. There should be sufficient suitable areas for large gatherings to support Travellers during their yearly periods of movement and for foreign Travellers passing through. These areas must provide access to services and utilities, such as electricity, water, and sewage, and must not be segregated from the surrounding urban environment.

As is the case with Roma, states must establish a legal framework ensuring an effective protection against unlawful forced evictions, be they individual or collective.²¹¹ This problem is exacerbated in the case of Travellers, since the lack of sufficient adequate authorised sites may lead them to settle in unauthorised sites, which in turn means that they are exposed to eviction and to fines or other sanctions.

In sum, states must show due regard for the specific circumstances of Travellers in legislation and in individual decisions, so as to enable them to live, insofar as possible, in accordance with their traditions and cultural identity.²¹² Consequently, policies and norms limiting planning permission or allowing municipalities to issue fixed-term permits generally constitute discrimination against Travellers, as planning permission for “bricks and mortar” housing lasts indefinitely.²¹³

3.5 Indirect discrimination against Travellers

Indirect discrimination appears as an especially appropriate instrument to address the situation of Travellers. Although in many contexts Travellers suffer discrimination based on hostility, prejudice, and stigma, in which case

²¹¹ Council of Europe, Committee of Ministers, “Recommendation on the Movement and Encampment of Travellers in Europe,” para. 30.

²¹² European Committee of Social Rights, *International Federation of Human Rights (FIDH) v. Belgium*, Collective complaint no. 62/2010 (21 March 2012), para. 135.

²¹³ European Committee of Social Rights, *International Federation of Human Rights (FIDH) v. Belgium*, para 138.

the considerations made above with regard to Roma still apply, many instances of discrimination against Travellers arise because of the lack of recognition of the identity and needs of this group, and the lack of respect for cultural identities that deviate from what is considered to be a neutral and universal norm.

Indirect discrimination is particularly well-equipped to address this type of conduct. As introduced in Chapter 1, indirect discrimination occurs when a provision, criterion, or practice which is apparently neutral creates a particular disadvantage for a group defined by one of the prohibited grounds, without this measure being justified by a legitimate aim or being implemented through appropriate and necessary means.

Several judicial and quasi-judicial decisions at the European level have addressed indirect housing discrimination against Travellers.²¹⁴ In what follows, I look at ECtHR case law as well as several ECSR decisions.

Firstly, the ECtHR has dealt with housing discrimination against Travellers in several cases, with a clear evolution in its case law. *Buckley* concerned an individual living with his family in a caravan who, given the difficulties to obtain a planning permission, complained that the system discriminated against Travellers by preventing them from pursuing their traditional lifestyle. The Court deemed however that the special needs of the applicant as a Traveller following a traditional lifestyle had been sufficiently taken into account by the British authorities.²¹⁵

In *Chapman*, the Court was again called on to examine planning and enforcement measures taken against a Traveller applicant in respect of the

²¹⁴ See European Committee of Social Rights, *European Federation of National Organisations working with the Homeless (FEANTSA) v. France*; European Committee of Social Rights, *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Greece*, Collective complaint no. 49/2008 (11 December 2009); European Committee of Social Rights, *Centre on Housing Rights and Evictions (COHRE) v. France*, Collective complaint no. 63/2010 (28 June 2011); European Committee of Social Rights, *Médecins du Monde – International v. France*, Collective complaint no. 67/2011 (11 September 2012); European Committee of Social Rights, *European Roma Rights Centre (ERRC) v. France*, Collective complaint no. 51/2008 (19 October 2009).

²¹⁵ European Court of Human Rights, Chamber, *Buckley v. the United Kingdom*, Application no. 20348/92 (29 September 1996).

occupation of land by her mobile home, considering whether these measures violated her right to respect for home and her private and family life.²¹⁶

Although the Court recalled that “the vulnerable position of [Travellers] as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in reaching decisions in particular cases,”²¹⁷ it nonetheless found that no violation of the right to private and family life or the right to nondiscrimination arose from these facts.²¹⁸

In these first cases, the ECtHR was unable to identify the discriminatory dimensions of the respective situations. This approach is problematic, as merely guaranteeing identical treatment as a means of protection is not enough in this context: states have an obligation to take due account of the relevant differences in Travellers’ cultural identity and needs and to act accordingly.

A change in ECtHR case law can be observed in the *Connors* case, where the Court found for the first time a violation of the right to private and family life regarding the traditional lifestyle of Travellers, in connection with a family residing for a long time in a site made available by a local authority and located in publicly owned land.²¹⁹

This shift in approach was consolidated in *Winterstein*, which concerned the eviction without adequate alternative accommodation of Travellers from land they had occupied for decades.²²⁰ The authorities had de facto tolerated the applicants’ occupation of land in the past, and had not pondered their needs before ordering the eviction.

²¹⁶ European Court of Human Rights, Grand Chamber, *Chapman v. the United Kingdom*, Application no. 27238/95 (18 January 2001).

²¹⁷ European Court of Human Rights, *Chapman v. the United Kingdom*, para. 95.

²¹⁸ See, for a similar outcome, European Court of Human Rights, Grand Chamber, *Coster v. the United Kingdom*, Application no. 24876/94 (18 January 2001); European Court of Human Rights, Second Section, *Stenegry and Adam v. France*, Application no. 40987/05 (22 May 2007).

²¹⁹ European Court of Human Rights (ECtHR), First Section, *Connors v. the United Kingdom*, Application no. 66746/01 (27 May 2004).

²²⁰ European Court of Human Rights, *Winterstein and Others v. France*. See also

Since the applicants belonged to a socially vulnerable group, the Court ruled that their particular needs ought to have been taken into account in the proportionality test that national authorities must carry out when deciding whether to evict.²²¹ The Court consequently found a violation of Article 8 ECHR. It considered, however, that no separate violation arose with regard to Article 14.

While this change in approach is welcome, the ECtHR is yet to take a step forward and clearly recognise a separate violation of the right to nondiscrimination in this type of cases. This would better acknowledge that these situations ultimately stem from misrecognition and the lack of respect for minority cultural identities, casting light on how majority representations of housing are used to exclude certain groups from the effective realisation of their right to housing under nondiscriminatory conditions.

Moreover, this would ultimately enrich our understanding of the right to adequate housing, by further clarifying the cultural adequacy component of this right. Antidiscrimination law clarifies the substantive equality rationale of this component and how it is materialised in particular situations, while also offering concrete legal avenues to better realise it. It does so through the concept of indirect discrimination and the raised attention to the antidiscrimination legal requirement to take the particular identities and needs of these groups into account when designing and implementing housing laws and policies.

Secondly, in contrast with the ECtHR, the ECSR has addressed discrimination against Travellers in a more refined manner. Notably, it has found that the insufficient number of stopping places for Travellers who choose to follow an itinerant lifestyle or who are forced to do so as well as the systematic eviction of Travellers from sites or dwellings they occupy breaches their right to nondiscrimination.²²²

²²¹ *Winterstein and Others v. France*, para. 160.

²²² European Committee of Social Rights, *European Roma Rights Centre (ERRC) v. Italy*.

In the important case of *FIDH v. Belgium* (no. 62/2010),²²³ the ECSR provided a definition of what the right to housing specifically means for Travellers. Travellers may need two main types of sites depending on whether they wish to reside on them permanently or semi-permanently or lead a nomadic lifestyle: public or privately owned residential sites on which to install a mobile home on a permanent basis, and temporary or transit sites specifically designed for Travellers. The failure to recognise mobile homes as dwellings and to adapt housing standards accordingly, as well as the failure to provide an adequate number of these sites, entails a discriminatory breach of their right to housing.

In the 2007 case of *International Movement ATD Fourth World v. France*,²²⁴ the ECSR found that Travellers (*Gens du voyage*) suffered systematic discrimination in France and a denial of housing assistance. In another decision against France on substantially the same grounds five years later, the 2012 case of *ERTF v. France*,²²⁵ the ECSR measured the action taken by the French authorities in those five years. It found that the state had not taken sufficient action in light of the passivity of certain municipalities, which led to a violation of Travellers' right to nondiscrimination.²²⁶

²²³ European Committee of Social Rights, *International Federation of Human Rights (FIDH) v. Belgium*.

²²⁴ European Committee of Social Rights, *International Movement ATD Fourth World v. France*, Collective complaint no. 33/2006 (5 December 2007). See further Mathias Möschel, "Race in French 'Republican' Law: The Case of Gens Du Voyage and Roma," *International Journal of Constitutional Law* 15, no. 4 (2017): 1206–25.

²²⁵ European Committee of Social Rights, *European Roma and Travellers Forum (ERTF) v. France*, Collective complaint no. 64/2011 (24 January 2012), para. 96.

²²⁶ In the 2015 case of *ERRC v. France*, the ECSR dealt again with the right to housing of Travellers and with France's failure to provide for sufficient halting sites for them. The ECSR found an inadequate legislative framework and noted the lack of sanctions for local authorities not willing to take up their duties, as well as the failure to ensure the adequacy of existing sites. However, in this case the ECSR did not find a separate violation of the right to nondiscrimination of Travellers besides the violation of their right to housing. It considered that France had sufficiently taken into account the specific needs and identities of these groups by reference to the ECSR's previous decisions. See European Committee of Social Rights, *European Roma Rights Centre (ERRC) v. France*, Collective complaint no. 100/2013 (1 December 2015).

Examples of facially neutral policies with a disproportionate impact on Travellers can also be found at the national level.²²⁷ In the Netherlands, several cases have dealt with the drastic reduction carried out by the Dutch government of the number of trailer parks available to accommodate Travellers.²²⁸ In Ireland, despite sufficient funding to provide Travellers with targeted accommodation, there is a general lack of political willingness leading to implementation deficits.²²⁹

In a similar vein to what I discussed above in relation to Roma, the reluctance by adjudicating bodies, and notably the ECtHR, to recognise these cases as instances of discrimination is problematic. As it has been shown, the shortcomings in the realisation of the right to housing of many Travellers arise precisely because of their particular cultural identity and the lack of

²²⁷ See also Mathias Möschel, “Eighteen Years of Race Equality Directive: A Mitigated Balance,” in *EU Anti-Discrimination Law Beyond Gender*, ed. Uladzislau Belavusau and Kristin Henrard (Oxford: Hart Publishing, 2019), 141–60.

²²⁸ Rikki Holtmaat, “Municipal Policy on Trailer Parks Found Discriminatory” (European Network of Legal Experts in Gender Equality and Non-Discrimination, 23 January 2014), <https://www.equalitylaw.eu/downloads/2209-nl-101-flash-report-nl-2015-1-nihr-decision-on-trailer-parks>; Rikki Holtmaat, “Municipal Policy on Trailer Parks Found Discriminatory (II)” (European Network of Legal Experts in Gender Equality and Non-Discrimination, 31 July 2015), <https://www.equalitylaw.eu/downloads/2916-the-netherlands-municipal-policy-on-trailer-parks-found-discriminatory-pdf-75-kb>; Titia Loenen, “The Netherlands Ombudsman Considers Municipal Housing Policies Regarding Roma Discriminatory” (European Network of Legal Experts in Gender Equality and Non-Discrimination, 16 June 2017), <https://www.equalitylaw.eu/downloads/4221-the-netherlands-the-netherlands-ombudsman-considers-municipal-housing-policies-regarding-roma-discriminatory-pdf-36-kb>. See, with regard to the UK, Aileen McColgan, “Discrimination against Travellers in Planning Matters” (European Network of Legal Experts in Gender Equality and Non-Discrimination, 16 February 2015), <https://www.equalitylaw.eu/downloads/828-23-uk-nd-discrimination-in-planning-against-travellers>.

²²⁹ See further Morgan-Williams, “Reality versus Rhetoric,” 116. See also Dorothy Watson, Oona Kenny, and Frances McGinnity, *A Social Portrait of Travellers in Ireland*, Research Series 56 (Dublin: The Economic and Social Research Institute, 2017), <https://www.esri.ie/system/files?file=media/file-uploads/2017-01/RS56.pdf>. See further Darren O’Donovan, “Breaking the Cycle of Discrimination? Traveller/Roma Housing Exclusion and the European Convention on Human Rights,” *International Journal of Discrimination and the Law* 16, no. 1 (2016): 5–23.

consideration of these specificities and needs in housing legislation, policies, and decisions.

By openly acknowledging this discriminatory dimension, the cultural adequacy component of the right to adequate housing is better highlighted and put into context. Again, this allows us to connect this element with a substantive equality rationale and with the idea of misrecognition, and to have recourse to consolidated antidiscrimination legal concepts that have been thoroughly interpreted and developed in antidiscrimination law, in particular indirect discrimination and the requirement to take the specific situation and needs of disadvantaged groups into account. These insights can then be used to clarify the implications of cultural adequacy in the specific housing context.

As shown in this section, certain norms, policies, and decisions may have a disproportionate impact on Travellers without their being sufficiently justified by an appropriate and objective justification in a strict relationship of proportionality. If this is the case, antidiscrimination norms will apply through the prohibition of indirect discrimination. In the case of Travellers, the multiple cases referenced show how merely guaranteeing identical treatment as a means of protection is not enough: states have an obligation to take due account of these relevant differences and to act accordingly.²³⁰

To sum up, realising the right to nondiscrimination for certain disadvantaged groups whose cultural identities and practices differ from those of the majority requires that legislators and policy makers take these particular identities and needs into account when designing and implementing housing norms and policies.

This responds to the second identified aim of antidiscrimination norms, that of respecting cultural diversity and avoiding misrecognition by seeking to undo institutionalised patterns of cultural value which label some groups as inferior, excluded, or invisible. I move now to the third stated aim: adapting and transforming existing housing structures.

²³⁰ European Committee of Social Rights, *European Roma Rights Centre (ERRC) v. France*.

3.6 Transforming existing housing structures

The third identified aim of antidiscrimination norms connects with the transformative project that antidiscrimination law represents. Beyond correcting injustices occurred in the past, antidiscrimination law seeks to have an enduring impact on structures themselves, so that these are progressively transformed and rendered more inclusive. In the field of housing, besides social and legal structures, we encounter physical and psychosocial barriers impinging on the realisation of the right to housing for some individuals and groups.

A caveat must be made from the outset: the realisation of the right to housing for persons with disabilities in nondiscriminatory terms is not only undermined by the lack of transformation of existing housing structures, but these persons may also be subject to discrimination rooted in hostility, prejudice, and stigma, as well as misrecognition. The concepts of direct and indirect discrimination are thus still relevant in this context.

Some cases at the domestic level have therefore shown how certain purportedly neutral housing policies and practices may de facto exclude persons with disabilities. For example, social housing allocation in the municipality of Bucharest was decided using a points-based system which disproportionately limited the access of persons with disabilities to public housing without an objective and appropriate justification, as the Romanian equality body found.²³¹

Turning back to the third identified aim and the transformation of existing housing structures, I mainly refer in this and the next sections to disability as the prohibited ground rendering this dimension most visible, although other grounds like age, health status, family status, or gender may also come into play.

²³¹ Romanița Iordache, “National Equality Body Decision on Social Housing Criteria in Bucharest” (European Network of Legal Experts in Gender Equality and Non-Discrimination, 12 August 2016), <https://www.equalitylaw.eu/downloads/3877-romania-national-equality-body-decision-on-social-housing-criteria-in-bucharest-pdf-134-kb>.

For instance, older people or persons with certain health conditions may experience difficulties accessing existing housing units when multiple stairs or steps are involved. The tendency towards small apartments in cities renders it difficult for larger families with several children or for multigenerational households to find a suitable dwelling. Women victims of gender-based violence may need a safe room in their dwellings to protect themselves from potential attacks. All of these situations pose accessibility issues in a broad sense, showing how existing structures must be transformed in different ways so as to be truly inclusive.

When looking at disability, be it physical or psychosocial, it is fundamental to take the social model of disability as the underlying conceptual framework on which to ground any legal interventions. As advanced in Chapter 2, the social model of disability opposes the outdated medical model which regarded the challenges faced by people with disabilities as resulting primarily or solely from their impairments.

The social model posits, by contrast, that most of the challenges faced by persons with disabilities result from a mismatch between their characteristics and the physical and social environment with which they interact. This model recognises a multiplicity of physical, environmental, administrative, social, educational, and attitudinal barriers that create disabilities.

In the field of housing, persons with disabilities often have specific physical or psychosocial needs that existing housing structures are not prepared to properly satisfy. When persons with disabilities interact with these non-inclusive housing structures, those structures become barriers to the realisation of their human rights. It follows that housing policies and practices ought to be developed with this transformative dimension in mind, and that housing structures should be designed so as to enable inclusiveness and nondiscrimination.

Housing structures refer in this context not only to the built environment, like the presence of ramps and handrails or visual, hearing, and tactile assistive technologies and indications, but also to psychosocial and societal elements like the presence of common areas and spaces where the

interaction with neighbours is made possible, the availability of dwellings of different configurations and sizes for diverse families, the enabling of community living and of independent living, or the facilitation of multigenerational relationships, among others.

A series of international and European human rights instruments have elaborated on the rights of persons with disabilities in the housing context.²³² The most important instrument in this regard is the UN CRPD, which the EU as well as all of its Member States have ratified.²³³ This Convention embodies a global shift from the medical model to the social model of disability.²³⁴ For some authors, the CRPD even takes a step further and establishes a new way of understanding disability that could be labelled as the “human rights” model.²³⁵

The UN Committee on the Rights of Persons with Disabilities, the monitoring body for the CRPD, has adopted a number of General Comments further clarifying the obligations required by this Convention in the field of housing.²³⁶ The CRPD Committee has emphasised that inaccessible housing

²³² See further Lisa Waddington and Andrea Broderick, *Promoting Equality and Non-Discrimination for Persons with Disabilities: Contribution to the Council of Europe Strategy on the Rights of Persons with Disabilities* (Strasbourg: Council of Europe, 2017), <https://rm.coe.int/168070d7f6>; Lisa Waddington and Andrea Broderick, *Combating Disability Discrimination and Realising Equality: A Comparison of the UN CRPD and EU Equality and Non-Discrimination Law* (Luxembourg: European Network of Legal Experts in Gender Equality and Non-Discrimination, 2018), https://ec.europa.eu/info/sites/info/files/combating_disability_discrimination.pdf.

²³³ United Nations, “Convention on the Rights of Persons with Disabilities.” See Lisa Waddington, “The Influence of the UN Convention on the Rights of Persons with Disabilities on EU Anti-Discrimination Law,” in *EU Anti-Discrimination Law Beyond Gender*, ed. Uladzislau Belavusau and Kristin Henrard (Oxford: Hart Publishing, 2019), 339–62.

²³⁴ See Lisa Waddington, “Fine-Tuning Non-Discrimination Law: Exceptions and Justifications Allowing for Differential Treatment on the Ground of Disability,” *International Journal of Discrimination and the Law* 15, no. 1–2 (2015): 12; Jan Grue, “Inclusive Marginalisation? A Critical Analysis of the Concept of Disability, Its Framings and Their Implications in the United Nations Convention on the Rights of Persons with Disabilities,” *Nordic Journal of Human Rights* 37, no. 1 (2019): 7.

²³⁵ See Theresia Degener, “Disability in a Human Rights Context,” *Laws* 5, no. 3 (2016).

²³⁶ See United Nations, Committee on the Rights of Persons with Disabilities, “General Comment No. 1 (2014). Article 12: Equal Recognition Before the Law,”

and institutionalisation policies run counter to the right of persons with disabilities to equality and nondiscrimination.²³⁷ I further explore the concept of institutionalisation and its qualification in terms of antidiscrimination law in Chapter 5, in the context of residential segregation.

Several judicial and quasi-judicial decisions at the European level cast light on some important implications of antidiscrimination law for persons with disabilities in the field of housing.

The case of *FIDH v. Belgium* (no. 75/2011) before the ECSR concerned a collective complaint on behalf of highly dependent adults with disabilities, claiming that many of them were unable to access adequate accommodation.²³⁸ Due to the shortage of places in existing care and accommodation centres, applicants were rejected or had to wait for three years and longer.

The ECSR ruled that states parties must take account of these persons' situation and needs, even if this means that persons with disabilities are treated more favourably than others.²³⁹ It consequently found a violation of the nondiscrimination clause in connection with the right to the social, legal, and economic protection of the family.

Looking now at the ECtHR, we can consider the case of *Guberina*, concerning a family with a child with multiple disabilities who lived in the third floor of an apartment block with no lift. They decided to move into a house in order to ensure that their child could easily access it.²⁴⁰ They applied

CRPD/C/GC/1 (19 May 2014); United Nations, Committee on the Rights of Persons with Disabilities, "General Comment No. 2 (2014). Article 9: Accessibility," CRPD/C/GC/2 (22 May 2014); United Nations, Committee on the Rights of Persons with Disabilities, "General Comment No. 6 (2018) on Equality and Non-Discrimination," CRPD/C/GC/6 (26 April 2018).

²³⁷ Committee on the Rights of Persons with Disabilities, "General Comment No. 6 (2018) on Equality and Non-Discrimination," para. 30.

²³⁸ European Committee of Social Rights, *International Federation for Human Rights (FIDH) v. Belgium*, Collective complaint no. 75/2011 (18 March 2013).

²³⁹ European Committee of Social Rights, *International Federation for Human Rights (FIDH) v. Belgium*, para. 209.

²⁴⁰ European Court of Human Rights, Second Section, *Guberina v. Croatia*. See further Andrea Broderick, "A Reflection on Substantive Equality Jurisprudence: The Standard of Scrutiny at the ECtHR for Differential Treatment of Roma and

for a fiscal exemption foreseen for this purpose, but their request was denied on the grounds that the apartment they were living in already satisfied the housing needs of the family.

The ECtHR ruled that the manner in which the legislation was applied in practice failed to sufficiently accommodate the requirements of the applicant in relation to the disability of his child, finding a violation of the right to nondiscrimination in conjunction with the right to property and to the peaceful enjoyment of possessions.²⁴¹ Notably, the Court derived in this case an obligation to provide reasonable accommodation from the general antidiscrimination clause contained in Article 14 ECHR.

These two cases clarify how an antidiscrimination law approach complements a right to adequate housing approach by casting light on the accessibility component of adequacy and by providing antidiscrimination legal avenues to address this issue. In the next section, I consider more specifically two antidiscrimination legal concepts that are particularly suitable to transform existing housing structures in the context of disability: reasonable accommodation and accessibility.

3.7 Disability: Reasonable accommodation and accessibility

Two specific legal concepts can be found within the antidiscrimination legal framework to fulfil the aim of transforming existing housing structures: the obligation to provide reasonable accommodation and the duty of accessibility. In this section, I look at these two concepts more closely, showing that both of them are ultimately geared towards this transformative endeavour and that they complement the accessibility component of the right to adequate housing, clarifying what it entails and offering concrete legal avenues to realise it through antidiscrimination legal norms.

While accessibility is recognised as a component of the right to adequate housing, it is a general notion that is not specific to disability. Both reasonable accommodation and accessibility have been the subject of

Persons with Disabilities,” *International Journal of Discrimination and the Law* 15, no. 1–2 (2015): 101–22.

²⁴¹ European Court of Human Rights, *Guberina v. Croatia*, para. 93.

important developments in antidiscrimination law through international and European norms and case law, which have specified the meaning, scope, and implications of these notions. These developments can therefore help to flesh out the content of the accessibility dimension of the right to adequate housing in the specific housing context.

Firstly, as advanced in Chapter 1, antidiscrimination norms incorporate the obligation to make reasonable adjustments under certain circumstances, considering their unjustified refusal as a prohibited instance of discrimination. In the context of disability and in light of the CRPD, reasonable accommodation entails the “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”²⁴²

It can be recalled that all EU Member States are bound by the UN CRPD, which recognises a general right to reasonable accommodation including in the field of housing. This means that the refusal to grant reasonable accommodation for a person with a disability in the housing context will be considered discriminatory and therefore unlawful.²⁴³ In this sense, some European countries have explicitly incorporated domestic obligations to provide for reasonable accommodation in the housing sector, mostly in relation to social housing.²⁴⁴

²⁴² United Nations, “Convention on the Rights of Persons with Disabilities,” art. 2.

²⁴³ See further Lisa Waddington, “Reasonable Accommodation for Persons with Disabilities: Part of the Right to Equality and Nondiscrimination,” in *Applying Non-Discrimination Law*, ed. D. Goulas and S. Kofinis (Thessaloniki: Hellenic League for Human Rights, 2018), 89–97.

²⁴⁴ An explicit duty of reasonable accommodation in the field of housing exists in Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, Germany, Hungary, Ireland, the Netherlands, Romania, Slovakia, Spain and the United Kingdom. See Lisa Waddington and Andrea Broderick, *Disability Law and Reasonable Accommodation beyond Employment: A Legal Analysis of the Situation in EU Member States* (Luxembourg: European Network of Legal Experts in Gender Equality and Non-Discrimination, 2016), <https://publications.europa.eu/en/publication-detail/-/publication/154560d2-d494-4080-90b5-dacfc1b83094>.

The duty of reasonable accommodation arises when a person with a disability requires so. It is an immediate obligation which is not restricted to physical works in particular dwellings, but which includes a requirement to adapt existing policies and practices also with regard to psychosocial disabilities. The limits to this obligation are found in the reasonableness of the accommodation that is required.

These limits are materialised in the notion of “disproportionate or undue burden,” which should be defined by considering the size and resources of the person in charge of providing the accommodation, its nature, the estimated costs, the life cycle of the particular accommodation, the possible benefits of increased access for other individuals or for the wider community, etc.²⁴⁵ Notably, the possibility to obtain public funding to make the corresponding accommodation must be taken into account to determine whether it constitutes a disproportionate or undue burden.²⁴⁶

Reasonable accommodation in the housing context may take different forms. In the case of *H.M.* before the CRPD Committee, the denial of planning permission to install a pool at the applicant’s home was at issue.²⁴⁷ She suffered from a rare medical condition and hydrotherapy was the only therapy available for her. The CRPD Committee found that the refusal to grant a permit in her case amounted to a failure to make a reasonable accommodation and was therefore discriminatory.

Some national cases similarly illustrate the wide variety of reasonable adjustments that may be required in the field of housing. We can consider, for instance, the refusal to install a stairlift in an apartment block for a 81-year-old resident with mobility problems living on the third floor, even though it was at no cost for the landlords.²⁴⁸ Another example is the refusal to remove a doorstep and to reposition the hinges of the main door in a

²⁴⁵ European Union, “Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation,” art. 4(2).

²⁴⁶ See further Ringelheim and Bernard, *Discrimination in Housing*, 30–35.

²⁴⁷ Committee on the Rights of Persons with Disabilities, “Communication No. 3/2011,” *H.M. v. Sweden*, CRPD/C/7/D/3/2011 (21 May 2012).

²⁴⁸ United Kingdom, Court of Appeal (Civil Division), *Richmond Court (Swansea) Ltd v. Williams*, [2006] EWCA Civ 1719, para. 39.

building to allow for wheelchair access.²⁴⁹ As a final example, the Dutch national equality body found an instance of housing discrimination in the case of an association of owner-occupiers who did not give permission to a resident with a chronic illness to park her mobility scooter in a specific location in the building's garage.²⁵⁰

Secondly, focusing now on the concept of accessibility, the starting point is the obligation incorporated in the CRPD requiring states parties to identify and eliminate all obstacles and barriers to accessibility, including in the field of housing.

Accessibility is defined in this context as the “access, on an equal basis with others, to the physical environment . . . and to other facilities and services open or provided to the public, both in urban and in rural areas.”²⁵¹ It is a precondition for persons with disabilities to be able to live independently and to participate fully and equally in society.²⁵² Furthermore, accessibility must be built into systems and processes from the outset, following the principles of so-called universal design.²⁵³

The CRPD explicitly protects the right to nondiscrimination of persons with disabilities with regard to housing accessibility, as well as the need to ensure the access of persons with disabilities to public housing programmes.²⁵⁴

Furthermore, the former UN SRAH noted that states are under an obligation to:

²⁴⁹ European Court of Human Rights, Fourth Section, *Neagu v. Romania*, Application no. 49651/16 (29 January 2019).

²⁵⁰ The Netherlands, College voor de rechten van de mens, [An owner-occupiers association makes a prohibited distinction by not allowing a chronically ill resident to park her mobility scooter in the garage], 2011-30 (25 February 2011), <https://mensenrechten.nl/nl/oordeel/2011-30>.

²⁵¹ United Nations, “Convention on the Rights of Persons with Disabilities,” art. 9.

²⁵² Committee on the Rights of Persons with Disabilities, “General Comment No. 2 (2014). Article 9: Accessibility,” para. 1.

²⁵³ Universal design means “the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design.” See United Nations, “Convention on the Rights of Persons with Disabilities,” art. 2.

²⁵⁴ “Convention on the Rights of Persons with Disabilities,” art. 28(2)(d).

ensure physical accessibility, such as through ramps and accessible doors, as well as the accessibility of windows, bathrooms and kitchens; remove the communication barriers confronted by persons with disabilities applying for and living in housing; and ensure access to work, services and public spaces—in short, to ensure that all aspects of the housing environment are accessible.²⁵⁵

At the EU level, the so-called EU Accessibility Act, which takes the form of a directive, has recently introduced certain obligations for Member States, including as regards the use of outdoor areas, the entrances and approaches to buildings, the paths for circulation, the use of rooms, the use of toilets and sanitary facilities, the use of exits and evacuation routes, and the communication and orientation via more than one sensory channel.²⁵⁶

The concept of accessibility can thus be seen as fulfilling a clear antidiscrimination mission in this context, complementary to its role as one of the adequacy components of the right to housing. States are required to ensure that all housing made available to the public, including social housing and private rental housing, is rendered accessible for persons with disabilities. In particular, accessibility standards should be upheld for newly built housing as well as for renovated or rehabilitated dwellings and buildings, including through direct intervention and subsidies made available to cover potential additional costs.

To conclude this examination, it is important to clarify the distinction between reasonable accommodation and accessibility. Whereas accessibility duties relate to groups and must be implemented gradually and

²⁵⁵ United Nations, “Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context,” A/72/128, para. 40.

²⁵⁶ See European Union, “Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services,” OJ L 151/70 (7 April 2019), Annex III. See further Luísa Lourenço and Pekka Pohjankoski, “Breaking Down Barriers? The Judicial Interpretation of ‘Disability’ and ‘Reasonable Accommodation’ in EU Anti-Discrimination Law,” in *EU Anti-Discrimination Law Beyond Gender*, ed. Uladzislau Belavusau and Kristin Henrard (Oxford: Hart Publishing, 2019), 321–38.

unconditionally, reasonable accommodation duties are individualised, apply immediately, and may be limited by the “undue burden” requirement.²⁵⁷

On the one hand, accessibility is an *ex ante* duty, which does not require that a specific person with a disability has a particular need. For example, an apartment block ought to be generally accessible, equipped with ramps and handrails, a lift with tactile buttons and spoken indications, and so forth.

On the other hand, reasonable accommodation is an *ex post* duty, which must be fulfilled only from the moment that a person with a disability requires access to a non-accessible environment or wants to exercise their rights in a situation where the lack of adjustments prevents them from doing so on an equal footing with others.²⁵⁸

Following the example of said apartment block, an individual with a disability may request that certain elements such as light switches or a mailbox be repositioned in order for them to be able to use or access these elements, or that some extra space be made available to them in the building to store necessary medical equipment or mobility aids.

In closing, reasonable accommodation and accessibility both represent important antidiscrimination legal concepts that can be mobilised to achieve the third identified aim of antidiscrimination norms, that of transforming existing housing structures, in particular in the context of persons with physical and psychosocial disabilities.

3.8 Conclusion

In this chapter, I have explored the consequences of applying antidiscrimination law to the field of housing in light of three of the four identified aims of antidiscrimination norms. The three aims explored in this chapter were those of eliminating hostility, prejudice, and stigma; recognising cultural diversity and avoiding misrecognition; and transforming existing housing structures. I have shown how different

²⁵⁷ Committee on the Rights of Persons with Disabilities, “General Comment No. 6 (2018) on Equality and Non-Discrimination,” para. 41.

²⁵⁸ “General Comment No. 6 (2018) on Equality and Non-Discrimination,” para. 24.

antidiscrimination legal concepts can be leveraged to achieve these aims in different contexts.

Firstly, the aim of eliminating hostility, prejudice, and stigma can be mostly addressed through direct discrimination. Antidiscrimination law has an added value here insofar as it casts light on the group-based dimension of the hostility and stigmatisation suffered by these individuals, which breaches their substantive equality in such a way that transcends the limits of a right to adequate housing approach. This can clearly be seen by looking at the case of Roma in Europe. Moreover, housing harassment is a helpful (albeit underused) concept to achieve this first aim, as it focuses on the existence of a persistent undesirable conduct linked to one of the prohibited grounds and it does not require a comparative element.

Secondly, the aim of recognising cultural diversity and avoiding misrecognition can be chiefly achieved through the prohibition of indirect discrimination. This means that housing laws and policies must accommodate different conceptions of what “home” means and what the realisation of the right to housing entails for different groups. This becomes especially evident when considering the case of Travellers in Europe. Antidiscrimination law complements here a right to adequate housing approach by further clarifying the cultural adequacy component of this right and by offering concrete legal avenues to realise it.

Thirdly, the aim of transforming existing housing structures can be best achieved through antidiscrimination legal concepts like reasonable accommodation and accessibility. In the field of disability, these concepts help to realise the social model of disability, where it is the interaction of an impairment or a characteristic with a physical, psychosocial, or societal barrier that impinges on the exercise of these persons of their human rights. In the housing context, this translates into obligations to adapt or to render accessible housing in multiple ways. Antidiscrimination law complements in this regard the accessibility component of the right to adequate housing, clarifying what it entails and opening up new ways of securing it through antidiscrimination legal concepts.

In Chapter 4, I consider the fourth identified aim of antidiscrimination norms: ensuring a fair housing distribution. I argue that this fourth aim prompts a reflection around the concept of socioeconomic disadvantage and how discrimination on this basis can be effectively addressed by antidiscrimination law.

Chapter 4

Discrimination and socioeconomic disadvantage

In this chapter, I build on the fourth identified aim of antidiscrimination norms, that of ensuring a fair distribution of important social goods. I advanced in Chapter 2 that need as a distributive criterion casts light on the inadequacy of purchasing power to allocate housing in society, and the fact that a distribution of housing on this basis hinders the realisation of the right to housing under nondiscriminatory conditions for many individuals and families.

This raises questions as to whether socioeconomic disadvantage can be legitimately used to justify distributive differences, and the role of antidiscrimination norms in combatting discrimination based on socioeconomic grounds.²⁵⁹

Socioeconomic discrimination can be here mobilised in two ways: to eliminate discrimination in distributive processes or, going a step beyond, to eliminate de facto socioeconomic inequalities. This chapter focuses on the first aspect, whereas I consider substantive tools to redress de facto housing inequalities in Chapters 6 and 7, notably in the framework of decommodification policies.

From the outset, it can be observed that several international and European instruments already foresee socioeconomic criteria among the grounds of discrimination they prohibit. Whereas socioeconomic criteria are not included as prohibited discrimination grounds in EU law, they can be found in the ECHR, the ICESCR, and the RESC.

²⁵⁹ Part of the findings included in this chapter have been published in a summarised form in Juan Carlos Benito Sánchez, “Towering Grenfell: Reflections around Socioeconomic Disadvantage in Antidiscrimination Law,” *Queen Mary Human Rights Law Review* 5, no. 2 (2019).

However, the specific criteria included in these instruments and their material scope differ substantially. Moreover, even when socioeconomic grounds have been incorporated in human rights instruments or in domestic legal orders, a lack of sufficient conceptual articulation and practical application deprives these grounds of much of their potential to effect change.

I first present some reflections about socioeconomic discrimination and antidiscrimination law (Section 4.1). I then look more in detail at socioeconomic disadvantage as a prohibited discrimination ground and its specific features (4.2), distinguishing it from other related concepts (4.3). After these preliminary considerations, I examine how this ground is understood in various antidiscrimination legal systems: in international human rights law (4.4), in EU law (4.5), by the ECtHR (4.6), and by the ECSR (4.7). Having set out the differences and common approaches between these systems, I explore selected practical implementations of socioeconomic disadvantage as a prohibited ground in Europe, considering the cases of France and Belgium (4.8). Lastly, I consider what has been done outside of Europe, in particular in the Canadian province of Quebec (4.9). A final section concludes (4.10).

4.1 Understanding socioeconomic discrimination

Antidiscrimination norms have not traditionally been concerned with socioeconomic disadvantage, at least in a direct manner. Originally, antidiscrimination norms were focused on the specific prejudice and stigma attached to racialised populations, particularly Black individuals and groups. These norms then evolved to cover other status-based grounds such as gender and disability, and they were later extended to include age, religion or belief, and sexual orientation.²⁶⁰

²⁶⁰ See generally Aileen McColgan, *Discrimination, Equality and the Law*, Human Rights Law in Perspective (Oxford: Hart Publishing, 2014), chap. 2; Schiek, Waddington, and Bell, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, chap. 1; Fredman, *Discrimination Law*, chap. 2; Michael Connolly, *Discrimination Law*, 2nd ed (London: Sweet & Maxwell, 2011), chap. 3.

Although many of these groups have historically been disadvantaged from a socioeconomic perspective, not infrequently as a consequence of the prejudice and stigma attached to those status-based characteristics, the goal of antidiscrimination provisions was not to directly address this socioeconomic disadvantage.

Socioeconomic disadvantage as a prohibited discrimination ground would help to ensure that no discrimination takes place, directly or indirectly, by reason of an individual or a group's situation of disadvantage rooted in their socioeconomic position.²⁶¹

Although this is not a novel idea, this chapter aims to show how this fits within the account of antidiscrimination law introduced in Chapter 2, in particular to partially fulfil the fourth identified aim that antidiscrimination norms ought to pursue: that of ensuring a fair distribution of important social goods.

A first observation to make is that the overlap between status-based disadvantaged groups and socioeconomically disadvantaged groups is significant.²⁶² In fact, marginalisation is often “an interaction between discrimination and poor socio-economic conditions, in which group-based discrimination feeds off poverty which, in turn, ensures that poverty becomes a trap.”²⁶³

As advanced in Chapter 1, some groups may experience intersectional discrimination on account of status-based characteristics and socioeconomic disadvantage, in such a way that these two dimensions interact with each other to create a greater disadvantage than what would occur if each dimension were to be taken in isolation.

On the one hand, discrimination entrenches socioeconomic disadvantage. Discriminating against individuals and groups who experience an unequal

²⁶¹ See Sandra Fredman, “The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty,” *Stellenbosch Law Review* 22 (2011): 566–590.

²⁶² See, for instance, *Addressing Poverty and Discrimination: Two Sides of the One Coin* (Brussels: Equinet, 2010), https://www.archive.equineteurope.org/IMG/pdf/poverty_opinion_2010_english.pdf.

²⁶³ Goodwin, “Romani Marginalisation after the Race Equality Directive,” 175.

access to basic needs and services fosters their social exclusion and impoverishment.²⁶⁴ For instance, the negative consequences of discrimination in housing as a factor contributing to poverty have largely been demonstrated.²⁶⁵

On the other hand, socioeconomic disadvantage gives rise to discrimination itself. Individuals and groups are often discriminated against because of their lower socioeconomic status. Indeed, “notwithstanding the frequent intersection of poverty and other forms of disadvantage The poor also comprise a discrete and identifiable group that is subject to its own particular and distinct forms of discrimination and disadvantage.”²⁶⁶ For instance, people receiving social benefits face extensive discrimination and stigmatisation. This is also the case in the field of housing, where rental advertisements excluding potential tenants who receive benefits can be found.²⁶⁷

Discrimination and socioeconomic disadvantage are intertwined, and any solutions to discriminatory phenomena shall take socioeconomic disadvantage seriously into account. I argue that discrimination on the basis of socioeconomic disadvantage should be fully recognised and incorporated into antidiscrimination norms, in order to account for the distinct dimensions of inequality that would otherwise be left unaddressed by the protection provided by these norms. Socioeconomic status has thus been

²⁶⁴ United Nations, General Assembly, “Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance,” A/68/333 (19 August 2013), para. 20.

²⁶⁵ See, for instance, John Yinger, “Housing Discrimination and Residential Segregation as Causes of Poverty,” in *Understanding Poverty*, ed. Sheldon H. Danziger and Robert H. Haveman (New York, NY and Cambridge, MA: Russell Sage Foundation and Harvard University Press, 2001), 359–391.

²⁶⁶ Martha Jackman, “Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian Charter and Human Rights Law,” *Review of Constitutional Studies* 2, no. 1 (1994): 103–4. See also Jessica Eisen, “On Shaky Grounds: Poverty and Analogous Grounds under the Charter,” *Canadian Journal of Poverty Law* 2, no. 2 (2013): 1–33.

²⁶⁷ See for instance *Baromètre de la diversité Logement*, 177–78.

defined as the “last bastion” regarding the attributes in respect of which discrimination is proscribed.²⁶⁸

Besides its connection with other identified aims of antidiscrimination law, notably that of eliminating hostility, prejudice, and stigma, socioeconomic disadvantage plays an important role in ensuring a fair housing distribution.

This may occur at two different levels: firstly, socioeconomic disadvantage may appear as an illegitimate consideration in existing distributive processes, leading to unfairness in the operation of those processes. This chapter deals with this dimension, clarifying the value of antidiscrimination law in tackling illegitimate considerations related to socioeconomic disadvantage with regard to the distribution of housing.

Secondly, socioeconomic discrimination may be understood in more complex sense, prompting a reflection around how the prohibition of this form of discrimination could be used to combat and redress de facto housing inequalities, beyond ensuring a fair process for the allocation of housing.

Socioeconomic disadvantage could be mobilised in this sense to challenge the premises of existing distributive systems, ensuring that such systems rely on the idea of need rather than on the notion of purchasing power as a central element. This point will be dealt with more closely in Chapters 6 and 7, when discussing (de)commodification policies and the role of the state in ensuring diversity-conscious and all-inclusive housing policies.

Some may object to the recognition of socioeconomic discrimination based on the fact that socioeconomic disadvantage is arguably already incorporated in human rights law through social and economic rights. This calls for a clarification of the difference between antidiscrimination law, on the one hand, and protecting social and economic rights, on the other hand, and how these two aspects relate to each other.

Some reasons supporting the incorporation of socioeconomic disadvantage into antidiscrimination law beyond the protection of economic and social

²⁶⁸ Margaret Thornton, “Social Status: The Last Bastion of Discrimination,” *Anti-Discrimination Law Review* 2018, no. 1 (2018): 5–26.

rights are the following.²⁶⁹ Firstly, economic and social rights are not enshrined in the constitutions of all countries, while the right to nondiscrimination generally is. Secondly, some states have progressive equality legislation providing avenues for claims in relation to human rights violations which would otherwise be unavailable from the standpoint of economic and social rights alone. Thirdly, antidiscrimination law obligations are generally considered as immediate, whereas economic and social rights obligations tend to be subject to progressive realisation standards.

Moreover, implementation experiences of economic and social rights in certain countries, even when these are constitutionally guaranteed, reveal that they do not always suffice to address socioeconomic disadvantage. Economic and social rights can be utilised to secure the entitlements of “insiders” to the detriment of “outsiders.”²⁷⁰ For instance, some experiences of economic and social rights litigation show how this can reinforce the “middle-class capture of public services,” diverting resources away from the structural reforms needed to make public services equitable for lower income groups.²⁷¹

I therefore argue that socioeconomic discrimination has a strong added value when economic and social rights have not been yet fully secured in local contexts.²⁷² Furthermore, socioeconomic discrimination would still play a

²⁶⁹ See *Economic and Social Rights in the Courtroom: A Litigator’s Guide to Using Equality and Non-Discrimination to Advance Economic and Social Rights* (London: Equal Rights Trust, 2014), 13–22, https://www.equalrightstrust.org/ertdocumentbank/ESR_Guide.pdf.

²⁷⁰ This has occurred in the framework of economic and social rights litigation in countries like Brazil, South Africa or Indonesia. See further Octavio Luiz Motta Ferraz, “Harming the Poor Through Social Rights Litigation: Lessons from Brazil,” *Texas Law Review* 89 (2011): 1643–1668; Daniel M. Brinks and Varun Gauri, “The Law’s Majestic Equality? The Distributive Impact of Judicializing Social and Economic Rights,” *Perspectives on Politics* 12, no. 2 (2014): 375–93; Malcolm Langford, “Critiques of Human Rights,” *Annual Review of Law and Social Science* 14 (2018): 69–89.

²⁷¹ See Florian Hoffmann, “The Future of Social and Economic Rights,” in *The Futures of Human Rights*, ed. Nehal Bhuta, Collected Courses of the Academy of European Law (Oxford: Oxford University Press, forthcoming).

²⁷² See also Tamas Kadar, *An Analysis of the Introduction of Socio-Economic Status as a Discrimination Ground* (Dublin: Equality & Rights Alliance, 2016), <http://17october.ie/wp-content/uploads/2019/08/Analysis-of-socio-economic-status-as-discrimination-final.pdf>.

role in addressing discrimination in the allocation of above-minimum social goods, should these be allocated in a way that neglects socioeconomically disadvantaged groups.²⁷³

In other terms, antidiscrimination law can be leveraged to claim that minimum essential levels of certain rights provided for some groups within society, or indeed any provision beyond that, must be provided for all. Antidiscrimination norms consequently allow claimants to request not only a minimum essential level of economic and social rights, but the same treatment as those enjoying the highest standard of these rights in that particular jurisdiction.

Having advanced these preliminary reflections around the notion of socioeconomic disadvantage in antidiscrimination law, I explore more in depth in the next section what the legal recognition and the practical application of socioeconomic disadvantage as a prohibited discrimination ground would entail.

4.2 Socioeconomic disadvantage as a prohibited ground

Continuing the discussion initiated in the previous section, socioeconomic disadvantage as a prohibited discrimination ground would primarily mean that socioeconomic disadvantage is included besides already consolidated status grounds in the list of criteria on the basis of which discrimination is legally proscribed, where this is not yet the case. Importantly, this would also require that this prohibition be rendered effective by making the notion of socioeconomic disadvantage sufficiently concrete to be relied upon when making findings of discrimination in particular cases.²⁷⁴

²⁷³ The difficulties inherent in defining what the “social minimum” entails may admittedly be a hurdle that is hard to overcome. See Colm O’Cinneide, “Giving Legal Substance to the Social Minimum,” in *Specifying and Securing a Social Minimum in the Battle Against Poverty*, ed. Toomas Kotkas, Ingrid Leijten, and Frans Pennings, Human Rights Law in Perspective (Oxford: Hart Publishing, 2019).

²⁷⁴ See also Sarah Ganty, “Prohibition of Discrimination on Grounds of Social Condition: Making Socio-Economically Disadvantaged People Visible,” Working Paper, 2016, <https://ssrn.com/abstract=3082951>.

This, in turn, would help remedy the current situation where public and private action which discriminates against socioeconomically disadvantaged groups falls outside the scope of antidiscrimination norms if those groups cannot be defined at the same time by at least one of the existing status-based discrimination grounds.

This occurs, for instance, at the European Union level, where antidiscrimination legislation prohibits discriminatory treatment exclusively on the grounds of racial or ethnic origin, gender, disability, age, religion or belief, and sexual orientation. As a consequence, priority is given to groups who can “gather under the banner” of one of the existing grounds, to the detriment of those living in poverty more generally.²⁷⁵

In other legal orders, socioeconomic disadvantage features already in the list of prohibited discrimination grounds, but this ground has not been sufficiently developed and concretised in case law and quasi-judicial decisions so as to be able to provide an effective protection for those groups.

At this point in the argument, it is important to consider why certain characteristics are considered to be prohibited grounds covered within the scope of antidiscrimination law while others are not. The reasoning as to what the background principle is to decide whether a potential criterion deserves inclusion in antidiscrimination norms is key to justify the claim that socioeconomic disadvantage ought to be included in this list.²⁷⁶

Unfortunately, that question does not have a clear-cut answer, and it has long been the subject of debate among antidiscrimination law scholars.²⁷⁷ Although a complete examination of the merits of all answers formulated to this question is out of the scope of my research, there are several possible

²⁷⁵ Sandra Fredman, “The Public Sector Equality Duty,” *Industrial Law Journal* 40, no. 4 (2011): 407.

²⁷⁶ Richard Arneson, “Discrimination, Disparate Impact, and Theories of Justice,” in *Philosophical Foundations of Discrimination Law*, ed. Deborah Hellman and Sophia Moreau (Oxford: Oxford University Press, 2013), 102.

²⁷⁷ See Deborah Hellman and Sophia Moreau, eds., *Philosophical Foundations of Discrimination Law* (Oxford: Oxford University Press, 2013); Khaitan, *A Theory of Discrimination Law*; Hugh Collins and Tarunabh Khaitan, eds., *Foundations of Indirect Discrimination Law* (Oxford: Hart Publishing, 2018).

explanations for why it is morally wrong to treat someone differently on the basis of some particular characteristics but not others.²⁷⁸

Recalling the overview of theories of justice and substantive equality presented in Chapter 2, these characteristics can be determined by looking at whether they ground structural inequalities in the distribution of certain important social goods, such as housing, and whether the access to those goods is ruled by an arbitrary criterion that is not justified by the characteristics ascribed to that particular good.²⁷⁹ Prohibited grounds may also be determined on the basis of whether they generate misrecognition for particular personal or cultural identities.²⁸⁰ Finally, they can be determined on the basis of whether they have historically been (and whether they still are) used to exclude, demean, and stigmatise.²⁸¹

Consequently, the chosen protected characteristics may be established, among other rationales, on the basis of maldistribution, misrecognition, and hostility, prejudice, and stigma. These are characteristics which ground structural unequal treatment where “failing to disallow such differential treatment would seriously undermine our ability to regard those institutions as consistent with the requirements of justice.”²⁸²

Moreover, many traits do not seem to be protected because they are fundamental aspects of personal identity, but rather because they are not sufficiently blameworthy or predictive of future conduct to justify the

²⁷⁸ See Patrick S. Shin, “Is There a Unitary Concept of Discrimination?,” in *Philosophical Foundations of Discrimination Law*, ed. Deborah Hellman and Sophia Moreau (Oxford: Oxford University Press, 2013), 170; Blum, “Racial and Other Asymmetries,” 188; Eidelson, “Treating People as Individuals,” 203.

²⁷⁹ See Fraser, “Social Justice in the Age of Identity Politics”; Philippe Van Parijs, “Discrimination et justice distributive,” in *Politiques antidiscriminatoires*, ed. Julie Ringelheim, Ginette Herman, and Andrea Rea, *Ouvertures politiques. Recherches* (Louvain-la-Neuve: De Boeck, 2015), 215–222; Roemer, *Theories of Distributive Justice*. See also the notion of “spheres of justice” set out in Section 2.3 of this chapter: Walzer, *Spheres of Justice*.

²⁸⁰ See Young, *Justice and the Politics of Difference*; Anderson, *The Imperative of Integration*.

²⁸¹ Blum, “Racial and Other Asymmetries,” 193–94.

²⁸² See Shin, “Is There a Unitary Concept of Discrimination?,” 171.

ongoing exclusion from social and economic opportunities.²⁸³ It is often impossible to discern in particular situations whether these traits result from voluntary choices as opposed to involuntary circumstances, as circumstances determine what choices are available and the reasonableness of those choices.²⁸⁴

Socioeconomic disadvantage responds to all of the aforementioned rationales. Socioeconomic status has historically been (and it still is) used to unfairly differentiate in the allocation of essential goods, including housing, by both public and private actors.

Although being socioeconomically disadvantaged is not an identity or cultural trait, “poorness” is often constructed as a demeaning category, and people belonging to (or perceived to belong to) that category are ascribed a series of negative traits, that is, they suffer from stigmatisation, prejudice, and “otherisation.”²⁸⁵ Moreover, class inequalities ground categorical inequalities, as individuals from privileged groups have been able to lock in their advantages during generations.²⁸⁶

Overall, socioeconomic disadvantage functions as a relevant category to understand the causes and the extent of persistent inequalities in the context of economic and social rights implementation. Socioeconomic discrimination also allows us to holistically address situations of intersectional discrimination on account of both status-based and socioeconomic factors, which, absent this lens of analysis, would be only partially dealt with by narrow status-based antidiscrimination grounds.

To summarise, I argue that antidiscrimination law has a significant role to play with regard to socioeconomic disadvantage. By ensuring that people are not discriminated against on this basis, it draws attention to the gaps in the realisation of economic and social rights, the structural inequalities at the source of those gaps, potential dynamics of intersectionality, and the stigma

²⁸³ Danieli Evans Peterman, “Socioeconomic Status Discrimination,” *Virginia Law Review* 104 (2018): 1298.

²⁸⁴ Evans Peterman, 1299.

²⁸⁵ See further Solanke, *Discrimination as Stigma*.

²⁸⁶ Anderson, *The Imperative of Integration*, 7.

placed on certain individuals and groups because of their categorisation as poor.

In the field of housing, antidiscrimination norms incorporating socioeconomic disadvantage as a prohibited ground could, if properly applied, help to prevent and reverse housing policies which structurally disadvantage the poorest segments of the population, in particular policies that result in the stigmatisation of residents as generally undeserving or which further exclude them from being able to access housing in the market.

This will be further explored in Chapter 5 with regard to housing segregation and in Chapter 6 with regard to housing commodification and financialisation. I move now to elucidating the notion of socioeconomic disadvantage, distinguishing it from other related concepts.

4.3. Socioeconomic disadvantage and related concepts

The notion of socioeconomic disadvantage itself raises some questions as regards its conceptual remit and the desirability for choosing it over other related concepts like social origin, property, birth, or socioeconomic status. In this section, I clarify these concepts and I defend my choice for “socioeconomic disadvantage” as the prohibited discrimination ground that antidiscrimination norms ought to incorporate and implement in order to successfully tackle this form of discrimination.

First of all, the notion of “socioeconomic status” has not been frequently used in legal scholarship. This concept is more common in sociology, psychology, and public health, where it is defined as “a composite measure that typically incorporates economic status, measured by income; social status, measured by education; and work status, measured by occupation.”²⁸⁷

Socioeconomic status is thus defined by reference to an individual’s economic and social situation, measured by factors such as income, wealth, education, employment and occupation, social and political participation,

²⁸⁷ D.B. Dutton and S. Levine, “Socioeconomic Status and Health: Overview, Methodological Critique, and Reformulation,” in *Pathways to Health: The Role of Social Factors*, ed. John P. Bunker et al. (Menlo Park: Henry J. Kaiser Family Foundation, 1989), 30.

cultural representation, access to power, capability development, and agency. Understood in this sense, socioeconomic status can be a valuable notion in order to reinforce the protection that antidiscrimination law confers on the most disadvantaged.

Furthermore, as will be evidenced by the examination carried out in this chapter of different international, European, and domestic legal orders, the three concepts most commonly used in antidiscrimination norms to refer to socioeconomic criteria are social origin, property, and birth.

There is certainly a relationship between these three concepts and socioeconomic disadvantage: in many respects, social origin, property, and birth will signal whether an individual has a weak position in society from a socioeconomic perspective. However, although social origin, property, and birth all refer to situations that may predict, generate, or exacerbate socioeconomic disadvantage, the material scope of these grounds does not entirely coincide.

“Social origin” generally refers to a person’s inherited social status. This notion is linked with property status and descent-based discrimination.²⁸⁸ “Property,” in turn, is a broad concept, and includes “real property (e.g. land ownership or tenure) and personal property (e.g. intellectual property, goods and chattels, and income), or the lack of it.”²⁸⁹ In this sense, property is understood as a symmetrical notion, encompassing both property owners and the underpropertied.²⁹⁰ “Birth” refers more specifically to parentage, birth out of wedlock or out of stateless parents, descent, adoption, caste, and analogous systems of inherited status.²⁹¹

²⁸⁸ United Nations, Committee on Economic, Social and Cultural Rights, “General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights),” para. 24.

²⁸⁹ “General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights),” para. 25.

²⁹⁰ See Marc L. Roark, “Under-Propertied Persons,” *Cornell Journal of Law and Public Policy* 28, no. 1 (2017).

²⁹¹ United Nations, Committee on Economic, Social and Cultural Rights, “General Comment No. 20: Non-discrimination in economic, social and cultural rights

These criteria all seem to refer either in a deterministic manner to immutable characteristics of individuals (social origin, birth), or potentially to situations of material comfort rather than disadvantage (property). By incorporating economic, social, and work status (respectively measured by income, education, and occupation) into this notion, the dynamic nature of disadvantage is captured more precisely.

I argue that socioeconomic disadvantage is thus more adequate than the three concepts just defined, for these reasons. Socioeconomic disadvantage encompasses the circumstances surrounding an individual's birth and upbringing, but it also contemplates the possibility of mishap at a later stage of their lives.

A terminological distinction can also be made between two related concepts: socioeconomic status and socioeconomic disadvantage. I again argue for the choice of "socioeconomic disadvantage" as the most appropriate concept to guide my enquiry, in light of the discussion in antidiscrimination law theory about the symmetry and asymmetry of discrimination grounds.²⁹²

Symmetrical grounds of discrimination offer, in principle, the same protection to groups who are structurally disadvantaged on the basis of that ground as to those who are not. For example, a prohibition of discrimination on the basis of racial or ethnic origin would prevent formal discrimination against Roma individuals, but also against white individuals. By contrast, asymmetrical grounds offer protection exclusively to structurally disadvantaged groups. For example, a prohibition of discrimination on the basis of disability protects persons with disabilities, but not those without.

Through the choice of "socioeconomic disadvantage," I seek to avoid the problem of symmetry, that is, the eventual co-optation of a prohibition on the basis of "socioeconomic status" by relatively better-off individuals or groups.

(art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)," para. 26.

²⁹² On the question of poverty, see, for instance, Kevin Lang, *Poverty and Discrimination* (Princeton, NJ: Princeton University Press, 2007).

Socioeconomic disadvantage thus allows us to combine the definition of socioeconomic status presented above (individual's economic and social situation, measured by factors such as income, wealth, education, employment and occupation, social and political participation, cultural representation, access to power, capability development, and agency) with a commitment towards asymmetry and combating structural disadvantage.

A final discussion to consider is whether socioeconomic disadvantage should be defined in relative terms, as inequalities between people, or in absolute terms, as the inability to meet a minimum threshold of basic needs.²⁹³

Socioeconomic disadvantage clearly has an absolutist core, since it impedes persons from satisfying many of their basic needs. On the other hand, an absolutist vision of socioeconomic disadvantage may assume inferiority on the part of socioeconomically disadvantaged people by defining needs on their behalf, and risks excluding individuals who, although disadvantaged, find themselves slightly above the sufficiency threshold.²⁹⁴

With regard to the relative definition of socioeconomic disadvantage, it addresses better the situation where an individual's income, even if adequate for survival, markedly falls behind that of the community, capturing more accurately the manner in which social expectations structure disadvantage.²⁹⁵ Moreover, when a situation is created where distinctions are

²⁹³ Fredman, "The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty," 568. See also Christian Arnspurger, "Poverty and Human Rights: The Issue of Systemic Economic Discrimination and Some Concrete Proposals for Reform," *International Social Science Journal* 56, no. 180 (2004): 289–299; John Hills et al., *Understanding the Relationship between Poverty and Inequality: Overview Report*, CASE Report 119 (London: Centre for Analysis of Social Exclusion, The London School of Economics and Political Science, 2019), <http://eprints.lse.ac.uk/100396/5/CASereport119.pdf>.

²⁹⁴ Fredman, "The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty," 568–74.

²⁹⁵ See J. K. Galbraith, *The Affluent Society* (Boston: Houghton Mifflin, 1958), 23–24.

made on the basis of socioeconomic disadvantage, it matters whether “others have more” besides whether one has enough.²⁹⁶

It follows that an operative definition of socioeconomic disadvantage should take into account these two dimensions, absolute and relative.

In conclusion, I argue that a prohibition of discrimination on the grounds of socioeconomic disadvantage is better tailored than the criteria of social origin, property, birth, or socioeconomic status to achieve the fourth identified aim of antidiscrimination law, that of ensuring a fair housing distribution. In the following sections, I look at the recognition of socioeconomic disadvantage discrimination in different legal orders, namely international human rights law, the EU, the ECHR, the RESC, and European (France, Belgium) and non-European (Quebec) selected domestic orders.

4.4 International human rights law: A general recognition

I first examine the approach to socioeconomic disadvantage as a prohibited discrimination ground taken in international human rights law, recalling the guidance offered by UN treaty-monitoring bodies, in particular the CESCR, and by UN Special Rapporteurs.

As mentioned in Chapter 1, the ICESCR prohibits discrimination “of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” in the exercise of the rights enunciated therein.²⁹⁷

Important guidance has been provided by the CESCR with regard to this provision: in its General Comment No. 20, concerning nondiscrimination in economic, social, and cultural rights, the Committee elaborates on the meaning of a number of discrimination grounds, including the term “other status” placed at the end of the list.²⁹⁸

²⁹⁶ See Margot E. Salomon, “Why Should It Matter That Others Have More? Poverty, Inequality, and the Potential of International Human Rights Law,” *Review of International Studies* 37, no. 5 (2011): 2137–2155.

²⁹⁷ United Nations, General Assembly, “International Covenant on Economic, Social and Cultural Rights,” art. 2(2).

²⁹⁸ United Nations, Committee on Economic, Social and Cultural Rights, “General Comment No. 20: Non-discrimination in economic, social and cultural rights

The Committee interprets “other status” in a flexible manner, as capturing “other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognized grounds.”²⁹⁹ After making a reference to intersectionality, it considers that “other status” encompasses grounds such as place of residence and health status, but also “economic and social situation.”

As regards economic and social situation, General Comment No. 20 advances that: “individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society. A person’s social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping.”³⁰⁰

However, this concept has not yet been sufficiently developed by the CESCR in its concluding observations on states parties’ reports or in its views on individual communications. It would be desirable that the CESCR does so when deciding future potential cases, leveraging socioeconomic disadvantage as well as the idea of intersectionality to address discriminatory economic, social, and cultural rights violations that would otherwise be left unrecognised.

One such case pending before the CESCR at the time of writing concerns the eviction of a 73-year-old man living alone and whose only income derived from social benefits. He was evicted from the dwelling where he had been living as a tenant for almost 25 years without a motive, as permitted by

(art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights),” paras. 27–35. See also United Nations, Human Rights Committee, “General Comment No. 18: Non-discrimination” (10 November 1989).

²⁹⁹ Committee on Economic, Social and Cultural Rights, “General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights),” para. 27.

³⁰⁰ “General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights),” para. 35. See also United Nations, Committee on Economic, Social and Cultural Rights, “Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights,” E/C.12/2001/10 (10 May 2001), para. 11.

Belgian law under certain conditions. This put him in a precarious situation where he can no longer afford the market price of rentals in nearby areas. Despite a provisional measure by the CDESCR ordering that the eviction be suspended, the Belgian authorities carried out the eviction. A third-party intervention elaborated by the Equality Law Clinic of the Université Libre de Bruxelles and submitted before the CDESCR in this case argues that this constitutes an instance of intersectional indirect discrimination linked to the applicant's age and to his social disadvantage.³⁰¹

Along the same lines, the UN Guiding Principles on Extreme Poverty and Human Rights recall that discrimination is both a cause and a consequence of poverty.³⁰² The Guiding Principles proclaim that “states must ensure that persons living in poverty are equal before and under the law and are entitled, without discrimination, to the equal protection and benefit of the law.”³⁰³ States must repeal or modify laws and regulations that are biased against the rights, interests, and livelihood of persons living in poverty.³⁰⁴ Crucially, “all forms of legislative or administrative discrimination, direct or indirect, on grounds of economic situation or other grounds associated with poverty must be identified and eliminated.”³⁰⁵

More specifically in the field of housing, the former UN SRAH, Raquel Rolnik, advanced that: “states must ensure that housing policies are non-discriminatory and do not increase existing inequalities. . . . Policies and legislation should be designed to bridge inequality gaps and to ensure access

³⁰¹ “Tierce-intervention sur la Communication 61/2018, L.J.W. c. Belgique, présentée au Comité des droits économiques, sociaux et culturels” (Equality Law Clinic, Université Libre de Bruxelles, 2020).

³⁰² United Nations, General Assembly, “Final draft of the guiding principles on extreme poverty and human rights, submitted by the Special Rapporteur on extreme poverty and human rights,” A/HRC/21/39 (18 July 2012).

³⁰³ United Nations, General Assembly, “Final Draft of the Guiding Principles on Extreme Poverty and Human Rights, submitted by the Special Rapporteur on extreme poverty and human rights,” para. 19.

³⁰⁴ See also United Nations, Commission on Human Rights, “Economic, Social and Cultural Rights. Report submitted by the independent expert on extreme poverty and human rights,” E/CN.4/2003/52 (20 January 2003).

³⁰⁵ United Nations, General Assembly, “Final Draft of the Guiding Principles on Extreme Poverty and Human Rights, submitted by the Special Rapporteur on extreme poverty and human rights,” para. 19.

to affordable housing for the poor and marginalized and not benefit already advantaged social groups at the expense of others.”³⁰⁶

In sum, this overview of the international human rights system shows a general recognition of the possibility to find discrimination on the basis of socioeconomic disadvantage in certain situations. However, this possibility remains for now at the conceptual level, and it should be developed and concretised in particular cases. CESCR views on individual communications brought under the Optional Protocol to the ICESCR would represent an excellent medium in which to start developing this possibility.

In the framework of non-European regional systems of human rights protection, it can be noted that the Inter-American Court of Human Rights has similarly found that the guarantee against discrimination contained in the American Convention on Human Rights includes “economic situation,” and it has mobilised the idea of intersectionality to find discrimination based on the compounded effect of a number of grounds, including socioeconomic disadvantage.³⁰⁷ In 2016, it found for the first time an instance of “structural historical discrimination on the basis of economic position.”³⁰⁸ The Inter-American Commission has confirmed that, in light of the developments in the Inter-American system of human rights protection, socioeconomic

³⁰⁶ United Nations, General Assembly, “The Right to Adequate Housing. Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living,” A/67/286 (10 August 2012), para. 17.

³⁰⁷ Inter-American Court of Human Rights, “Juridical Condition and Rights of Undocumented Migrants,” OC-18/03 (17 September 2003), para. 101. In the case of *Gonzales Lluy et al. v. Ecuador*, the Inter-American Court examined the violation of the right to a dignified existence (*vida digna*) and personal integrity of a child who had been infected with HIV as a result of a blood transfusion when she was three years old. The Court found that the child had been discriminated against on the grounds of her HIV-positive status, her young age, her being a woman, and her living in conditions of poverty. See Inter-American Court of Human Rights, Case of *Gonzales Lluy et al. v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs, Judgment of 1 September 2015, Series C No. 298.

³⁰⁸ Inter-American Court of Human Rights, *Caso Trabajadores de la Hacienda Brasil Verde vs. Brasil*. Excepciones Preliminares, Fondo, Reparaciones y Costas, Judgment of 20 October 2016, Series C No. 318, para. 343.

disadvantage can now be considered as a prohibited category of discrimination within that system.³⁰⁹

4.5 The EU legal framework: An unlikely way forward

I move now from the international to the European context. The first European legal order I consider is EU law. As I show in this section, EU law is the least progressive legal order with regard to the possibility of incorporating and mobilising socioeconomic disadvantage as a prohibited ground of discrimination.

As advanced in Chapter 1, Article 10 of the Treaty on the Functioning of the European Union states that the Union “shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation” in defining and implementing its policies and activities.³¹⁰ Article 19 of the same treaty allows for appropriate action to combat discrimination based on these six grounds, whereas separate provisions address discrimination on the basis of nationality.³¹¹

However, none of the grounds featured in this list refers to socioeconomic considerations: even the three usual grounds contained in other international and European instruments (social origin, property, birth) are absent from the EU treaties. The open-ended clauses present in other instruments allowing for a conceptual expansion (“any ground,” “other status”) are not included either.

In line with these treaty provisions, EU antidiscrimination directives do not prohibit discrimination on the basis of socioeconomic criteria. Furthermore, as a consequence of the different material scope of the various directives, not all six discrimination grounds apply to the same extent to all fields. In the field of housing, for instance, discrimination is currently only prohibited,

³⁰⁹ *Pobreza y Derechos Humanos* (Washington, DC: Comisión Interamericana de Derechos Humanos, 2017), para. 153, <http://www.oas.org/es/cidh/informes/pdfs/PobrezaDDHH2017.pdf>.

³¹⁰ European Union, “Consolidated version of the Treaty on the Functioning of the European Union,” OJ C 326 (26 October 2012).

³¹¹ European Union, “Consolidated version of the Treaty on the Functioning of the European Union,” art. 18.

besides nationality, on the basis of racial or ethnic origin and gender, by virtue of the combined operation of Directives 2000/43/EC and 2004/113/EC, both of which apply to the access to and the supply of goods and services.³¹²

The Charter of Fundamental Rights of the European Union, on the other hand, provides in its Article 21 that:

any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

Social origin, property, and birth are part of the enumeration contained in Article 21 CFREU, as well as the clause “any ground.” Whereas this may be interpreted at first sight as indicating a potential opening of the EU system towards socioeconomic criteria, it is important to recall that, according to the EU Treaties, the CFREU provisions do not extend in any way the competences of the Union.³¹³

Moreover, although the Charter contains a clause providing that the meaning and scope of the rights it protects shall be the same as those laid down in the ECHR, this does not mean that the CJEU is bound by the interpretation developed in that system.³¹⁴ In any case, as I examine in the next section, the ECtHR’s interpretation of Article 14 ECHR is not very far-reaching either.

³¹² See further Ringelheim and Bernard, *Discrimination in Housing*, 12–13; Julie Ringelheim, “The Prohibition of Racial and Ethnic Discrimination in Access to Services under EU Law,” *European Anti-Discrimination Law Review* 10 (2010): 11–18. See also European Union, “Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.”

³¹³ See also European Union, “Charter of Fundamental Rights of the European Union,” art. 51(2).

³¹⁴ Angela Ward, “The Impact of the EU Charter of Fundamental Rights on Anti-Discrimination Law: More a Whimper than a Bang?,” *Cambridge Yearbook of European Legal Studies* 20 (2018): 36.

The CFREU applies to EU institutions and bodies, and to Member States only to the extent that they are implementing EU law.³¹⁵ In practice, there will be many instances where Member States will indeed be acting within the ambit of EU law when they regulate or implement policies touching on economic, social, and cultural rights, including housing. Furthermore, even if the EU lacks a direct competence in the field of housing, many EU legal instruments have an impact on national housing systems and on social housing policies.³¹⁶ In these cases, Member States would be compelled in theory not to discriminate on the basis of the criteria included in Article 21 CFREU. However, the overall impact of the CFREU on the development of EU antidiscrimination case law is quite modest.³¹⁷

The prospects of a clear recognition of socioeconomic disadvantage as a prohibited discrimination ground under EU law are therefore not very promising. Any step towards this recognition would need to come from a treaty modification or from a very expansive reading of amended secondary legislation taking on board the “other status” clause of the CFREU, which seems rather unlikely. This is all the more so considering the failure to adopt the 2008 Proposal for a Directive setting out a general prohibition of discrimination on the basis of religion or belief, disability, age, and sexual orientation.

4.6 The ECtHR’s interpretation: A missed opportunity

As advanced in Chapter 1, the ECHR prohibits discrimination in the enjoyment of the rights and freedoms contained therein on the basis of “any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority,

³¹⁵ European Union, “Charter of Fundamental Rights of the European Union,” art. 51(1).

³¹⁶ See Juli Ponce Solé, “The European Union Role in Ensuring Access to Affordable Housing and in Fighting Against Urban Segregation and Gentrification: Moving Forward,” *European Journal of Human Rights / Journal Européen Des Droits de l’homme* 2019, no. 5 (2019): 311–34; Juli Ponce Solé, *El derecho de la Unión Europea y la vivienda: análisis de experiencias nacionales e internacionales* (Madrid: McGraw-Hill, Instituto Nacional de Administración Pública, 2019).

³¹⁷ Ward, “The Impact of the EU Charter of Fundamental Rights on Anti-Discrimination Law.”

property, birth or other status.”³¹⁸ Protocol No. 12 to the Convention extends the prohibition of discrimination to the enjoyment of any right set forth by law.³¹⁹

Article 14 ECHR (and Protocol No. 12, by analogy) has been interpreted as extending to a number of grounds not explicitly mentioned in that list. Discrimination is generally prohibited on “any ground,” and the enumeration contained in this article includes the term “other status,” thus allowing for a conceptual expansion.

The case law of the ECtHR highlights that, although only differences in treatment based on an identifiable characteristic or status are capable of amounting to discrimination within the meaning of Article 14, the list of grounds contained in this article is illustrative and not exhaustive. The term “other status” has generally been given a wide meaning, and its interpretation has not been limited to characteristics which are personal, in the sense that they are innate or inherent.³²⁰ For instance, fatherhood, marital status, and membership of a trade union have all been interpreted as coming within the scope of “other status.”³²¹

Although the enumeration included in Article 14 contains social origin, property, and birth, there are no cases decided by the ECtHR concerning discrimination on the grounds of social origin, perhaps because applicants are reluctant to argue cases on this basis given that the ground has never been interpreted by the Court in the first place. Cases concerning discrimination on the grounds of birth and property have, for the most part,

³¹⁸ Council of Europe, “Convention for the Protection of Human Rights and Fundamental Freedoms,” art. 14.

³¹⁹ Council of Europe, “Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms,” art 1.

³²⁰ See, among others, European Court of Human Rights, Fourth Section, *Clift v. the United Kingdom*, Application no. 7205/07 (13 July 2010), paras. 55–63. In some cases, the Court has been more ambiguous on this point. See Janneke Gerards, “The Discrimination Grounds of Article 14 of the European Convention on Human Rights,” *Human Rights Law Review* 13, no. 1 (2013): 99–124.

³²¹ See, for instance, European Court of Human Rights, Second Section, *Weller v. Hungary*, Application no. 44399/05 (31 March 2009); European Court of Human Rights, Fifth Section, *Petrov v. Bulgaria*, Application no. 15197/02 (22 May 2008); European Court of Human Rights, *Danilenkov and Others v. Russia*, Application no. 67336/01 (30 July 2009).

addressed hereditary matters, divisions of real estate, and taxation disputes.³²²

The ECtHR therefore seems more comfortable with making findings of discrimination on well-established grounds, rather than developing the social origin ground or creating a specific socioeconomic discrimination category.³²³ Nevertheless, its interpretation of Article 14 reinforces the idea that this antidiscrimination provision may extend beyond more traditional grounds to cover other dimensions which, although not explicitly mentioned in the ECHR, respond to similar concerns and operate in a comparable manner.

The ECtHR decision in the *Garib* case provides an interesting example to explore the possibility of considering socioeconomic criteria as “other status” for the purposes of Article 14 ECHR.³²⁴ This case concerns Ms. Garib, a single mother with two young children who sought to move to a different property in the same district that she was previously living in. However, under the Dutch “City Problems (Special Measures) Act,” that district had been designated as a hotspot area, where housing permits were required in order to take up new residence. Ms. Garib’s permit was rejected since her income consisted exclusively of social welfare benefits and it did not derive from “gainful economic activity.”

The Human Rights Centre of Ghent University and the Equality Law Clinic of the Université Libre de Bruxelles submitted a third-party intervention in

³²² See, for instance, European Court of Human Rights, First Section, *Camp and Bourimi v. the Netherlands*, Application no. 28369/95 (3 October 2000); European Court of Human Rights, Grand Chamber, *Fabris v. France*, Application no. 16574/08 (7 February 2013); European Court of Human Rights, Grand Chamber, *Chassagnou and Others v. France*, Application nos. 25088/94, 28331/95 and 28443/95 (29 April 1999); European Court of Human Rights, Third Section, *Mazurek v. France*, Application no. 34406/97 (1 February 2000).

³²³ See further Laurens Lavrysen, “Strengthening the Protection of Human Rights of Persons Living in Poverty under the ECHR,” *Netherlands Quarterly of Human Rights* 33, no. 3 (2015): 293–325.

³²⁴ European Court of Human Rights, Grand Chamber, *Garib v. the Netherlands*, Application no. 43494/09 (6 November 2017).

this case focusing on its discriminatory dimensions, including from the perspective of harmful stereotypes and intersectionality.³²⁵

This third-party intervention argued that the Act in question was likely to aggravate both the social hardship and the stereotyping of those who do not meet the income criterion foreseen in the legislation, raising an issue of direct discrimination on the basis of socioeconomic disadvantage and of indirect discrimination on the basis of gender and race. I address the claim of indirect discrimination further in Chapter 5.

The ECtHR Grand Chamber ruled that there was no violation of the right to freedom of movement in this case, and did not consider the issue of discrimination.³²⁶ The ruling was delivered by a 12–5 majority, and it contains three dissenting opinions. The dissenting opinion of Judge Pinto de Albuquerque, joined by Judge Vehabović, contains a particularly nuanced examination of the issue of discrimination in this case.³²⁷

This dissenting opinion criticised the fact that the court had examined the general measure in the abstract, instead of focusing on the specific impact that the policy had had on the applicant. According to these two judges, the legislative provisions at hand had the underlying aim to remove the most disadvantaged inhabitants from certain areas, under the assumption that individuals with no work income were the cause of incivility and other social disorders.³²⁸

³²⁵ “Third Party Intervention in *Garib v. the Netherlands* (Application No. 43494/09), Written Submission” (Human Rights Centre, Ghent University and Equality Law Clinic, Université Libre de Bruxelles, 2016), <https://hrc.ugent.be/wp-content/uploads/2019/10/Garib-tpi-hrc-ugent-ulb.pdf>.

³²⁶ European Court of Human Rights, Grand Chamber, *Garib v. the Netherlands*, para. 165. The alleged violation concerned Art. 2 of Protocol No. 4 to the ECHR. See Council of Europe, “Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto,” ETS 46 (16 September 1963).

³²⁷ European Court of Human Rights, Grand Chamber, *Garib v. the Netherlands*, Dissenting Opinion of Judge Pinto de Albuquerque Joined by Judge Vehabović.

³²⁸ *Garib v. the Netherlands*, Dissenting Opinion of Judge Pinto de Albuquerque Joined by Judge Vehabović, paras. 5–8.

This dissenting opinion went on to examine the issue of discrimination on the basis of “social precarity,” highlighting the multifaceted nature of poverty and its consequences, and recalling that many international instruments as well as national legal systems prohibit discrimination on grounds of socioeconomic disadvantage.³²⁹

Building on the work of the ECSR, the dissenting judges claimed that the difference in treatment on the basis of source of income in this case was not supported by any objective justification, but was rather grounded on a “latent stigmatisation of the most disadvantaged groups who are living off welfare.”³³⁰ Tying restrictions on the freedom to choose one’s residence to employment status stigmatises persons living in poverty, reducing their chances to participate in society and reinforcing social exclusion.

The key insight of this dissenting opinion is the understanding that a policy such as the one at stake in the *Garib* case may create direct discrimination on the basis of socioeconomic disadvantage, and at the same time indirect discrimination on the basis of gender and racial or ethnic origin.³³¹ In the

³²⁹ *Garib v. the Netherlands*, Dissenting Opinion of Judge Pinto de Albuquerque Joined by Judge Vehabović, paras. 27–30.

³³⁰ *Garib v. the Netherlands*, Dissenting Opinion of Judge Pinto de Albuquerque Joined by Judge Vehabović, para. 29.

³³¹ This critique was also advanced in a dissenting opinion to the Chamber judgment: see European Court of Human Rights, Third Section, *Garib v. the Netherlands*, Joint Dissenting Opinion of Judges López Guerra and Keller. The dissenting judges highlighted the fact that the applicant belonged to the socioeconomically underprivileged, and pointed out that the policy at hand was linked to source of income and was therefore implicitly connected with the social origin and gender of the persons concerned (para. 14). They emphasised the particular impact that the time-based restriction of six years is likely to have for families, especially when young children are involved (para. 17). With regard to the income-based restriction, they considered that it led to stigmatisation of the poor and that it indirectly created discrimination on the basis of race and gender, since the people most gravely affected by unemployment are migrants and single mothers (para. 18). The dissenting judges concluded that “the problems facing impoverished areas are real and serious. It is unquestionably legitimate to strive to improve those areas, and it is of primary importance to avoid ghettoisation. However, such policies should not be linked to personal characteristics” (para. 23).

case of Ms. Garib, moreover, both layers of discrimination intersected, rendering her situation especially precarious.³³²

In conclusion, despite the fact that the ECHR antidiscrimination legal framework is conceptually equipped to deal with socioeconomic disadvantage under the “any ground” and “other status” clauses of Article 14 (and of Protocol No. 12), the current judicial interpretation of this provision is not yet very receptive to this possibility, despite the dissenting voices of some judges.

To conclude the examination of international and European human rights law, I now turn to the ECSR’s promising approach to socioeconomic disadvantage in the context of discrimination.

4.7 The ECSR’s interpretation: A promising approach

As advanced in Chapter 1, the principle of nondiscrimination is enshrined in the Preamble to the 1961 ESC. The 1996 RESC develops this prohibition in its Article E, which provides that “the enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.”

According to the interpretation developed by the ECSR, Article E aims to secure the equal effective enjoyment of all rights contained in the Charter, regardless of difference. It does not constitute, however, an autonomous right which could in itself provide independent grounds for a complaint, but it must be invoked and examined in conjunction with one of the substantive rights enshrined in the Charter.³³³

Moreover, in relation to Article 30 RESC, which contains the right to protection against poverty and social exclusion, the ESCR has highlighted

³³² European Court of Human Rights, Grand Chamber, *Garib v. the Netherlands*, Dissenting Opinion of Judge Pinto de Albuquerque Joined by Judge Vehabović, paras. 34–39.

³³³ European Committee of Social Rights, *International Association Autism-Europe v. France*, Collective complaint no. 13/2002 (8 March 2004), para. 51.

“the important impact of the non-discrimination clause (Article E), which obviously includes non-discrimination on grounds of poverty.”³³⁴

Contrary to the ECtHR, the ECSR has in some instances found discrimination based on poverty and social exclusion. In one of its decisions, the ECSR accepted the possibility of discrimination on the basis of socioeconomic status in theory, but it found that in the particular case there was no specific evidence supporting the allegations of socioeconomic discrimination.³³⁵

In two other cases, it considered this ground in the framework of overlapping or multiple discrimination, looking at the combined effect of “health status, territorial location and socio-economic status.”³³⁶ Finally, the ECSR has also found instances of discrimination on the basis of poverty and social exclusion besides the corresponding violations of the substantive right to protection against poverty and social exclusion, but it has not elaborated much on the circumstances warranting this separate finding of discrimination.³³⁷

To evaluate more closely the articulation of socioeconomic disadvantage as a discrimination ground prohibited by the (R)ESC, and how this would operate in practice, I turn more specifically to two ECSR decisions. These decisions, one in the field of social assistance and one concerning housing, address the exclusionary effects of some public policies on the basis of socioeconomic disadvantage, as well as the relationship between socioeconomic disadvantage and status grounds.

The first case to be considered in this regard is *European Roma Rights Centre (ERRC) v. Bulgaria*, concerning the withdrawal of social assistance

³³⁴ European Committee of Social Rights, “Conclusions 2013 - Statement of interpretation - Article 30,” 2013_163_06/Ob/EN (2013).

³³⁵ European Committee of Social Rights, *Mental Disability Advocacy Center (MDAC) v. Belgium*, Collective complaint no. 109/2014 (16 October 2017).

³³⁶ European Committee of Social Rights, *International Planned Parenthood Federation - European Network (IPPF EN) v. Italy*, Collective complaint no. 87/2012 (10 September 2013); European Committee of Social Rights, *Confederazione Generale Italiana del Lavoro (CGIL) v. Italy*, Collective complaint no. 91/2013 (12 October 2015).

³³⁷ European Committee of Social Rights, *International Movement ATD Fourth World v. France*.

benefits as a consequence of the imposition of maximum time limits on the eligibility for those benefits.³³⁸ The complainant organisation claimed that the introduction of time limits deprived socioeconomically disadvantaged individuals of access to an important form of social welfare support. Moreover, the organisation claimed that this withdrawal disproportionately affected Roma individuals, who are substantially overrepresented among the beneficiaries of social assistance in Bulgaria.

After examining the particular circumstances of the case, the ECSR found this withdrawal to be in violation of the right to social assistance set out in Article 13(1) RESC. It recalled that the right to social assistance takes the form of an individual right when a basic condition of eligibility is satisfied, namely that no other means of reaching a minimum income level consistent with human dignity be available to that person. States may establish a link between the access to this right and seeking employment or receiving vocational training, but they cannot make it subject to time limits if the persons concerned continue to fulfil that basic condition.³³⁹

The ECSR went on to examine whether there had been an additional violation of Article E RESC. After acknowledging that the Roma constitute a particularly disadvantaged group, and that the legislative measures in question were likely to have a considerable impact on them, the ECSR found that “a denial of the right to social assistance . . . will inevitably constitute a denial of the fundamental right of persons belonging to socially disadvantaged groups to equality of respect and esteem.”³⁴⁰ It thus considered that the violation of the right to nondiscrimination could be subsumed in the wider violation of the right to social assistance.

The dissenting opinion of Mr. Stangos, joined by Mr. Belorgey, took a different view on this point.³⁴¹ It argued that the ECSR should have found a

³³⁸ European Committee of Social Rights, *European Roma Rights Centre (ERRC) v. Bulgaria*, Collective complaint no. 48/2008 (1 August 2009).

³³⁹ European Committee of Social Rights, *European Roma Rights Centre (ERRC) v. Bulgaria*, paras. 38–39.

³⁴⁰ *European Roma Rights Centre (ERRC) v. Bulgaria*, para. 45.

³⁴¹ *European Roma Rights Centre (ERRC) v. Bulgaria*, Dissenting Opinion of Mr. Petros Stangos Joined by Mr. Jean-Michel Belorgey.

violation of Article E, since the withdrawal had had a disproportionate impact on unemployed persons.

Noting the particularly disadvantaged situation of unemployed persons among the beneficiaries of social assistance, the dissenting members considered that “it is the socio-economic status—being unemployed—which determines over time (from the award of social assistance to its withdrawal) that they come within the scope of the legislation.”³⁴² They argued, against the majority, that the withdrawal of benefits indirectly discriminated against this group on the basis of socioeconomic status.

This case illustrates well some of the questions surrounding the notion of nondiscrimination on the grounds of socioeconomic disadvantage. Firstly, the boundaries between status-based grounds and socioeconomic disadvantage are not clearly drawn. Here, the complainants claimed that Roma beneficiaries were disproportionately affected since they were overrepresented among the poor.

Secondly, it may be difficult, as the majority contended, to delimit the instances where discrimination should come into play, as most violations of economic and social rights will tend to have a disproportionate impact on socioeconomically disadvantaged groups.

These situations are best addressed through the prism of intersectionality, as socioeconomically disadvantaged individuals within status-based groups and individuals belonging to status-based groups who are socioeconomically disadvantaged will often suffer the consequences of such policies in an intersectional manner.

However, in the absence of a clear development of the notion of intersectionality in most international, European and national antidiscrimination norms, the possibility should be open to find a particular policy directly discriminatory against the socioeconomically disadvantaged and, at the same, indirectly discriminatory against a certain status-based

³⁴² *European Roma Rights Centre (ERRC) v. Bulgaria*, Dissenting Opinion of Mr. Petros Stangos Joined by Mr. Jean-Michel Belorgey, para. 8.

group, or vice versa. This would echo the discussion in the previous section in light of the *Garib* case before the ECtHR.

The second case before the ECSR illustrating discrimination on the basis of socioeconomic disadvantage in the framework of the ESC is *FIDH v. Ireland*.³⁴³ This collective complaint concerned the lack of adequacy, habitability, and suitability of municipal housing in several council estates.

The complainant organisation argued that the sale of local authority housing stock during the previous decades in Ireland had led to a residualisation of this housing modality, which increasingly accommodates socioeconomically disadvantaged individuals and families. Individuals living in local authority housing experience levels of unemployment, dependency on social welfare, lone parent poverty, and child and elderly poverty which are significantly higher than the national average.³⁴⁴

The ECSR examined in this case whether the measures taken by Ireland to ensure the right to housing of an adequate standard for families living in local authority housing had been sufficient. Although the complaint concerned Article 16 ESC (the right to family protection), the ECSR emphasised the link between this provision and Article 31 RESC.³⁴⁵ It considered that the complainant organisation had provided ample evidence of poor housing conditions, amounting to a violation of these rights.

The decision went on to examine the alleged violation of Article E RESC in conjunction with Article 16 ESC. The complainant organisation had made the argument that local authority housing residents had been discriminated against on the grounds of social origin, health, or other status.

The ECSR found that:

³⁴³ European Committee of Social Rights, *International Federation for Human Rights (FIDH) v. Ireland*, Collective complaint no. 110/2014 (23 October 2017).

³⁴⁴ European Committee of Social Rights, *International Federation for Human Rights (FIDH) v. Ireland*, paras. 34–35.

³⁴⁵ *International Federation for Human Rights (FIDH) v. Ireland*, para. 107. Ireland has ratified the 1996 Revised European Social Charter but it is not bound by Article 31 RESC as a consequence of the declaration contained in the relevant instrument of ratification.

[It] cannot in principle exclude that certain individuals or groups are, in the present case, specially hampered or prevented from enjoying the right to family housing of an adequate standard on the grounds of their socio-economic or health status, or other personal conditions. This could concern, for example, families living in, or at risk of, poverty, who cannot avoid being allocated local authority housing, or persons with disabilities.³⁴⁶

However, in the instant case, the ECSR deemed that these allegations had not been sufficiently proven. More data or evidence would be needed as regards the specific ground of discrimination, the discriminated group or groups, and the comparator group or groups.

It also evaluated whether there had been discrimination against local authority tenants when compared with public sector tenants, ruling that their different situation and the existence of separate regimes did not amount to less favourable treatment. The alleged violations of Article E RESC were therefore rejected.

These decisions suggest that the Committee may be ready, at least in principle, to accept that certain policies may discriminate against socioeconomically disadvantaged individuals and groups, as long as this discrimination is sufficiently demonstrated. Once again, this avenue remains theoretically possible, but its practical articulation is less clear. A heightened threshold seems to be placed on the complainants, but the lack of more concrete guidance as to the appropriate data or evidence that should be produced to prove socioeconomic discrimination means that this possibility remains distant. The ECSR should develop its interpretation of this ground with the occasion of future collective complaints, clarifying the evidence required to make such a finding.

To summarise, the different bodies considered (CESCR, ECtHR, ECSR) take divergent approaches with regard to the possibility of recognising socioeconomic disadvantage as a prohibited ground of discrimination. The ECtHR seems more reluctant to adopt this approach, unconvinced that the facts in question in these cases reveal socioeconomic discrimination.

³⁴⁶ *International Federation for Human Rights (FIDH) v. Ireland*, para. 124.

By contrast, the CDESCR and the ECSR both seem to take a more progressive stance towards this possibility. The former has developed a very broad interpretation of socioeconomic disadvantage in its General Comment No. 20, but this is yet to be rendered more concrete in the framework of individual communications. For its part, the ECSR has more openly acknowledged this possibility in relation to collective complaints. However, doubts still remain as to how this ground is to be interpreted in particular contexts, and what the evidentiary threshold is so that claimants are able to rely on it in practice.

4.8 Selected domestic implementations: France and Belgium

The recognition of socioeconomic criteria as prohibited grounds in domestic antidiscrimination law is not unknown in European national legal orders. Around fifteen European states (notably those located in Central and Eastern Europe) include, at least formally, criteria such as “social standing,” “social class,” “social status,” “financial status,” or “social condition” as prohibited grounds of discrimination in legislation.³⁴⁷

Even though these criteria may be formally recognised in many legal orders, it is not clear whether they are capable of being used effectively to tackle socioeconomic disadvantage. As suggested in the introduction to this chapter, one of the major problems evidenced by this research is how to render the notion of socioeconomic disadvantage more concrete and how to mobilise it to combat specific instances of socioeconomic discrimination, even when it is already nominally incorporated in antidiscrimination law provisions.

This section explores the case of two selected European domestic legal orders: France and Belgium. These countries have been chosen as examples since they are the two countries in Western Europe where the socioeconomic

³⁴⁷ Isabelle Chopin and Catharina Germaine, *A Comparative Analysis of Non-Discrimination Law in Europe: 2019* (Brussels: European network of legal experts in gender equality and non-discrimination, 2019), 12–15, <https://www.equalitylaw.eu/downloads/5118-a-comparative-analysis-of-non-discrimination-law-in-europe-2019-1-72-mb>. See further Thornton, “Social Status”; Shreya Atrey, “The Intersectional Case of Poverty in Discrimination Law,” *Human Rights Law Review* 18, no. 3 (2018): 411–440.

ground is starting to be mobilised to combat specific instances of discrimination, as well as for practical reasons relating to the accessibility of legislation, case law, and decisions and reports from national equality bodies. In fact, although the terms in which the prohibited criterion is cast differ between the French and the Belgian cases, their implementation points towards the same direction.

Firstly, the French antidiscrimination legal framework currently recognises more than twenty prohibited grounds of discrimination, among which “place of residence,” “family situation,” and “customs.”³⁴⁸ Discrimination is, notably, also prohibited on the basis of the particular vulnerability resulting from an individual’s economic situation, be it presumed or known. This criterion was introduced in 2016, following an extended discussion on whether discrimination on the grounds of “social precarity” should be forbidden by law.

The discussions surrounding the legislative recognition of this ground are helpful in order to better apprehend the meaning of the notion of particular vulnerability.³⁴⁹ In 2013, after a campaign by the NGO ATD Quart Monde for the prohibition of discrimination on the basis of social precarity, the National Human Rights Consultative Commission delivered an opinion supporting the inclusion of this ground in legislation.

In this opinion, the Commission argued that:

Certain persons are victims of a form of discrimination characterised by the fact that, at the same time, the blame for their situation is put on them, their history of deprivation and exclusion is reproached to them, their word is discredited, their actions and behaviour are diminished for the single reason that they appear as individuals without recognised status or representation.

³⁴⁸ See France, Law No. 2008-496 of 27 May 2008 containing diverse provisions transposing EU law in the domain of nondiscrimination, JORF n°0123 (28 May 2008).

³⁴⁹ See further Ioannis Rodopoulos, “L’absence de la précarité sociale parmi les motifs de discrimination reconnus par le droit français : un frein normatif à l’effectivité de la lutte contre les discriminations ?,” *La Revue des droits de l’homme* 9 (2016); Diane Roman, “La discrimination fondée sur la condition sociale, une catégorie manquante du droit français,” *Recueil Dalloz*, no. 28 (2013): 1911–1918.

... This social and political discrimination generates feelings of shame, guilt, and distress for those suffering it, caused by the reality of not being considered equal as other human beings in their own society.³⁵⁰

Making at the same time a reference to the intersectional discrimination that many persons living in social precarity are likely to suffer, the report concluded that the French legal framework to combat exclusion would greatly benefit from the addition of such a discrimination ground.

An Act was presented before the French Senate to this end. During the parliamentary proceedings, the initial ground of “social precarity” was eventually renamed to “particular vulnerability resulting from an individual’s economic situation,” in order to render it more concrete from a conceptual standpoint.³⁵¹ In 2016, the Act was adopted, finally incorporating the “particular vulnerability” criterion in French antidiscrimination law.³⁵²

Since its incorporation into the antidiscrimination legal framework, the socioeconomic ground has been used by the French national equality body in several cases. This body found, for instance, that the policy of refusing the public school enrolment of children living in a hostel was discriminatory on the basis of the particular vulnerability stemming from the economic situation of their families, alongside their origin and place of residence.³⁵³

³⁵⁰ France, Commission nationale consultative des droits de l’homme, [Opinion on discriminations based on social precarity] (26 September 2013), para. 2. My translation.

³⁵¹ See France, Senate, [Report on the proposed act seeking to combat discrimination on the ground of social precarity], No. 507 (10 June 2015).

³⁵² France, Law No. 2016-832 of 24 June 2016 seeking to combat discrimination on the grounds of social precarity, JORF n°0147 (25 June 2016).

³⁵³ France, Défenseur des droits, [Refusal to enrol children living in a hostel in a preschool class], 2017-091 (27 March 2017), <https://juridique.defenseurdesdroits.fr/eli/decision/2017/03/27/00091/aa/te xte>. For a similar case, see France, Défenseur des droits, [Refusal to enrol a child in a preschool class], 2017-023 (30 January 2017), https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=21325. In the case of a municipal decree that prohibited loitering in certain areas, the French national equality body considered that the real aim of this norm was to prevent associations from distributing food to migrants on humanitarian grounds, finding an instance of discrimination on the basis of their particular economic vulnerability and their nationality. See France, Défenseur des droits, [Municipal decree prohibiting the abusive, prolonged, and repeated occupation of certain spaces], 2017-119 (16 March 2017),

In the housing context, a decision from the same body found discrimination in the refusal to allocate social housing to a family on the grounds that they would not have enough income left to subsist, despite the family's contention to the contrary.³⁵⁴ This was seen as constituting discrimination on the basis of socioeconomic disadvantage, since such a requirement would have the effect of excluding the most disadvantaged families from social housing, contrary to the objective of social housing itself.

The added value of socioeconomic discrimination becomes here more evident in light of both the construction of "poorness" as a category and the intersection of socioeconomic disadvantage with status-based grounds. In all of these cases, the particular vulnerability individuals experienced as a result of their socioeconomic situation created a specific form of discrimination that went beyond what antidiscrimination norms would have been capable of addressing had this ground been absent from legislation.

Secondly, the case of Belgium can also be relied upon to cast some light on the conceptual remit of socioeconomic disadvantage. The Belgian federal act prohibiting discrimination includes the notion of "*fortune*" among the protected characteristics.³⁵⁵ The French language term *fortune*, which translates roughly into English as "property," refers to an individual's livelihood, resources, and income.³⁵⁶ It is therefore a symmetrical ground, analogous to the manner in which the CESCR has interpreted the notion of property.

In the field of housing, *fortune* has been mobilised by some Belgian lower courts to make findings of discrimination based on the sources of income of an individual or a family, especially in the private rented sector.³⁵⁷ Whereas

https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=21397.

³⁵⁴ France, Défenseur des droits, [Refusal to allocate a dwelling to a person recognised as being in a priority situation], 2019-052 (21 February 2019), <https://juridique.defenseurdesdroits.fr/eli/decision/2019/02/21/00052/aa/texte>.

³⁵⁵ Belgium, Law of 10 May 2007 seeking to combat certain forms of discrimination (30 May 2007).

³⁵⁶ See *Baromètre de la diversité Logement*, 1 and 18.

³⁵⁷ See Nicolas Bernard, "Actualités du bail d'habitation : saut d'index « loyer », résiliation anticipée du bail de courte durée, discrimination, régionalisation,

evaluating the ability of a potential tenant to afford rental payments is allowed, discrimination occurs if the landlord refuses certain candidates as a matter of principle on the basis of the origin of their income.

For instance, a landlord will discriminate against potential tenants if they place an advertisement reading “unemployed persons or persons living on benefits need not apply.” The same will be true if the landlord refuses to rent out to an individual or a family on the grounds that their income is made up of social, family, or disability allowances, instead of “gainful employment.”

A Belgian court of first instance thus found discrimination on the basis of *fortune* in the case of a landlord who requested that candidates have a permanent employment contract and be able to prove income above a minimum threshold.³⁵⁸ Another court of first instance similarly found socioeconomic discrimination in the case of a landlord systematically rejecting potential tenants who received unemployment benefits, sickness and disability benefits, or a conditional minimum income.³⁵⁹

By contrast, it must also be noted that some other Belgian judicial decisions have rejected claims of discrimination on the basis of *fortune* in analogous situations, considering that the landlord had merely conducted a legitimate

colocation, garantie locative, etc.,” in *Baux d’habitation, commerciaux et à ferme: Actualités sur fond de régionalisation*, ed. Étienne Beguin et al. (Limal: Anthemis, 2016), 35–37.

³⁵⁸ Belgium, Unia, [Court of First Instance of Namur, 5 May 2015] (5 May 2015), <https://www.unia.be/fr/jurisprudence-alternatives/jurisprudence/tribunal-de-premiere-instance-de-namur-5-mai-2015>.

³⁵⁹ Belgium, Unia, [Court of First Instance of Leuven, 6 September 2018] (6 September 2018), <https://www.unia.be/fr/jurisprudence-alternatives/jurisprudence/tribunal-1iere-instance-leuven-6-septembre-2018>. Two further cases reported by the Belgian equality body resulted in an extrajudicial agreement between the parties. One of these cases concerned a real estate agency who rejected a family since the benefits they received were not counted towards the calculation of whether they could afford rent. See Belgium, Unia, [All types of income count to determine whether you can rent out a dwelling, even family benefits] (25 February 2019), <https://www.unia.be/fr/jurisprudence-alternatives/solutions-negocies/tous-les-revenus-comptent-pour-savoir-si-vous-pouvez-louer-un-appartement>. The other case concerned a landlord who rejected a potential tenant on the basis of the source of their income, as the person concerned was not employed at the time. See Belgium, Unia, [Tenant receives damages due to a refusal to rent out to them on the basis of their source of income] (22 November 2019), <https://www.unia.be/fr/jurisprudence-alternatives/solutions-negocies/locataire-indemnise-suite-a-un-refus-de-location>.

and objective appreciation of the solvability of candidates and their ability to pay rent. This was not seen as constitutive of discrimination, even when these cases essentially concerned persons receiving social allowances or persons who were unemployed.³⁶⁰

In sum, the Belgian antidiscrimination legal framework foresees the notion of *fortune* as a prohibited ground of discrimination. This ground has been used to tackle discrimination on the basis of source of income in certain cases. The principle is that creditworthy and solvable individuals should not be rejected on the basis of where their income comes from. However, divergences of interpretation between different courts remain.

Besides France and Belgium, other European countries have successfully mobilised socioeconomic discrimination grounds to tackle instances of socioeconomic disadvantage. For example, in 2015 the municipality of Miskolc in Hungary (mentioned in Chapter 3) started to systematically terminate the social housing tenancies of persons living in a low-income part of the town, without taking any measures to provide them with alternative housing and exposing them to homelessness. The Hungarian national equality body found that this practice amounted to discrimination on the grounds of social status, financial situation, and the Roma origin of the tenants affected.³⁶¹

³⁶⁰ Belgium, Unia, [Court of Appeal of Mons, 16 May 2013] (16 May 2013), <https://www.unia.be/fr/jurisprudence-alternatives/jurisprudence/cour-dappel-de-mons-16-mai-2013>; Belgium, Unia, [Court of First Instance of Liège, 6 May 2014] (6 May 2014), <https://www.unia.be/fr/jurisprudence-alternatives/jurisprudence/tribunal-de-premiere-instance-liege-6-mai-2014>.

³⁶¹ See András Kádár, “Equal Treatment Authority Condemns the Town of Miskolc for Failure to Adequately Plan and Prepare the Winding up of Segregated Roma Neighbourhood” (European Network of Legal Experts in Gender Equality and Non-Discrimination, 25 August 2015), <https://www.equalitylaw.eu/downloads/2924-hungary-equal-treatment-authority-condemns-the-town-of-miskolc-for-failure-to-adequately-plan-and-prepare-the-winding-up-of-segregated-roma-neighbourhood-pdf166kb>; András Kádár, “Court Upholds Equal Treatment Authority’s Decision on Failure to Adequately Plan and Prepare the Winding up of Segregated Roma Neighbourhood” (European Network of Legal Experts in Gender Equality and Non-Discrimination, 4 April 2016), <https://www.equalitylaw.eu/downloads/3786-hungary-court-upholds-equal-treatment-authority-s-decision-on-failure-to-adequately-plan-and-prepare-the-winding-up-of-segregated-roma-neighbourhood-pdf-66-kb>; Kádár, “First

To continue this examination and in order to further illustrate how such a ground can be applied in practice, I briefly consider in the next section some examples from beyond Europe.

4.9 Looking beyond Europe: The case of Quebec

To conclude the examination of socioeconomic disadvantage as a prohibited discrimination ground, it is interesting to briefly look beyond Europe, in particular at the case of the Canadian province of Quebec. The articulation of this ground in Quebec represents a good example of how to successfully mobilise socioeconomic disadvantage in connection with economic and social rights, including in the context of housing.

The Canadian Charter of Rights and Freedoms prohibits discrimination based on “race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”³⁶² Early on, Canadian scholars and public bodies raised attention to the fact that poverty does not feature in this list, and called for the inclusion of this ground and for courts to interpret the Canadian Charter as well as provincial human rights codes as if poverty constituted in fact a prohibited ground.³⁶³

However, some commentators have noted that the story of the nondiscrimination clause of the Canadian Charter is marked by divisiveness, uncertainty and disappointing outcomes, including in the housing field.³⁶⁴ Certain provinces have incorporated grounds such as source of income or

Instance Court Decision on the Harassing Practices of the Municipality of Miskolc.”

³⁶² Canada, Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

³⁶³ See Roman, “La discrimination fondée sur la condition sociale, une catégorie manquante du droit français,” 1913; Bruce Porter, “Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights,” *Journal of Law and Social Policy* 15 (2000): 117–162; Jackman, “Constitutional Contact with the Disparities in the World”; *Promoting Equality: A New Vision* (Ottawa: Canadian Human Rights Act Review Panel, 2000), <http://publications.gc.ca/site/eng/412030/publication.html>.

³⁶⁴ Jena McGill and Daphne Gilbert, “Of Promise and Peril: The Court and Equality Rights,” *Supreme Court Law Review* 78, no. 2 (2017): 235–57; Margot Young, “Charter Eviction: Litigating Out of House and Home,” *Journal of Law and Social Policy* 24 (2015): 46–67.

being the beneficiary of social assistance in their provincial human rights acts.³⁶⁵

The Quebec Charter of Human Rights and Freedoms includes “social condition” among the prohibited grounds of discrimination.³⁶⁶ There is no precise statutory definition for this term, however, the Quebec Human Rights Commission has described it as: “referring to a rank, a social position or class attributed to someone principally because of his or her level of income, occupation and education, having regard to the objective and subjective components of each.”³⁶⁷

The Quebec judiciary, for its part, has noted that:

the definition of ‘social condition’ contains an objective component. A person’s standing in society is often determined by his or her occupation, income or education level, or family background. It also has a subjective component, associated with the perceptions that are drawn from these various objective points of reference.³⁶⁸

The case law dealing with the application of this ground shows the conceptual breadth of the Quebec socioeconomic ground. For instance, unemployment, receipt of social assistance, and type of tenure have all been found to come within the scope of this notion.³⁶⁹

Social condition has also been mobilised to make a finding of discrimination when landlords have refused to rent out premises to social assistance recipients based on assumptions about their ability to pay, in a similar way

³⁶⁵ See further Wayne MacKay and Natasha Kim, *Adding Social Condition to the Canadian Human Rights Act* (Ottawa: Canadian Human Rights Commission, 2009), https://www.chrc-ccdp.gc.ca/sites/default/files/sc_eng_1.pdf.

³⁶⁶ Canada, Quebec, Charter of Human Rights and Freedoms, CQLR c. C-12 (1975), s. 10.

³⁶⁷ Canada, Quebec, Commission des droits de la personne et des droits de la jeunesse du Québec, [Guidelines on social condition], Cat. 2.120.8.4 (31 March 1994), 6. My translation.

³⁶⁸ Canada, *Québec (Comm. des droits de la personne) v. Gauthier*, [1993] 19 CHRR D/312 [English summary].

³⁶⁹ See further MacKay and Kim, *Adding Social Condition to the Canadian Human Rights Act*, 21–27.

to the Belgian cases explored in the previous section.³⁷⁰ Discrimination will take place if the refusal to rent an apartment is entirely based on the candidate's social condition, but also if this condition influenced that decision even in part.³⁷¹ In one case, the refusal to rent to a freelance writer, whose type of work was associated with a low level of income, was considered discriminatory.³⁷²

Social condition is thus understood as the situation of persons who cannot reasonably be expected to meet their needs with their own resources.³⁷³ There is an objective component to it, concerning the economic status or the social position of an individual, based on factors such as income, occupation, or level of education. Social condition also has a subjective component, which points to the value or worth others may attribute to an individual following social perceptions or stereotypes associated with those factors. In other words, a person's level of income constitutes an objective element of their social condition, whereas the manner in which this level of income impacts that person's relative position in society constitutes a subjective component of their social condition.

This interpretation of social condition means that the ground is asymmetrical: it applies to individuals who are disadvantaged because of their socioeconomic position, but not to those who are advantaged because of it. For instance, the Quebec judiciary has been reluctant to find that a professional occupation characterised by a high level of income could be relied upon to claim discrimination on the basis of social condition, emphasising that the purpose of this ground is to protect vulnerable groups in society who cannot easily escape their situation. In this sense, the

³⁷⁰ See, among others, Canada, *Leroux et CDPQ c. J.M. Brouillette Inc.*, [1994] JTDPQ No. 16; Canada, *Lavigne et Québec (CDPDJ) c. Latreille*, [2000] JTDPQ No. 12; Canada, *Reeves et Québec (CDPDJ) c. Fondation Abbé Charles-Émile Gadbois*, [2001] JTDPQ No. 13; Canada, *Commission des droits de la personne et des droits de la jeunesse v. Normandin*, [2011] QCTDP No. 6.

³⁷¹ Canada, *Commission des droits de la personne et des droits de la jeunesse c. Huong*, [2005] JTDPQ No. 4.

³⁷² Canada, *Bia-Domingo et Québec (CDPDJ) c. Sinatra*, [1999] JTDPQ No. 19.

³⁷³ See Roman, "La discrimination fondée sur la condition sociale, une catégorie manquante du droit français," 1914.

interpretation of social condition in Quebec comes close to the French understanding of particular vulnerability.

Before concluding, a final reference can be made to the South African legal order, which contains a particularly well-constructed definition of socioeconomic disadvantage. In South African legislation, socioeconomic status is understood as “a social or economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status or lack of or low-level educational qualifications.”³⁷⁴ This definition is carefully built to address the characteristics arising as a result of a person’s disadvantaged socioeconomic position, rather than the situation of disadvantage itself.³⁷⁵

In summary, the French, Belgian, and Quebec cases all present common, if slightly different, understandings of the socioeconomic discrimination ground. In France, there is an asymmetrical “particular vulnerability” ground referring to an individual’s disadvantaged economic position, be it presumed or known, which is starting to be applied by the national equality body. In Belgium, the “*fortune*” ground is symmetrical, but certain lower courts have started to mobilise it in the field of housing to tackle discrimination based on source of income.

In Quebec, the “social condition” ground has been more developed in case law and it encompasses a large number of situations. It has been interpreted as asymmetrical and as having a double objective and subjective component. In light of the conceptual discussion around socioeconomic disadvantage advanced earlier in this chapter, the “social condition” ground in Quebec comes closest to the understanding of socioeconomic disadvantage that I have defended.

To move forward, this broad understanding of socioeconomic disadvantage ought to be enshrined in law. The socioeconomic disadvantage ground must be rendered open-textured enough so that it can be applied in multiple

³⁷⁴ South Africa, Promotion of Equality and Prevention of Unfair Discrimination Act 2000, B57—1999 (25 October 1999), s. 34.

³⁷⁵ Kate Malleson, “Equality Law and the Protected Characteristics,” *The Modern Law Review* 81, no. 4 (2018): 615.

instances of socioeconomic-related discrimination, including from an intersectional perspective. Such a ground must also be asymmetrical, leaving the socioeconomically privileged out of its scope of protection. Finally, the socioeconomic ground ought to incorporate the dual objective and subjective dimensions proper to socioeconomic discrimination, and reflect the absolute (inability to meet a minimum threshold) and relative (falling behind others) character of socioeconomic disadvantage.

Understood in this way, socioeconomic disadvantage as a prohibited ground of discrimination represents a significant contribution towards the achievement of the fourth identified aim of antidiscrimination norms, that is, ensuring a fair distribution of important social goods, including housing. In this chapter, I have focused for the most part on socioeconomic disadvantage as an illegitimate consideration in distributive processes, leading to unfairness in the operation of those processes.

However, as advanced earlier in the chapter, socioeconomic discrimination may be understood in more complex sense, prompting a reflection around how it can be used to combat and redress *de facto* inequalities, beyond ensuring a fair process for the allocation of housing. It could be mobilised in this sense to challenge the premises of existing distributive systems, ensuring that they rely on the idea of need rather than purchasing power to determine the access to housing of individuals and families. I consider this in subsequent chapters, when discussing decommodification policies and the role of the state in ensuring all-inclusive housing policies.

4.10 Conclusion

In this chapter, I have shown how the fourth identified aim of antidiscrimination norms, namely that of ensuring a fair distribution of certain important social goods including housing, triggers a reflection around the incorporation and the effective application of socioeconomic disadvantage as a prohibited ground of discrimination.

I have first considered the possibility of incorporating socioeconomic disadvantage as a prohibited discrimination ground from a theoretical standpoint, exploring what this would imply and pondering the

philosophical responses to the question as to why it is morally wrong to treat someone differently on the basis of some characteristics but not others. I have also explored the notion of socioeconomic disadvantage by contrasting it to other concepts like social origin, property, birth, or socioeconomic status.

I have then explored how socioeconomic disadvantage is incorporated in different antidiscrimination legal orders. International human rights law as well as the interpretation of the ECSR offer inroads for this possibility, although the corresponding bodies still have to develop this ground further in order for it to be applicable in practice. By contrast, the ECtHR's interpretation (notwithstanding some dissenting opinions to the contrary) as well as the potential incorporation of this ground into EU law are less promising. By looking at selected national examples, I have argued that the French, Belgian, and Quebec cases all show how a socioeconomic ground could be used to tackle particular instances of socioeconomic discrimination.

In Chapter 5, I further explore the four identified aims of antidiscrimination law by looking at the phenomenon of housing segregation. I will argue that housing segregation raises multiple antidiscrimination law issues that must be addressed through antidiscrimination norms.

Chapter 5

Housing segregation as discrimination

Housing segregation is one of the major processes threatening the right to adequate housing of individuals and families.³⁷⁶ In this chapter, I argue that housing segregation is also a violation of the right to nondiscrimination. I show that antidiscrimination law is key to address this phenomenon, and that an antidiscrimination law perspective offers an important added value when compared to a right to adequate housing approach to this issue, by allowing us to specifically address the group-based hostility, prejudice, and stigma suffered by residents of segregated areas.

The chapter evidences, by means of the case study of housing segregation, how the aims of antidiscrimination law explored in previous chapters are interrelated, in particular the aims of eliminating hostility, prejudice, and stigma and of transforming existing housing structures, and how a holistic approach combining these dimensions is essential to properly address housing segregation from a legal perspective.

The chapter begins with some introductory remarks and some insights derived from urban sociology to better understand the legal context and the dynamics at play in segregation processes (5.1). Delving into how antidiscrimination law may be mobilised to combat housing segregation, I distinguish several situations. Firstly, I consider the responsibility of states when they actively create segregation or when they design and implement housing policies which have a segregationist impact on disadvantaged groups without an adequate justification (5.2). Secondly, I argue that there is an obligation for states to desegregate when they are faced with a situation

³⁷⁶ Part of the contents of this chapter were included in an unpublished conference paper co-authored with Prof. Julie Ringelheim. See Juan Carlos Benito Sánchez and Julie Ringelheim, “Housing Segregation as Discrimination: A European Law Approach” (Berkeley Comparative Equality and Anti-Discrimination Law Study Group Annual Conference 2017, Dublin, 2017).

of de facto segregation under certain circumstances (5.3), and that this should be done in a way compatible with antidiscrimination law and with human rights law more broadly (5.4). Finally, segregation may also occur on the basis of disability: it is the case of institutionalisation (5.5). A final section concludes (5.6).

5.1. Understanding housing segregation

The ICERD is the core instrument in international human rights law targeting discrimination based on “race, colour, descent, or national or ethnic origin.”³⁷⁷ It requires states parties to prohibit and eliminate racial discrimination in all its forms. In particular, alarmed by “governmental policies based on racial superiority or hatred, such as policies of apartheid, segregation or separation,”³⁷⁸ the states parties to the ICERD express their condemnation of racial segregation, undertaking to prevent, prohibit, and eradicate all practices of this nature.³⁷⁹

However, the ICERD does not contain an explicit definition of segregation. It provides no explanation of how segregation is to be understood, nor of which parameters ought to be considered when trying to qualify a particular policy as segregationist and therefore unlawful. As the *travaux préparatoires* of the ICERD reveal, states were mainly concerned at the time that the Convention was drafted with governmental and other state-enforced policies of segregation, like apartheid in South Africa.³⁸⁰

The CERD, the corresponding treaty-monitoring body, did however not limit itself to such a restrictive understanding of segregation. In its General Recommendation XIX, the CERD clarified that: “while conditions of complete or partial racial segregation may in some countries have been

³⁷⁷ United Nations, General Assembly, “International Convention on the Elimination of All Forms of Racial Discrimination,” art. 1.

³⁷⁸ “International Convention on the Elimination of All Forms of Racial Discrimination,” Preamble.

³⁷⁹ “International Convention on the Elimination of All Forms of Racial Discrimination,” art. 3.

³⁸⁰ See Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (Oxford: Oxford University Press, 2016), 243–46.

created by governmental policies, a condition of partial segregation may also arise as an unintended by-product of the actions of private persons.”³⁸¹

It thus affirmed that a condition of racial segregation can arise without any initiative or direct involvement by public authorities, establishing that the prohibition of segregation contained in the ICERD also includes de facto segregation.³⁸² This interpretation ultimately requires governments to take an active role in dismantling the lingering effects of discrimination and segregation, beyond public or state-enforced segregation policies.

Furthermore, while segregation is not explicitly prohibited in other international and European human rights instruments, some bodies like the ECSR have dealt with issues of housing segregation when evaluating the compatibility of certain housing policies with human rights law, as I discuss below. In this context, I argue that antidiscrimination law can help to clarify the approach taken by treaty-monitoring bodies as regards the legal qualification of housing segregation, providing a clearer analytical framework to address this issue.

Before taking a closer look at how antidiscrimination law can be mobilised to combat housing segregation, it is important to look at urban sociology to obtain a clearer understanding of this phenomenon. These reflections contribute to a more complete vision of the dynamics underpinning residential segregation processes, ensuring that the responses provided by antidiscrimination law are appropriately anchored in solid sociological foundations.

In urban sociology, segregation has been generally defined as “the concentration of ethnic, national-origin, or socioeconomic groups in

³⁸¹ United Nations, Committee on the Elimination of Racial Discrimination, “General Recommendation XIX on Article 3 of the Convention,” para. 3.

³⁸² United Nations, Committee on the Elimination of Racial Discrimination, “General Recommendation XIX on Article 3 of the Convention” (18 August 1995), para. 140. See further Michael B. de Leeuw et al., “The Current State of Residential Segregation and Housing Discrimination: The United States’ Obligations Under the International Convention on the Elimination of All Forms of Racial Discrimination,” *Michigan Journal of Race & Law* 13, no. Spring 2008 (2008): 337–90.

particular neighborhoods of a city or metropolitan area.”³⁸³ Such a concentration becomes problematic when it is associated with “overlapping inequalities that persist across generations.”³⁸⁴ This approach supports the interpretation of the CERD, insofar as it does not restrict segregation to situations directly arising because of state action.

A wide array of elements may contribute to residential segregation.³⁸⁵ A first set of factors is socioeconomic in nature. The separation of groups in space is often (at least partly) a consequence of socioeconomic differences between those groups, as lower income individuals and families have limited housing options in certain neighbourhoods.

Since socioeconomic status correlates with racial or ethnic origin, individuals and families belonging to ethnic minorities are more likely to experience these constraints and to settle in areas where housing is less expensive. These areas are in turn more likely to house the same or other ethnic minorities.³⁸⁶

Secondly, it has been shown that housing discrimination is a major factor explaining the emergence and persistence of segregated neighbourhoods.³⁸⁷ Discriminatory practices by a variety of public and private actors, including mortgage providers, real estate agents, landlords, and governmental

³⁸³ John Iceland, “Residential Segregation: A Transatlantic Analysis” (Migration Policy Institute, 2014), 2.

³⁸⁴ Iceland, 3.

³⁸⁵ See Sheila R. Foster, “The Limits of Mobility and the Persistence of Urban Inequality,” *The Yale Law Journal Forum* 127 (2017): 480–97; Nick Bailey, Wouter P. C. van Gent, and Sako Musterd, “Remaking Urban Segregation: Processes of Income Sorting and Neighbourhood Change,” *Population, Space and Place* 23, no. 3 (2017); Sako Musterd et al., “Socioeconomic Segregation in European Capital Cities. Increasing Separation between Poor and Rich,” *Urban Geography* 38, no. 7 (2017): 1062–1083; Marco Oberti and Edmond Préteceille, *La ségrégation urbaine*, Repères 666 (Paris: La Découverte, 2016).

³⁸⁶ John Iceland and Rima Wilkes, “Does Socioeconomic Status Matter? Race, Class, and Residential Segregation,” *Social Problems* 53, no. 2 (2006): 248–49; Gideon Bolt, Ronald Van Kempen, and Maarten Van Ham, “Minority Ethnic Groups in the Dutch Housing Market: Spatial Segregation, Relocation Dynamics and Housing Policy,” *Urban Studies* 45, no. 7 (2008): 1361–62.

³⁸⁷ Iceland and Wilkes, “Does Socioeconomic Status Matter?,” 250; A. Sule Özüekren and Ronald Van Kempen, “Special Issue Editors’ Introduction: Dynamics and Diversity: Housing Careers and Segregation of Minority Ethnic Groups,” *Housing, Theory and Society* 20, no. 4 (2003): 167–68.

institutions shape the residential patterns of ethnic minorities and limit their residential mobility. As a result, even ethnic minority members who could afford to live in majority-dominated neighbourhoods may in practice be excluded from them. This spatial separation between groups aggravates majority bias against minority groups living in deprived areas, thereby increasing their stigmatisation and exacerbating discrimination.

Finally, individual residential choices also affect segregation processes to some extent. It has been documented how members of majority groups tend to leave or avoid certain neighbourhoods when the number of ethnic minority or lower income residents increases. This phenomenon is known as “white flight” or “white avoidance.”³⁸⁸

On the other hand, while it is true that certain persons belonging to ethnic minorities may prefer to settle in areas populated by individuals with the same background, as these areas provide them with “information, support, networks, and even funding for self-employment, especially for new arrivals,”³⁸⁹ racial prejudice and discrimination are more likely to explain residential segregation than these benign intragroup preferences.³⁹⁰

Moving from causes to consequences, sociological research has posited that a range of harmful effects arise for individuals living in segregated areas.³⁹¹ The so-called “neighbourhood effects” theory defends the idea that living in a segregated neighbourhood limits residents’ chances of escaping poverty,

³⁸⁸ Michele Wilde Anderson and Victoria C. Plaut, “Property Law: Implicit Bias and the Resilience of Spatial Colorlines,” in *Implicit Racial Bias across the Law*, ed. Justin D. Levinson and Robert J. Smith (Cambridge: Cambridge University Press, 2012), 29.

³⁸⁹ Iceland, “Residential Segregation,” 3. It has been argued that some degree of spatial segregation might even help minorities to adjust to the host society and country at an initial stage. See Hanna Dhalmann and Katja Vilkkumaa, “Housing Policy and the Ethnic Mix in Helsinki, Finland: Perceptions of City Officials and Somali Immigrants,” *Journal of Housing and the Built Environment* 24 (2009): 437.

³⁹⁰ Iceland and Wilkes, “Does Socioeconomic Status Matter?,” 250–51; Anderson and Plaut, “Property Law: Implicit Bias and the Resilience of Spatial Colorlines,” 27. Deborah Phillips and Malcolm Harrison, “Constructing an Integrated Society: Historical Lessons for Tackling Black and Minority Ethnic Housing Segregation in Britain,” *Housing Studies* 25, no. 2 (2010): 221–235.

³⁹¹ See Emily M Miltenburg and Tom WG van der Meer, “Lingering Neighbourhood Effects: A Framework to Account for Residential Histories and Temporal Dynamics,” *Urban Studies* 55, no. 1 (2018): 151–74.

due to poor social networks, limited resources, and constrained job opportunities.³⁹² In addition to concentrating poverty, ethnic or racial segregation impacts negatively on educational achievements, health conditions, and labour market access.³⁹³

However, neighbourhood effects literature has been itself criticised for overstating these effects and for characterising them as overly deterministic. Neighbourhood effects proponents usually fail to address the underlying structural reasons leading people to live where they live, including existing neighbourhood stigmatisation.³⁹⁴

In this connection, urban sociology has also offered important insights regarding the link between place of residence and stigma. This link can be explained by reference to the “symbolic defamation” of places, which refers to the stigma carried by the residents of segregated areas. Symbolic defamation conveys the idea that “residing in a notorious place can become

³⁹² Jürgen Friedrichs, George Galster, and Sako Musterd, “Neighbourhood Effects on Social Opportunities: The European and American Research and Policy Context,” *Housing Studies* 18, no. 6 (2003): 797–806; Robert J. Sampson, Jeffrey D. Morenoff, and Thomas Gannon-Rowley, “Assessing ‘Neighborhood Effects’: Social Processes and New Directions in Research,” *Annual Review of Sociology* 28 (2002): 443–478; Gideon Bolt, Deborah Phillips, and Ronald Van Kempen, “Housing Policy, (De)Segregation and Social Mixing: An International Perspective,” *Housing Studies* 25, no. 2 (2010): 129–135.

³⁹³ Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (Cambridge, MA: Harvard University Press, 1998); Douglas S. Massey, Andrew B. Gross, and Kumiko Shibuya, “Migration, Segregation, and the Geographic Concentration of Poverty,” *American Sociological Review* 59, no. June (1994): 425–445; Douglas S. Massey and Mary J. Fischer, “How Segregation Concentrates Poverty,” *Ethnic and Racial Studies* 23, no. 4 (2000): 670–691; Friedrichs, Galster, and Musterd, “Neighbourhood Effects on Social Opportunities,” 798; Bolt, Van Kempen, and Van Ham, “Minority Ethnic Groups in the Dutch Housing Market,” 1360; Ade Kearns and Michael Parkinson, “The Significance of Neighbourhood,” *Urban Studies* 38, no. 12 (2001): 2103–10; Jean-Paul Fitoussi, Éloi Laurent, and Joël Maurice, *Ségrégation urbaine et intégration sociale* (Paris: Conseil d’analyse économique, 2004); Marie-Hélène Bacqué and Sylvie Fol, “Politiques de Mobilité Résidentielle et de Déségrégation : Une Analyse Critique,” in *Pour Sortir de La Crise Du Logement, Regards Croisés Sur l’économie* 9 (Paris: La Découverte, 2011), 261–271.

³⁹⁴ Tom Slater, “Your Life Chances Affect Where You Live: A Critique of the ‘Cottage Industry’ of Neighbourhood Effects Research,” *International Journal of Urban and Regional Research* 37, no. 2 (2013): 367–87.

affixed to personal identity and may prove to become . . . an indelible mark during encounters with outsiders.”³⁹⁵

This idea is best explained through the concept of “territorial stigmatisation,” notably developed by Wacquant by combining Goffman’s sociological work surrounding stigma with Bourdieu’s theory of symbolic power.³⁹⁶ This concept points to the understanding that the stigmatisation of neighbourhoods is a process that is external to neighbourhoods, and not an inherent characteristic of them. Territorial stigmatisation represents an external marker imposed on these neighbourhoods by societal structures engendering bias and discrimination.³⁹⁷

The sociological reflections advanced in this section thus locate the harm of segregation in the external processes of territorial stigmatisation experienced by the inhabitants of segregated neighbourhoods. Consequently, the key question to answer in situations where segregation is not actively enforced by the state is whether segregation is wrong in itself (i.e. whether the concentration of ethnic, national-origin, or socioeconomic groups in particular neighbourhoods is wrong as such) or whether it is wrong to the extent that it attracts these external processes of stigmatisation, prejudice, and hostility.

Looking at the sociological background just presented, as well as the philosophical considerations advanced in Chapter 2, I argue that segregation is wrong precisely when it gives rise to prejudice, stigmatisation, and hostility. I distinguish here the issue of state-enforced policies of segregation, which I argue are inherently stigmatising, from de facto segregation,

³⁹⁵ Tom Slater, “Territorial Stigmatization: Symbolic Defamation and the Contemporary Metropolis,” in *The SAGE Handbook of New Urban Studies*, by John A. Hannigan and Richards Greg (London: SAGE Publications, 2017), 111–25.

³⁹⁶ See Loïc Wacquant, “Territorial Stigmatization in the Age of Advanced Marginality,” *Thesis Eleven* 91, no. 1 (2007): 66–77; Loïc Wacquant, *Urban Outcasts: A Comparative Sociology of Advanced Marginality* (Cambridge: Polity Press, 2008). See also Troels Schultz Larsen and Kristian Nagel Delica, “The Production of Territorial Stigmatisation: A Conceptual Cartography,” *City* 23, no. 4–5 (2019): 540–63.

³⁹⁷ See John R. Logan et al., “Creating the Black Ghetto: Black Residential Patterns before and during the Great Migration,” *The Annals of the American Academy of Political and Social Science* 660, no. 1 (2015): 18–35.

resulting from more complex factors, which I argue is wrong only when it gives rise to territorial stigmatisation.

In both cases, it is group-based hostility, prejudice, and stigma against residents of segregated areas that begets the application of antidiscrimination norms. Antidiscrimination law provides here a conceptual and legal framework allowing us to tackle the breach of substantive equality and participatory parity arising from segregation, beyond the material harm resulting from being constrained to live in poor housing conditions.

As I develop later in this chapter, this also means that states must carry out desegregation policies to tackle these harmful processes, but these policies must be carried out in a way that is in itself nondiscriminatory and that does not violate other human rights of residents.

Bearing in mind these sociological reflections, we can thus distinguish between different situations engaging the responsibility of states. Firstly, there is the situation where the state actively practices discrimination or where it contributes to segregation through facially neutral laws and policies that indirectly discriminate against certain groups by creating territorial stigmatisation. Secondly, states may remain passive faced with a situation of segregation, which raises questions about their duty to desegregate. In the next sections, I consider more in depth these situations and how they can be addressed from an antidiscrimination law perspective.

5.2 State-enforced policies and practices of segregation

First of all, the fact of physically and geographically separating ethnic minority groups from the rest of the population can in itself be seen as discriminatory. There are well-known historical examples of segregation, like apartheid in South Africa or “Jim Crow” segregation policies in US Southern states.

In these situations, particular individuals and groups, especially Black persons, were placed in deprived neighbourhoods with poor quality housing. In these cases of state-enforced segregation, it is the separation of certain

groups as such which raises antidiscrimination law concerns, as these policies can be seen as inherently stigmatising.

To clarify this idea, let us imagine a hypothetical situation where a country is scrupulous in the realisation of the right to housing of all of its citizens. This state ensures very high levels of housing provision for all its residents, but it follows an apartheid or legal segregation model whereby citizens are placed in different areas according to their racial or ethnic origin (“separate but equal” model).

This model would constitute unlawful direct discrimination, breaching antidiscrimination law insofar as allocative decisions are taken on the basis of a prohibited criterion like racial or ethnic origin, even if the adequacy of housing is otherwise ensured.

Separating and assigning different groups to different areas on the basis of a protected characteristic impinges on their dignity and worth and contributes to entrenching hostility, prejudice, and stigma. We can recall in this regard the statement of the US Supreme Court in *Brown v. Board of Education*, when it ruled that segregating Black children in certain schools “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”³⁹⁸ Even if, all things being equal, the other dimensions of the right to housing were to be fulfilled, antidiscrimination law would still be breached in this regard.

In these cases, state action directly expresses hostility, prejudice, and stigma towards certain individuals and groups, by labelling them as less deserving of dignity on the basis of a prohibited ground. For instance, some municipalities in Eastern European countries adopted local ordinances in the 1990s designed to prohibit Roma from residing in their territory.³⁹⁹

³⁹⁸ United States, *Brown v. Board of Education of Topeka et al.*, 347 U.S. 483 (1954). The ECtHR case law on the segregation of Roma children in schools is also relevant in this regard. See, in particular, European Court of Human Rights, Grand Chamber, *D.H. and others v. the Czech Republic*, Application no. 57325/00 (13 November 2007); European Court of Human Rights, First Section, *Sampanis and others v. Greece*, Application no. 32526/05 (5 June 2008).

³⁹⁹ See, for example, Committee on the Elimination of Racial Discrimination, “Communication No. 13/1998,” *Koptova v. Slovakia*, CERD/C/57/D/13/1998 (8 August 2000).

While blatant legal prohibitions of settling in certain areas based on race or ethnicity have disappeared in Europe, other forms of segregationist policies can still be found. In some cases, public authorities have erected physical barriers to separate neighbourhoods which are mostly inhabited by Roma from those which are not.⁴⁰⁰ This practice, known as “architectural exclusion,” can be overt, like the construction of walls, or more subtle, like designing low bridge passes so that only private cars but not buses or caravans can access certain roads.⁴⁰¹

If this is done on the basis of a protected characteristic, or, as we will see later, because of reasons relating to the ethnic origin common to most of the inhabitants of the area concerned, it will constitute prohibited direct discrimination.

This argument finds support in some CERD and ECSR decisions dealing with state-enforced segregationist policies and practices. In its 2017 Concluding Observations on Italy’s report, the CERD expressed its concerns with regard to the fact that Roma and Sinti communities “continue to live in segregated camps or housing areas with substandard accommodation, many unsuitable for human habitation, and in remote areas distanced from basic services, including health care and schools,”⁴⁰² and warned against the construction by municipal authorities of segregated Roma-only camps. In its 2018 Concluding Observations on Slovakia’s report, the CERD found that the residential segregation of Roma communities persisted, including through

⁴⁰⁰ These practices have been documented in a number of municipalities in various countries, including Portugal, Romania, Slovakia, and Czechia. See *Human Rights of Roma and Travellers in Europe*.

⁴⁰¹ See Sarah Schindler, “Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment,” *The Yale Law Journal* 124 (2015): 1934–2024. In the United Kingdom, many traditional stopping places for Travellers have been blocked off by ditches, walls and gates. See *A Synthesis of Civil Society’s Reports on the Implementation of National Roma Integration Strategies in the European Union* (Brussels: European Commission, Directorate-General for Justice and Consumers, 2018), 31–32, <https://cps.ceu.edu/sites/cps.ceu.edu/files/attachment/basicpage/3034/rcm-civil-society-monitoring-report-1-synthesis27-2017-eprint-fin.pdf>.

⁴⁰² Committee on the Elimination of Racial Discrimination, “Concluding Observations on the combined nineteenth and twentieth periodic reports of Italy,” CERD/C/ITA/CO/19-20 (17 February 2017), para. 21.

the construction of walls that separated them from the rest of the population.⁴⁰³

With regard to the ECSR, in the case of *COHRE v. Italy* the Committee found a violation of Article E RESC in conjunction with the right to housing, due to the segregation of Roma and Sinti in camps.⁴⁰⁴ The ECSR rejected the Italian government's policy of placing Roma and Sinti populations on encampments which were segregated from the rest of the population and where material conditions were appalling.

In these decisions, both the CERD and the ECSR therefore found that public authorities were directly responsible for creating segregation. States have an obligation under antidiscrimination law not to create or foster segregation when designing and implementing housing policies. I argue that antidiscrimination law must be brought in to fully address the harm that such state action had on these groups: these violations were not independent of their ethnic origin, thus raising important issues in terms of substantive equality and participatory parity.

Public authorities may also create housing segregation with the occasion of individuals who apply for social housing or who have to be resettled after being evicted from their homes. Segregation practices in the allocation of public or social housing, with disadvantaged groups being systematically placed in dwellings situated in specific neighbourhoods, have been observed in a number of countries.⁴⁰⁵

In the United Kingdom, social landlords avoided placing ethnic minority families in predominantly white neighbourhoods in the outer areas of cities before the 1980s, which led to minorities being concentrated in the poorest areas of the inner city.⁴⁰⁶

⁴⁰³ Committee on the Elimination of Racial Discrimination, "Concluding observations on the combined eleventh and twelfth periodic reports of Slovakia," CERD/C/SVK/CO/11-12 (12 January 2018), para. 21.

⁴⁰⁴ European Committee of Social Rights, *Centre on Housing Rights and Evictions (COHRE) v. Italy*.

⁴⁰⁵ See further Ringelheim and Bernard, *Discrimination in Housing*, 53.

⁴⁰⁶ Claire Colomb, "Urban Regeneration and Policies of 'Social Mixing' in British Cities: A Critical Assessment," *ACE: Architecture, City, and Environment / Arquitectura, Ciudad y Entorno* 6, no. 17 (2011): 226. See also Valérie Sala Pala,

Similar practices affecting Roma have been found in Central and Eastern European countries. In Czechia, Roma social housing applicants were systematically placed in poor quality housing and isolated on the outskirts of towns.⁴⁰⁷ In Romania, Roma families were forcefully evicted and relocated near a garbage and a former chemical waste dump.⁴⁰⁸ In another case, several Roma families were relocated in a former military garrison outside of the city, and others were left homeless for more than a month in extreme weather conditions.⁴⁰⁹

We can again look at a ECSR decision to clarify this aspect. In *ERRC v. Portugal*,⁴¹⁰ the ECSR examined a complaint claiming that the rehousing programmes carried out by Portuguese municipalities in order to address the precarious housing conditions of Roma and to dismantle illegal settlements resulted in their spatial and social segregation. These policies often led to the concentration of Roma families in remote areas, far away from urban centres, with poor transport accessibility and in poorly built dwellings.

The ECSR found in this case that segregated neighbourhoods for Roma had been created to a large extent by the action of municipalities. It underlined various specific policies conducive to segregation, such as the construction of

“Le racisme institutionnel dans les attributions de logement social. Une comparaison franco-britannique,” *Hommes et migrations* Novembre-décembre 2006, no. 1264 (2006): 103–112; David Robinson, “Missing the Target? Discrimination and Exclusion in the Allocation of Social Housing,” in *Race, Housing and Social Exclusion*, ed. Peter Somerville and Andy Steele (London: Jessica Kingsley Publishers, 2002), 94–113.

⁴⁰⁷ See Kateřina Hrubá, “Ethnic Discrimination and Segregation in Housing as a Violation of Personality Rights – Strategic Litigation Cases in Kladno, Czech Republic,” in *Housing Rights of Roma and Travellers Across Europe* (Brussels: Housing Rights Watch, 2010), 3, http://www.noticiaspsh.org/IMG/pdf/3870_roma_issue_en.pdf.

⁴⁰⁸ Romanița Iordache, “Cluj Tribunal Sanctions Forced Eviction of Roma Families and Their Relocation in Inadequate Conditions in Pata Rat” (European Network of Legal Experts in the Non-Discrimination Field, 7 January 2014), <https://www.equalitylaw.eu/component/edocman/?task=document.viewdoc&id=2399>.

⁴⁰⁹ Romanița Iordache, “Constanța Court of Appeal Holds Local Authorities Responsible for Housing of Roma Community Evicted in 2006” (European Network of Legal Experts in the Non-Discrimination Field, 19 June 2014), <https://www.equalitylaw.eu/document?task=document.viewdoc&id=2408>.

⁴¹⁰ European Committee of Social Rights, *European Roma Rights Centre (ERRC) v. Portugal*.

a concrete wall separating the Roma community from the rest of the urban fabric, the cutting off of water, and the construction of precarious municipal houses lacking electricity, water, and sanitation.⁴¹¹

The ECSR noted in this connection that “states should be vigilant when implementing housing policies so as to prevent spatial or social segregation of ethnic minorities or immigrants.”⁴¹² Accordingly, it found a breach of Article E RESC. By means of this decision, the ECSR clarified that the right to nondiscrimination, when combined with the right to adequate housing, entails an obligation for states to avoid creating ethnic segregation through their housing policies.

Potentially segregationist policies have also been challenged before national courts in some European countries. One landmark decision is the judgment by the Civil Court of Rome in the case of the campsite *La Barbuta*, where the policy of the municipality of Rome of resettling Roma in this campsite was challenged as discriminatory. The campsite was located on the remote outskirts of Rome and living conditions there were especially precarious. The Court held that this policy constituted indirect discrimination on the grounds of racial or ethnic origin.⁴¹³

Another relevant national case is the legal action brought in Slovakia against the forced resettlement of Roma families by the city of Sabinov.⁴¹⁴ Whereas these families used to live in the urban centre, they were resettled in a location situated one kilometre away from the city and with poor infrastructure. The District Court found that the municipality and the

⁴¹¹ *European Roma Rights Centre (ERRC) v. Portugal*, para. 48.

⁴¹² *European Roma Rights Centre (ERRC) v. Portugal*, para. 41. See also European Committee of Social Rights, *Médecins du Monde – International v. France*, para. 61.

⁴¹³ See *European Equality Law Review*, vol. 2015, 2 (Brussels: European Network of Legal Experts in Gender Equality and Non-Discrimination, 2015), 108, <https://www.equalitylaw.eu/downloads/2955-european-equality-law-review-2-2015-pdf-1-338-kb>. See also *A Synthesis of Civil Society's Reports on the Implementation of National Roma Integration Strategies in the European Union*, 31–32.

⁴¹⁴ See *Country Report – Non-Discrimination: Slovakia 2016* (Brussels: European Network of Legal Experts in Gender Equality and Non-Discrimination, 2016), 85–86, <https://www.equalitylaw.eu/downloads/3714-slovakia-country-report-non-discrimination-2016-pdf-2-08-mb>.

national government had violated the principle of equal treatment, explicitly acknowledging the segregationist dimension of this policy. The Supreme Court later underlined the responsibility of governmental institutions to prevent the residential segregation of the Roma minority in Slovakia.⁴¹⁵

This was not an isolated case. It has been observed that the creation of Roma slums in Slovakia by public authorities takes different forms, including the formal or informal designation of areas as “Gypsy slums,” the facilitation of the removal of non-Roma families from predominantly Roma areas, the failure to act to challenge racial discrimination against Roma in the private housing market, the disproportionate use of the power to evict, and the rehousing of Roma in temporary housing without the intention of ever removing them from those dwellings.⁴¹⁶

Finally, the Spanish Supreme Court also ruled on a case concerning the construction of eight homes on municipal land intended for Roma families, in connection with the municipal plan to eradicate slums. It found that, if the objective was to achieve the integration of these families into urban life, the authorities should have offered them dwellings in the city itself rather than in a rural area on the outskirts, where integration would not be possible. It considered that this decision constituted indirect discrimination since it led to the spatial segregation of those families.⁴¹⁷

The legal categorisation of these practices as discriminatory would still hold true even if racial or ethnic criteria were not explicitly taken as the basis for

⁴¹⁵ See Vanda Durbakova, “Supreme Court Recognises the Positive Obligation of the Government Institutions to Prevent Residential Segregation of Roma Minority” (European Network of Legal Experts in Gender Equality and Non-Discrimination, 24 July 2017), <https://www.equalitylaw.eu/downloads/4259-slovakia-supreme-court-recognises-the-positive-obligation-of-the-government-institutions-to-prevent-residential-segregation-of-roma-minority-pdf-148-kb>. See *A Synthesis of Civil Society’s Reports on the Implementation of National Roma Integration Strategies in the European Union*, 31–32.

⁴¹⁶ See Cahn, “Slums, The Right to Adequate Housing and the Ban on Discrimination.”

⁴¹⁷ Spain, Supreme Court (Administrative Chamber, Fifth Section), Judgment no. 7984/2003 of 11 December, ES:TS:2003:7984. See Juli Ponce Solé, “Housing Discrimination and Minorities in European Cities: The Catalan Right to Housing Act 2007,” *International Journal of Law in the Built Environment* 2, no. 2 (2010): 145; Ponce Solé, “La lucha contra la discriminación residencial y el acoso inmobiliario,” 507–8.

those decisions, as long as some facially neutral criteria are used to hide racial or ethnic factors or as long as certain policies or practices have a disproportionate impact on these groups without an appropriate and objective justification.

Once again, antidiscrimination law has an added value here insofar as it allows us to tackle the situation where the right to housing is unevenly realised on the basis of prohibited grounds and on account of group-based prejudice, hostility, and stigma. Antidiscrimination norms provide us with legal avenues, in the form of antidiscrimination legal concepts, to address this specific symbolic harm linked to substantive equality and participatory parity.

To be sure, public authorities may influence the spatial distribution of various ethnic or socioeconomic groups through a variety of policy choices: whether or not they develop social housing and in which areas they build it, how they regulate the construction of different types of buildings through zoning ordinances, whether they effectively combat discrimination by private landlords, etc. All these decisions have an impact on the residential opportunities of individuals and especially of stigmatised and disadvantaged minorities. This also implies that the state has a whole set of policy tools at its disposal to act to counter housing segregation and the social exclusion resulting from it.⁴¹⁸

5.3. The responsibility of states faced with de facto segregation

Antidiscrimination law can also be mobilised when states do not act when confronted with a situation of de facto segregation. Coming back to our hypothetical situation above, let us imagine that said country does not place citizens in different areas according to their racial or ethnic origin anymore. However, faced with a situation where certain groups disproportionately inhabit in stigmatised areas, that country does not act to revert this situation.

⁴¹⁸ Sako Musterd and Wim Ostendorf, “Segregation, Polarisation and Social Exclusion in Metropolitan Areas,” in *Urban Segregation and the Welfare State: Inequality and Exclusion in Western Cities*, ed. Sako Musterd and Wim Ostendorf (London: Routledge, 1998), 5.

The question arises as to whether this can also be seen as a violation of antidiscrimination law.

As in the previous section, some CERD and ECSR decisions can be referenced to clarify this point. In its 2008 Concluding Observations on Belgium's report, the CERD pointed out that the fact that ethnic minorities are often overrepresented in social housing (up to 90 percent in some cases) results in de facto segregation in certain neighbourhoods of large cities, recommending that the state "adopt effective measures to prevent de facto segregation and address the underlying factors."⁴¹⁹

In its 2013 Concluding Observations on Sweden's report, the CERD similarly noted that several metropolitan areas showed a stark divergence in the modalities and areas of residence along ethnic and socioeconomic lines. This had a particular impact on foreign-born persons, in particular Afro-Swedes and Muslims.⁴²⁰ The CERD recommended that the state assess the effectiveness of its strategies against prevailing segregation along ethnic and socioeconomic lines.⁴²¹ The approach of the CERD in these two decisions thus points to the idea that states are required to take certain positive measures when faced with de facto segregation.

In *ERTF v. the Czech Republic*,⁴²² the ECSR examined a collective complaint claiming that the lack of a systematic social housing policy in Czechia had resulted in the lack of accessible housing for the most socially disadvantaged, in particular Roma, and to the residential segregation of Roma families, who were forced into residential hostels or isolated locations at the edges of towns and cities.

⁴¹⁹ Committee on the Elimination of Racial Discrimination, "Concluding observations on the fourteenth and fifteenth periodic reports of Belgium," CERD/C/BEL/CO/15 (11 April 2008), para. 15.

⁴²⁰ Committee on the Elimination of Racial Discrimination, "Concluding observations on the combined nineteenth to twenty-first periodic reports of Sweden," CERD/C/SWE/CO/19-21 (23 September 2013), para. 14.

⁴²¹ Committee on the Elimination of Racial Discrimination, "Concluding observations on the combined nineteenth to twenty-first periodic reports of Sweden," para 14.

⁴²² European Committee of Social Rights, *European Roma and Travellers Forum (ERTF) v. the Czech Republic*, Collective complaint no. 104/2014 (17 May 2016).

The ECSR noted the lack of information on housing needs provided by the state, as well as the lack of specific targets or achievements. It found little concrete evidence of sufficient action and measurable progress in the field of housing for Roma. It consequently found a violation of Article 16 ESC in light of the nondiscrimination clause contained in the Preamble, on the grounds that “there is a lack of accessible housing, that residential segregation of Roma persists, and that many Roma families live in inadequate conditions.”⁴²³

In other words, the ECSR deemed that housing discrimination had taken place as a result of the passivity of the state when faced with a situation of de facto segregation. This case can therefore be interpreted as recognising a positive obligation for public authorities to take concrete measures to bring this type of situations to an end, by collecting information on existing discriminatory patterns and the housing needs of individuals living in segregated areas, establishing targets, and monitoring action, progress, and achievements.

I therefore argue that the responsibility of states under antidiscrimination law can indeed be engaged when, faced with a situation of de facto segregation, they do not sufficiently act. The existence of segregation patterns can become, in itself, a source of discrimination for the inhabitants of segregated neighbourhoods.

In light of the insights provided by urban sociology presented earlier in this chapter, the mere fact of living in one of these neighbourhoods attracts hostility, prejudice, and stigma through processes of territorial stigmatisation, as negative traits are ascribed to segregated areas and consequently to their inhabitants. Antidiscrimination law can be mobilised to combat these processes, fully addressing this dimension related to substantive equality.

In this connection, the judgment of the CJEU in the *CHEZ* case further illustrates the link between segregation and discrimination.⁴²⁴ This judgment

⁴²³ European Committee of Social Rights, *European Roma and Travellers Forum (ERTF) v. the Czech Republic*, para. 79.

⁴²⁴ Court of Justice of the European Union, Judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480. See also Court of Justice of

provides an example of how housing segregation can become a source of discrimination for the inhabitants of segregated neighbourhoods in the realm of access to goods and services.

The case concerned the request for a preliminary ruling made by a Bulgarian administrative court with regard to the practice carried out by an electricity provider of placing the electricity consumption meters at inaccessible heights only in districts predominantly inhabited by Roma individuals.

The CJEU found that this practice constituted a less favourable treatment or a particular disadvantage for inhabitants of both Roma and non-Roma origin living in the districts concerned. The Court understood that the placement of electricity meters at such heights affected “persons who have a certain ethnic origin [and] those who, without possessing that origin, suffer, together with the former” this treatment or disadvantage, thus allowing for the concept of discrimination by association to come into play.⁴²⁵

There were clear indications in the case that the practice was linked to stereotypes and prejudice about Roma. The CJEU underscored the “compulsory, widespread and lasting” nature of the practice at issue, which is such as to affect persons with a Roma ethnic origin in considerably greater proportions and accordingly to put them at a particular disadvantage compared with other persons, giving the impression that the inhabitants of that district are as a whole potential perpetrators of such unlawful conduct.⁴²⁶ For the Court, this assumption is rooted in ethnic stereotypes and prejudices, where racial grounds are combined with other grounds.

The CJEU ultimately left it open for the national court to rule whether the discrimination in this case was direct or indirect. If the decision is found to

the European Union, Opinion of Advocate General Kokott delivered on 12 March 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:170. See further Sara Benedi Lahuerta, “Ethnic Discrimination, Discrimination by Association and the Roma Community: CHEZ,” *Common Market Law Review* 53 (2016): 797–818.

⁴²⁵ Court of Justice of the European Union, *CHEZ Razpredelenie Bulgaria*, para. 60.

⁴²⁶ *CHEZ Razpredelenie Bulgaria*, para. 84. See also Court of Justice of the European Union, Opinion of Advocate General Kokott delivered on 12 March 2015, *CHEZ Razpredelenie Bulgaria*, para. 1.

have been adopted because of the ethnic origin of the majority of the inhabitants in the concerned neighbourhoods, direct discrimination will be engaged. Otherwise, indirect discrimination would still apply since the practice has a disproportionate impact on the inhabitants of these neighbourhoods without an objective and adequate justification in connection with a prohibited ground, that is, racial or ethnic origin.

Two central lessons can be drawn from this case. Firstly, it becomes clear that if private actors contribute to territorial stigmatisation by entrenching the hostility, prejudice, and stigma suffered by the inhabitants of segregated neighbourhoods, they will be liable for discrimination under antidiscrimination law. Secondly, the CJEU linked the existence of discrimination to the stereotypes and prejudice suffered by the residents of those neighbourhoods by reason of the ethnic origin of the majority of their inhabitants. In this case, it was precisely an antidiscrimination law approach and not a right to housing approach which allowed for EU law to be applied and for this dimension to be addressed.

To sum up, an obligation for states to take active measures to desegregate when faced with a situation of de facto segregation can be derived from antidiscrimination law. This is not an obligation of result, to definitively end all outstanding instances of de facto segregation, but rather an obligation to take measures to endeavour inasmuch as possible to achieve this aim.

This approach can be linked with the stance of the ECSR developed in the context of the right to housing, where it has advanced that, in order for a given situation to be compatible with the (R)ESC, states must:

- a. adopt the necessary legal, financial and operational means of ensuring steady progress towards achieving the goals laid down by the Charter;
- b. maintain meaningful statistics on needs, resources and results;
- c. undertake regular reviews of the impact of the strategies adopted;
- d. establish a timetable and not defer indefinitely the deadline for achieving the objectives of each stage;

e. pay close attention to the impact of the policies adopted on each of the categories of persons concerned, particularly the most vulnerable.⁴²⁷

Similarly, in the context of Article 30 RESC (which enshrines the right to protection against poverty and social exclusion), the ECSR has stated that states must “adopt an overall and coordinated approach, which should consist of an analytical framework, a set of priorities and measures to prevent and remove obstacles to access fundamental social rights. There should also exist monitoring mechanisms involving all relevant actors, including civil society and persons affected by poverty and exclusion.”⁴²⁸

An obligation to desegregate under antidiscrimination law can be conceptualised along these lines. Desegregation policies being a complex and polycentric matter, states must take steps in this direction “within a reasonable time, with measurable progress and making maximum use of available resources.”⁴²⁹ In the next section, I look more in detail at what desegregation policies entail from an antidiscrimination law perspective.

5.4 Desegregation policies and antidiscrimination law

In the previous section, I argued that states are under a positive obligation to counter segregation in neighbourhoods where residents suffer from territorial stigmatisation. If this is the case, the next step is to determine how states should carry out these desegregation policies in a way that is compliant with antidiscrimination law requirements.

Some preliminary sociological considerations on the issue of desegregation are useful in this regard. As a matter of fact, most of the sociological research surveyed comments on the obsolescence of the theoretical frameworks to

⁴²⁷ European Committee of Social Rights, *European Federation of National Organisations working with the Homeless (FEANTSA) v. France*, para. 54.

⁴²⁸ European Committee of Social Rights, *International Movement ATD Fourth World v. France*, para. 164. See also European Committee of Social Rights, “Conclusions 2013 - Statement of interpretation - Article 30,” 2013_163_06/Ob/EN (2013).

⁴²⁹ See European Committee of Social Rights, *International Association Autism-Europe v. France*, para. 53.

which policy makers have recourse when developing public policies seeking to combat segregation.

Many of these policies are based on oversimplifications, overlooking the fact that the causes of segregation are multifaceted and contextually bounded.⁴³⁰ Some desegregation policies are based on the reductive premise that the spatial dispersion of different social groups in the city constitutes ethnic segregation, which, given socioeconomic differences between groups, unchains processes of socioeconomic segregation that have in turn negative outcomes as regards social integration.

These policies tend to lack, however, a thorough prior evaluation of the causes and effects of segregation in specific neighbourhoods, the potential harmful impact of desegregating measures on individuals if these are not accompanied by adequate safeguards, and the need to respect the right to housing of residents when implementing these types of measures, in particular their “right to stay put,” that is, their right not to be displaced.⁴³¹

Desegregation policies can be roughly grouped in two categories: place-based policies and people-based policies.⁴³² Place-based policies target neighbourhoods and dwellings, including through the improvement of the housing stock and amenities, the creation of affordable housing units, and the mixing of housing units of different qualities and prices. People-based policies target specific individuals and families with the aim of facilitating their housing mobility: this includes policies like rental subsidies, housing vouchers, or mobility programmes. People-based policies are more typically implemented in the US, whereas place-based policies are more frequently used to combat segregation in Europe.⁴³³

⁴³⁰ See Sonia Arbaci, “(Re)Viewing Ethnic Residential Segregation in Southern European Cities: Housing and Urban Regimes as Mechanisms of Marginalisation,” *Housing Studies* 23, no. 4 (2008): 590–91.

⁴³¹ David Imbroscio, “‘United and Actuated by Some Common Impulse of Passion’: Challenging the Dispersal Consensus in American Housing Policy Research,” *Journal of Urban Affairs* 30, no. 2 (2008): 114.

⁴³² See Leah Platt Boustan, “Racial Residential Segregation in American Cities,” in *The Oxford Handbook of Urban Economics and Planning*, ed. Nancy Brooks, Kieran Donaghy, and Gerrit-Jan Knaap (Oxford: Oxford University Press, 2012), 319.

⁴³³ See Oberti and Préteceille, *La ségrégation urbaine*, 103.

In fact, most desegregation policies do little to desegregate ethnic minorities or lower income groups or to attract higher income residents to disadvantaged areas. On the contrary, they might even display negative effects.⁴³⁴ This can probably be explained by the fact that these policies often fail to address the root causes of segregation, deflecting attention from prejudice and inequality and concealing housing marginalisation and discrimination.⁴³⁵

Desegregation policies also tend to disregard the impact of gentrification and the displacement of sociocultural concentrations.⁴³⁶ One of the most frequent stated aims of desegregation policies is the achievement of a “social mix,” through which to obtain a balanced population structure or a balanced urban development.⁴³⁷

Some authors have raised concerns about the disproportionate impact that such social mixing policies may have on ethnic and cultural minorities and on lower income groups, which may see core elements of their right to housing unduly restricted as a result. In particular, long-time residents who want to stay in the area due to the location of their employment, their

⁴³⁴ See Roger Andersson, Åsa BråmÅ, and Emma Holmqvist, “Counteracting Segregation: Swedish Policies and Experiences,” *Housing Studies* 25, no. 2 (2010): 237–256; Maarten Van Ham and David Manley, “Social Housing Allocation, Choice and Neighbourhood Ethnic Mix in England,” *Journal of Housing and the Built Environment* 24 (2009): 407–422; Silver and Danielowski, “Fighting Housing Discrimination in Europe”; Bolt, Phillips, and Van Kempen, “Housing Policy, (De)Segregation and Social Mixing,” 130.

⁴³⁵ Silver and Danielowski, “Fighting Housing Discrimination in Europe”; Bolt, Phillips, and Van Kempen, “Housing Policy, (De)Segregation and Social Mixing,” 133; Arbaci, “(Re)Viewing Ethnic Residential Segregation in Southern European Cities,” 604.

⁴³⁶ Bolt, Van Kempen, and Van Ham, “Minority Ethnic Groups in the Dutch Housing Market,” 1369.

⁴³⁷ See Gideon Bolt, “Combating Residential Segregation of Ethnic Minorities in European Cities,” *Journal of Housing and the Built Environment* 24 (2009): 397–405; Sybille Münch, “‘It’s All in the Mix’: Constructing Ethnic Segregation as a Social Problem in Germany,” *Journal of Housing and the Built Environment* 24 (2009): 441–455; Emma Holmqvist and Zara Bergsten, “Swedish Social Mix Policy: A General Policy without an Explicit Ethnic Focus,” *Journal of Housing and the Built Environment* 24 (2009): 477–490.

children's school, and their local networks, amenities, and quality public services, may be priced out as a consequence of these policies.⁴³⁸

These sociological considerations point to the need for states to be mindful of their human rights obligations, including in the context of antidiscrimination law, when elaborating and implementing desegregation policies. Some international and European cases can be further highlighted in this connection.

At the international level, the case of *L.R.* before the CERD concerned a local council in Slovakia which had approved a plan to construct low-cost housing for the Roma inhabitants of the town, most of whom were living in unsanitary conditions.⁴³⁹ However, after receiving a petition signed by residents opposing the plan on the grounds that it would lead to "an influx of inadapted citizens from the surrounding villages, other districts and regions," the town cancelled the construction plan. The CERD found that, by withdrawing its decision, the town council had deprived the Roma of their right to housing in a discriminatory manner.

The *Garib* case, mentioned in the previous chapter, can be also mentioned here as it concerns a desegregation policy with a significant impact in terms of nondiscrimination.⁴⁴⁰ This case arose in the framework of the Dutch City Problems (Special Measures) Act, commonly referred to as the "Rotterdam Act."⁴⁴¹

This Act seeks to:

reverse a process of overburdening and decreasing quality of life, particularly by striving towards districts whose composition is more mixed from a socioeconomic point of view, . . . counteract the existing segregation of incomes throughout the city through the regulation of the supply of housing

⁴³⁸ Silver and Danielowski, "Fighting Housing Discrimination in Europe," 12.

⁴³⁹ Committee on the Elimination of Racial Discrimination, "Communication No. 31/2003," *L.R. et al. v Slovakia*, CERD/C/66/D/31/2003 (10 March 2005).

⁴⁴⁰ European Court of Human Rights, Grand Chamber, *Garib v. the Netherlands*.

⁴⁴¹ The Netherlands, Law of 22 December 2005, containing rules that make it possible to comprehensively target issues linked with metropolitan areas, Stb. 2005, 726 (29 December 2005).

in certain districts and in so doing improve quality of life for the inhabitants of those districts.⁴⁴²

To achieve those aims, the Act allows for specific areas, known as “hotspots,” to be subjected to a housing permit regime. The designation of these areas must comply with the principles of proportionality and subsidiarity. Once a decision to this effect has been taken by the national government, the municipal councils concerned can issue local ordinances requiring all potential tenants seeking to take up new residence in those hotspot areas to previously obtain a housing permit.

That permit will be denied should the prospective tenant not comply with the income or prior residence requirements: applicants whose income does not derive from “gainful economic activity” and applicants who have not resided in the Rotterdam metropolitan area for at least six years will see in principle their housing permits refused.

Since 2016, the housing permit regime has been expanded to allow the exclusion of residents based on criminal police records, antisocial behaviour, and suspicions of extremism and radicalism, with the stated objective to ensure public safety.⁴⁴³

Several sources had already pointed to the fact that this Act would have a disproportionate impact on certain groups along ethnic origin, gender, and age lines.⁴⁴⁴ In particular, persons with non-Western European immigrant

⁴⁴² See European Court of Human Rights, Grand Chamber, *Garib v. the Netherlands*, para. 16.

⁴⁴³ The Netherlands, College voor de rechten van de mens, [Opinion regarding the proposal for an Act modifying the City Problems (Special Measures) Act], 2015/0003/EH/JB (3 February 2015), <https://mensenrechten.nl/publicaties/detail/35305>. See further Michel Vols, “Screening and Excluding People with Low Income and Nuisance Neighbours from Housing: Human Rights Proof?,” in *Regulating the City: Contemporary Urban Housing Law*, ed. Julian Sidoli, Michel Vols, and Marvin Noah Frank Kiehl (The Hague and Portland, OR: Eleven International Publishing, 2017), 132–35. See also Wouter van Gent, Cody Hochstenbach, and Justus Uitermark, “Exclusion as Urban Policy: The Dutch ‘Act on Extraordinary Measures for Urban Problems,’” *Urban Studies*, 2017, 14.

⁴⁴⁴ See European Court of Human Rights, Grand Chamber, *Garib v. the Netherlands*, paras. 42–47 and 73–74. See also, among others, Reinout Kleinhans, “Social Implications of Housing Diversification in Urban Renewal: A Review of Recent Literature,” *Journal of Housing and the Built Environment* 19

roots and single-parent families (in practice, single mothers) were overrepresented among those excluded by the requirements established by this norm, as were young individuals and persons living alone.

In its ruling, the ECtHR's Grand Chamber recalled the state's margin of appreciation. It characterised housing as a "prime social need" in modern societies, which plays a central role in the welfare and economic policies of states.⁴⁴⁵ It found, however, that the legislation at hand contained sufficient safeguards to consider that it made adequate provision for the rights and interests of persons in a similar position to the applicant's. The ECtHR consequently did not find a violation of the right to freedom of movement or the right to nondiscrimination.

In light of the argument I have developed along this chapter, the Grand Chamber's ruling is problematic. In my opinion, it should have found an instance of discrimination, as this case shows extremely well how desegregation policies purportedly seeking to put an end to territorial stigmatisation can be designed in such a way that they discriminate against disadvantaged groups in their operation.

If, as a matter of principle, it is legitimate for states to act to counter de facto segregation (and if, as explored above, states have indeed a duty to do so), this must always be done under nondiscriminatory conditions and ensuring the full respect of other human rights of the persons affected.

Another example of discriminatory desegregation policies can be found in Denmark, where recent legislation informally known as the "ghetto package" contains desegregation measures targeting lower income and heavily non-Western and Muslim background neighbourhoods.⁴⁴⁶

(2004): 367–390; Bolt, Van Kempen, and Van Ham, "Minority Ethnic Groups in the Dutch Housing Market."

⁴⁴⁵ European Court of Human Rights, Grand Chamber, *Garib v. the Netherlands*, para. 139.

⁴⁴⁶ See Jakob Juul-Sandberg, "Evictions on Grounds of 'Anti-Social Behaviour' in Denmark – Aspects on Tenancy Law Regulations and the Protection of Human Rights," in *Houses, Homes and the Law*, ed. Michel Vols and Christoph U. Schmid, Studies in Housing Law 3 (The Hague: Eleven International Publishing, 2019), 183–200; Silver and Danielowski, "Fighting Housing Discrimination in Europe," 13.

In particular, this legislative package makes it illegal, among others, for housing associations in these marginalised residential areas to assign housing to applicants who receive public integration benefits or whose family members receive public integration benefits.⁴⁴⁷

This legislative package also sets higher penalties for crimes committed in or near those neighbourhoods, and allows for the eviction of entire families if even one of their members commits a criminal act. Children in these areas must attend state schools where the number of migrant children in the same class is limited, and they must take special language classes lest their families' benefits be revoked.

From 2020, these "ghetto" areas must even reduce the share of their public housing stock below 40%. Current tenants affected by these measures will reportedly be offered alternative accommodation, but they will have no control over its location, quality, and cost.⁴⁴⁸

In sum, besides segregation created or fostered by states in a directly or indirectly discriminatory manner, I argue for an antidiscrimination law-based obligation for states to desegregate. Such an obligation can be rooted in the link between de facto segregation and territorial stigmatisation, as well as the obligation in international and European human rights law to dismantle the lingering effects of segregation and to prevent the spatial or social segregation of ethnic minorities and lower income groups.

Such an obligation to desegregate will therefore arise when instances of de facto segregation in particular areas are correlated with territorial stigmatisation, that is, when a marker is externally imposed on these

⁴⁴⁷ Pia Justesen, "No Ghettos in Denmark by 2030!" (European Network of Legal Experts in Gender Equality and Non-Discrimination, 22 January 2019), <https://www.equalitylaw.eu/downloads/4811-denmark-no-ghettos-in-denmark-by-2030-pdf-153-kb>.

⁴⁴⁸ See Feargus O'Sullivan, "How Denmark's 'Ghetto List' Is Ripping Apart Migrant Communities," *The Guardian*, 11 March 2020, <https://www.theguardian.com/world/2020/mar/11/how-denmarks-ghetto-list-is-ripping-apart-migrant-communities>. See also Tim Luimes, "In de 'getto's' van Kopenhagen, de achterstandswijken waar speciale wetten gelden," *Vrij Nederland*, 28 May 2019, <https://www.vn.nl/in-het-getto-van-kopenhagen>.

neighbourhoods by societal structures, generating hostility, prejudice, and stigma against residents of those areas.

When desegregating, however, states must be mindful of their antidiscrimination law obligations. They have a duty to desegregate in a manner that is compliant with antidiscrimination legal provisions and which is respectful of the human rights of the persons affected, in particular their right to adequate housing and their right to stay put.

Whereas I have focused until now on segregation linked with racial or ethnic origin and socioeconomic disadvantage, in the next section I briefly discuss the phenomenon of “institutionalisation,” which I argue can be qualified as a form of segregation on grounds of disability.

5.5 Institutionalisation: Segregation on the basis of disability

Institutionalisation is another pervasive form of housing discrimination which shares many of the characteristics described above regarding ethnic and socioeconomic segregation.

Institutionalisation is generally characterised by the fact that persons with disabilities are isolated on the basis of a diagnose of disability or chronic illness. They are forced to live in specific housing arrangements which offer little opportunity for their equal participation as peers in society, and which entail prolonged periods of separation from family, friends, and the community at large.

Institutionalised individuals are forced to live with one another, often following a strict routine determined without regard to the needs and wishes of residents.⁴⁴⁹ Institutions are thus increasingly seen as aggravating the exclusion and the stigmatisation of persons with disabilities.⁴⁵⁰

The CRPD brought with it a radical change of perspective in this regard. Historically, it was generally accepted that the state ought to supervise persons with psychosocial disabilities, and that the issue was rather to

⁴⁴⁹ See Georgette Mulheir, “Deinstitutionalisation – A Human Rights Priority for Children with Disabilities,” *The Equal Rights Review* 9 (2012): 119.

⁴⁵⁰ See Jan Tøssebro, “Scandinavian Disability Policy: From Deinstitutionalisation to Non-Discrimination and Beyond,” *Alter* 10, no. 2 (2016): 111–23.

determine “the bounds of permitted compulsion.”⁴⁵¹ With the paradigm shift to the social model of disability in this Convention, the basic principle becomes that disability itself cannot be a factor in determining whether compulsion is imposed. Laws and policies allowing for the institutionalisation of persons with disabilities for their care and treatment without their free and informed consent will be in violation of the CRPD as a matter of principle.⁴⁵²

This central premise grounds the idea of “deinstitutionalisation.” Deinstitutionalisation involves the physical relocation of formerly institutionalised individuals from those settings to accommodation within the larger community. It also entails a transformation in the way that services are delivered, so that they respond to individual needs and preferences.⁴⁵³ In this context, deinstitutionalisation programmes can be seen as compensatory measures for the history of imprisonment and institutionalisation of persons with disabilities.

Deinstitutionalisation requires that a series of services be developed in order to ensure that the right to housing of these persons is adequately secured under nondiscriminatory conditions, including through the availability of “personal assistance, housing adaptations, technical aids and

⁴⁵¹ Peter Bartlett, “The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law: CRPD and Mental Health Law,” *The Modern Law Review* 75, no. 5 (2012): 753.

⁴⁵² See Peter Bartlett, “Implementing a Paradigm Shift: Implementing the CRPD in the Context of Mental Disability Law,” in *Torture in Healthcare Settings: Reflections on the Special Rapporteur on Torture’s 2013 Thematic Report* (Washington, DC: Centre for Human Rights and Humanitarian Law, American University Washington College of Law, 2014), 169–80.

⁴⁵³ *From Institutions to Community Living for Persons with Disabilities: Perspectives from the Ground* (Luxembourg: European Union Agency for Fundamental Rights, 2018), https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-from-institutions-to-community-living-ground-perspectives_en.pdf. See also United Nations, Human Rights Council, “Thematic Study on the Right of Persons with Disabilities to Live Independently and Be Included in the Community. Report of the Office of the United Nations High Commissioner for Human Rights,” A/HRC/28/37 (12 December 2014), para. 25. See also Camilla Parker and Luke Clements, “The UN Convention on the Rights of Persons with Disabilities: A New Right to Independent Living?,” *European Human Rights Law Review* 2008, no. 4 (2008): 508–23; Geoffrey Nelson, “Housing for People with Serious Mental Illness: Approaches, Evidence, and Transformative Change,” *Journal of Sociology & Social Welfare* 37, no. 4 (2010): 123–46.

assistive devices, peer support and counselling, and help with household tasks,” among others.⁴⁵⁴

This must be accompanied by sufficient funding, which must shift from institutional to community-based services. Moreover, the meaningful participation of persons with disabilities in this process must be guaranteed.⁴⁵⁵ In this context, the right to independent living and to community living protected by the CRPD becomes essential.⁴⁵⁶

Institutionalisation represents a clear violation of antidiscrimination law, insofar as it generates hostility, prejudice, and stigma against persons with disabilities.⁴⁵⁷ By analogy to the analysis made above with regard to racial or ethnic origin, the “separate but equal” approach is to be rejected in relation to disability. In this regard, antidiscrimination law adds something to the recognition of the material harm suffered by persons with disabilities in the context of forced institutionalisation which a finding of right to adequate housing violation would permit, insofar as it allows us to address the symbolic harm in their dignity and worth and the impact this has on their substantive equality and their participatory parity.

⁴⁵⁴ *From Institutions to Community Living for Persons with Disabilities: Perspectives from the Ground*, 14.

⁴⁵⁵ See Tina Kempin Reuter, “Human Rights and the City: Including Marginalized Communities in Urban Development and Smart Cities,” *Journal of Human Rights* 18, no. 4 (2019): 382–402.

⁴⁵⁶ The CRPD Committee has clarified that: “access to housing means having the option to live in the community on an equal basis with others. [The right to independent living and community living] is not properly implemented if housing is only provided in specifically designed areas and arranged in a way that persons with disabilities have to live in the same building, complex or neighbourhood. Accessible housing providing accommodation to persons with disabilities, whether they live alone or as a part of a family, must be available in sufficient number, within all areas of the community, to provide the right of persons with disabilities to choose and the possibility to do so.” United Nations, Committee on the Rights of Persons with Disabilities, “General Comment No. 5 (2017) on living independently and being included in the community,” CRPD/C/GC/5 (27 October 2017), para. 34.

⁴⁵⁷ United Nations, Committee on the Rights of Persons with Disabilities, “General Comment No. 5 (2017) on living independently and being included in the community,” para. 77. See also See Ilan Wiesel and Ruth Fincher, “The Choice Agenda in Disability Housing Provision,” *Housing Studies* 24, no. 5 (2009): 611–27.

It is essential that persons with disabilities are effectively able to exercise their rights and to participate in society equally as others, ensuring that they can make their own life choices also in the field of housing. In this light, deinstitutionalisation can be seen as fulfilling the aim of transforming existing housing structures identified in Chapter 2, as well as the aim of eliminating hostility, prejudice, and stigma.

This last point reinforces the idea argued along this chapter that segregation is more than a violation of the right to housing. It represents a violation of antidiscrimination law, arising from the breach of dignity that persons suffer when they are separated from others on the basis of prohibited grounds and labelled as inferior and as not deserving of equal participation in society.

In closing, states must develop an active role in ensuring that segregation and its lingering effects are appropriately eliminated. Segregation, be it based on racial or ethnic origin, low income, or disability, constitutes an antidiscrimination law violation besides a right to housing violation. To fulfil the aims of antidiscrimination norms I have identified, in particular that of eliminating hostility, prejudice, and stigma and of transforming existing housing structures, states have a duty not to directly or indirectly create or foster segregation. Moreover, when faced with de facto segregation that is linked with territorial stigmatisation, states have a duty to desegregate in a nondiscriminatory manner that is at the same time fully compliant with other human rights law obligations.

5.6 Conclusion

This chapter has shown that housing segregation has important nondiscrimination dimensions. I have argued that antidiscrimination law can help to clarify the approach taken by treaty-monitoring bodies as regards the legal qualification of housing segregation, providing a clearer analytical framework to address this issue. I have also shown that an antidiscrimination law perspective offers an added value when compared to a right to adequate housing approach to segregation issues, by allowing us to specifically address the group-based hostility, prejudice, and stigma suffered by residents of segregated areas.

I have first advanced that the CERD has interpreted the prohibition of segregation contained in the ICERD as extending to de facto segregation. I have then presented some additional reflections from the field of urban sociology and urban studies. In particular, I have highlighted the notion of “territorial stigmatisation” as a useful concept to use in this context. This notion refers to the external marker imposed on segregated neighbourhoods by societal structures, generating hostility, prejudice, and stigma against residents of those areas.

Bearing this in mind, I have examined different situations from an antidiscrimination law perspective. States may actively create segregation, or design and implement housing policies which have a segregationist impact on disadvantaged groups without an adequate justification. In these situations of state-enforced segregation, it is the separation of certain groups as such which raises antidiscrimination law concerns, as these policies can be seen as inherently stigmatising.

States may also remain inactive faced with a situation of de facto segregation linked to territorial stigmatisation. In this last case, I have argued for an antidiscrimination law-based obligation for states to desegregate, insisting that this obligation must be carried out under nondiscriminatory conditions and avoiding other human rights violations, in particular of the right to adequate housing and the right of the persons affected not to be displaced. This is not an obligation of result, to definitively end all outstanding instances of de facto segregation, but rather an obligation to take measures to endeavour inasmuch as possible to achieve this aim.

In both cases, it is group-based hostility, prejudice, and stigma against residents of segregated areas that begets the application of antidiscrimination norms. Antidiscrimination law provides here a conceptual and legal framework allowing us to tackle the symbolic harm resulting from the breach of substantive equality and participatory parity arising from segregation, beyond the material harm stemming from being deprived of adequate housing, which a finding of right to adequate housing violation permits to highlight.

Finally, I have highlighted the issue of institutionalisation, qualifying it as a form of segregation on grounds of disability and arguing that it represents a clear violation of antidiscrimination law. In Chapter 6, I take another case study to further show the contribution of antidiscrimination law when applied to particular housing processes, considering the phenomena of housing commodification and financialisation.

Chapter 6

Housing commodification and financialisation as discrimination

This chapter examines housing commodification and financialisation from the perspective of antidiscrimination law. Academic studies analysing the commodification and financialisation of housing have surged in the wake of the 2008 financial crisis that led to massive welfare cuts and austerity measures. Moreover, it is likely that the current economic crisis arisen as a result of the COVID-19 pandemic in 2020 will yield similar results.⁴⁵⁸ While these phenomena have been largely addressed from the perspective of urban studies and of social rights legal scholarship, I argue that the nondiscrimination dimension is essential to fully apprehend and combat these processes.

In this chapter, I argue that housing commodification and financialisation may lead to violations of the right to nondiscrimination, especially with regard to socioeconomic disadvantage. I characterise housing commodification and financialisation as pervasive phenomena prompting a reflection about how antidiscrimination norms can be used to ameliorate the situation of the most disadvantaged individuals and groups, both along status-based and socioeconomic axes, building on the analysis developed in previous chapters.

Through this examination, I show how an antidiscrimination law perspective enriches and complements a right to adequate housing approach, in particular by building on the affordability component of adequate housing. Antidiscrimination law provides an analytical framework

⁴⁵⁸ See Leilani Farha, “COVID-19 Guidance Note: Protecting Renters and Mortgage Payers” (Special Rapporteur on the right to adequate housing, 8 April 2020), https://www.ohchr.org/Documents/Issues/Housing/SR_housing_COVID-19_guidance_rent_and_mortgage_payers.pdf; Balakrishnan Rajagopal, “The Pandemic Shows Why We Need to Treat Housing as a Right,” *The Washington Post*, 7 May 2020.

to approach these issues, as well as a legal framework to tackle certain discriminatory instances of housing commodification and financialisation.

I first look at urban sociology and urban geography to sketch out the main characteristics of housing commodification (Section 6.1) and of housing financialisation (6.2). These sociological considerations help to unveil the dynamics at the root of these processes and to properly understand how they operate before applying an antidiscrimination legal approach to them. I then consider what the role of states is in this context (6.3), as well as their potential responsibility under antidiscrimination law with regard to both socioeconomic disadvantage and status-based prohibited grounds (6.4). Finally, I examine the role and responsibility of private actors in this context (6.5). A final section concludes (6.6).

6.1. Understanding housing commodification

Housing commodification arises when housing is no longer viewed as a human right, but rather as an object to be traded in the market. Through commodification, housing becomes detached from its rights and needs-based function and it is considered as a mere commodity to be produced and then sold for profit.

Housing financialisation, for its part, represents one further step in this process. Through financialisation, housing becomes an asset in which financial flows of capital are invested and disinvested, and profit is here generated through financial (instead of productive) channels.

To better understand the concepts of housing commodification and financialisation, I have recourse to the fields of urban sociology and urban geography. Notably, these disciplines have largely explored these processes by reference to critical urban theory and the “socio-spatial approach.” This approach foregrounds the centrality of space, emphasising the role of state intervention and governmental policies, the real estate industry, and the effects of global capitalism. It views the spatial relations of housing as embedded in social, power-laden processes.⁴⁵⁹

⁴⁵⁹ See Edward W. Soja, “The Socio-Spatial Dialectic,” *Annals of the Association of American Geographers* 70, no. 2 (1980): 207–225; Mark Gottdiener, *The Social*

The basic conceptual distinction to understand housing commodification is that between the notions of “use value” and “exchange value.” Value conveys two different meanings: it sometimes expresses the utility of some particular object and some other times its relationship to other objects.⁴⁶⁰ Whereas use value is determined by the utility of a thing, and becomes a reality by its use or consumption, exchange value appears as a relation.⁴⁶¹ Exchange value is “the proportion in which values in use of one sort are exchanged for those of another sort.”⁴⁶²

Lefebvre illustrated this dissociation by means of the conflict between the abstract space or *habitat* (“*l’habitat*,” in the French original text), that is, how government and real estate actors view space for their political or economic gain, and the social space or the idea of *to inhabit* (“*l’habiter*”), that is, how people think about the place where they live.⁴⁶³

With these two terms, Lefebvre illustrated the dichotomy between the social and use value of housing within a framework of urban life and urban interactions (the action of *to inhabit*), on the one hand, and the creation of a new reality detached of these interactions, inscribed into the logic of markets and dominated by exchange value (the logic of *habitat*), on the other hand.⁴⁶⁴

This idea also finds echo in Turner’s distinction between “housing as a noun,” where housing is seen a commodity or a product, and “housing as a

Production of Urban Space, 2nd ed (Austin, TX: University of Texas Press, 1994), x; Manuel B. Aalbers and Brett Christophers, “Centring Housing in Political Economy,” *Housing, Theory and Society* 31, no. 4 (2014): 380.

⁴⁶⁰ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, vol. I (Indianapolis: Liberty Classics, 1976), 44.

⁴⁶¹ See also Karl Marx, *Capital: A Critique of Political Economy*, First English edition, vol. I (Moscow: Progress Publishers, 1887), 27–28.

⁴⁶² Marx, I:27. See also David Harvey, *Social Justice and the City* (London: Edward Arnold, 1973), chap. 5.

⁴⁶³ See Henri Lefebvre, *Le droit à la ville*, 3rd ed. (1968; repr., Paris: Economica, 2009), 16–18.

⁴⁶⁴ See Henri Lefebvre, *Writings on Cities*, ed. Eleonore Kofman and Elizabeth Lebas (Oxford: Blackwell, 1996), 79–80. See further Manuel B. Aalbers, *Place, Exclusion and Mortgage Markets* (Chichester and Malden, MA: Wiley-Blackwell, 2011), 40–41.

verb,” where housing is seen a social process or activity rooted in the satisfaction of needs.⁴⁶⁵

This analysis is strongly linked with industrialisation processes, which resulted in large internal migrations of workers from rural regions to expanding urban industrial centres.⁴⁶⁶ As I further develop in Chapter 7, these migrations precipitated shifts in demand and supply in housing markets, stimulating the rapid construction of low-quality dwellings in order to quickly house the newly arrived workers.⁴⁶⁷

Commodification thus refers to the general process whereby the economic value of a thing comes to dominate its other uses, that is, the process whereby a thing becomes a commodity.⁴⁶⁸ In turn, a commodity is, in its most simple definition, an object of economic value.⁴⁶⁹ Commodification means that an object becomes no longer primarily valuable because of the utility it provides to its owner in terms of needs satisfaction, but rather because of the things it allows its owner to obtain through exchange.

Because of the intrinsic characteristics of housing, housing commodification is deeply connected with the idea of “accumulation by dispossession,” developed in urban sociology.⁴⁷⁰ Accumulation by

⁴⁶⁵ See John F. C. Turner, “Housing as a Verb,” in *Freedom to Build, Dweller Control of the Housing Process*, ed. John F. C. Turner and Robert Fichter (New York: Collier Macmillan, 1972), 148–175.

⁴⁶⁶ See Frederick Engels, *The Housing Question* (Moscow: Co-operative Publishing Society of Foreign Workers, 1872).

⁴⁶⁷ Jason R. Dinse, *Consortium Comparison*, ed. Christoph U. Schmid, TENLAW: Tenancy Law and Housing Policy in Multi-Level Europe, Deliverable No. 4.2, 2016.

⁴⁶⁸ David Madden and Peter Marcuse, *In Defense of Housing: The Politics of Crisis* (London: Verso, 2016), 17.

⁴⁶⁹ See Arjun Appadurai, “Introduction: Commodities and the Politics of Value,” in *The Social Life of Things: Commodities in Cultural Perspective*, ed. Arjun Appadurai (Cambridge: Cambridge University Press, 1986), 3–63.

⁴⁷⁰ Stuart Hodgkinson, “The New Urban Enclosures,” *City* 16, no. 5 (2012): 500–518. See also Arundhati Roy, *Power Politics* (Cambridge, MA: South End Press, 2001), 16. See further Eva García Pérez and Michael Janoschka, “Derecho a la vivienda y crisis económica: la vivienda como problema en la actual crisis económica,” *Ciudad y Territorio. Estudios Territoriales* 188 (2016): 213–228; Cristina Fernández Ramírez and Fernando Roch Peña, “La quiebra de la ciudad global y sus efectos en la morfología urbana. Madrid, bajo la lógica inmobiliaria de la acumulación-desposesión,” *Urban NS03* (2012): 45–63.

dispossession refers to a process marked by privatisation and enclosure, whereby land and housing are transferred from the state to private owners, and dispossession, whereby a separation is operated between those with the right to own, access, and determine the use of land and housing and those who have no such rights.⁴⁷¹

One of the main drivers of housing commodification is the fact that housing can act as a vehicle of value storage. Unlike other commodities, many of which need to be quickly consumed lest they perish, housing “retains value during consumption, increases and decreases in value over time, can have several owners/consumers, and can persist across decades.”⁴⁷² Housing is instrumental in enabling capital to circulate, but also in enabling capital to be stored.⁴⁷³

Housing commodification is further compounded by globalisation, which has the harmful effect that the price signals to which global markets respond are no longer aligned with the local social needs for housing in a particular location.⁴⁷⁴

Housing commodification policies have profoundly affected the enjoyment of the right to adequate housing across the world, through the abandonment of the conceptual meaning of housing as a social good.⁴⁷⁵ As a consequence, economic elites are able to control and redefine the purposes and ends of housing.⁴⁷⁶ This ultimately translates into the allocation of housing and

⁴⁷¹ See David Harvey, *The New Imperialism* (Oxford and New York, NY: Oxford University Press, 2003), 149. See also David Harvey, *The Limits to Capital* (Oxford: Blackwell, 1982), 232–38; David Harvey, *The Urban Experience* (Oxford: Blackwell, 1989), 61–66.

⁴⁷² Mary Pattillo, “Housing: Commodity versus Right,” *Annual Review of Sociology* 39 (2013): 515.

⁴⁷³ Aalbers and Christophers, “Centring Housing in Political Economy,” 376–77.

⁴⁷⁴ Madden and Marcuse, *In Defense of Housing*, 46–52.

⁴⁷⁵ Raquel Rolnik, “Late Neoliberalism: The Financialization of Homeownership and Housing Rights,” *International Journal of Urban and Regional Research* 37, no. 3 (2013): 1059. See also Susan Saegert, Desiree Fields, and Kimberly Libman, “Deflating the Dream: Radical Risk and the Neoliberalization of Homeownership,” *Journal of Urban Affairs* 31, no. 3 (2009): 302.

⁴⁷⁶ Michael J. Thompson, “The Political Dimensions of Economic Division: Republicanism, Social Justice, and the Evaluation of Economic Inequality,” in *Twenty-First Century Inequality & Capitalism: Piketty, Marx and Beyond*, ed. Lauren Langman and David A. Smith (Brill, 2018), 202.

housing rights based on purchasing power or the ability to access markets, rather than need.⁴⁷⁷

Recalling the philosophical overview of the foundations of antidiscrimination law advanced in Chapter 2, this runs counter to the fourth identified aim of antidiscrimination norms, that of ensuring a fair housing distribution. This idea can be further developed by looking at what housing financialisation entails.

6.2. Understanding housing financialisation

From a general perspective, the financialisation of the economy describes the “increasing power and prominence of actors and firms that engage in profit accumulation through the servicing and exchanging of money and financial instruments.”⁴⁷⁸ Financialisation thus refers to the increasing influence and dominance of financial actors, markets, motives, practices, narratives, institutions, and elites into new areas of the state, economy, and society, including companies and households.⁴⁷⁹

Housing financialisation can then be defined as “a pattern of accumulation in which profit-making occurs increasingly through financial channels rather than through trade and commodity production.”⁴⁸⁰ It has three interrelated outcomes: the increased liquidity of real estate, the transformation of real

⁴⁷⁷ See Olivier De Schutter and Balakrishnan Rajagopal, “Property Rights from below: An Introduction to the Debate,” in *Property Rights from Below: Commodification of Land and the Counter-Movement*, ed. Olivier De Schutter and Balakrishnan Rajagopal, Routledge Complex Real Property Rights Series (Abingdon: Routledge, 2020), 8.

⁴⁷⁸ Madden and Marcuse, *In Defense of Housing*, 31.

⁴⁷⁹ Josh Ryan-Collins et al., *Rethinking the Economics of Land and Housing* (London: Zed, 2017), 120. See also Manuel B. Aalbers, “Financialization,” in *The International Encyclopedia of Geography: People, the Earth, Environment, and Technology*, ed. Douglas Richardson et al. (Oxford: Wiley, 2019); Gerald A. Epstein, ed., *Financialization and the World Economy* (Cheltenham: Edward Elgar, 2005), 3.

⁴⁸⁰ Manuel B. Aalbers, “The Financialization of Home and the Mortgage Market Crisis,” *Competition & Change* 12, no. 2 (2008): 148. See further *Housing Financialization: Trends, Actors, and Processes* (Brussels: European Action Coalition for the Right to Housing and to the City, Rosa-Luxemburg-Stiftung, 2018), <https://housingnotprofit.org/wp-content/uploads/2019/08/Housing-Financialization.pdf>. See also Aalbers and Christophers, “Centring Housing in Political Economy,” 376–77.

estate into a financial asset, and the growing availability of capital for real estate investment.⁴⁸¹

Through financialisation, housing and urban policies lose their rights-based function, as housing is no longer considered as a social good that is also provided to those with less resources, but it rather becomes a mechanism for rent extraction, financial gain, and wealth accumulation.⁴⁸²

Housing financialisation is especially visible in connection with mortgage markets and mortgage securitisation. Mortgage markets have indeed been labelled as the quintessential vehicle for financialisation in the housing sector.⁴⁸³ What was once a way to facilitate the production of family housing at a small scale, usually by local banks or savings institutions with a social function, has become today a circuit for profitmaking on its own.⁴⁸⁴ Mortgage finance has enabled the financialisation of housing at a large scale mainly through the notion of “securitisation.”⁴⁸⁵

Mortgage securitisation designates the process whereby mortgage loans are converted into liquid financial assets traded in secondary financial markets.⁴⁸⁶ More specifically, securitisation entails the pooling together and repackaging of a number of illiquid loans by means of tradable debt securities that are then sold to investors.⁴⁸⁷ The consequence is that profit is made by

⁴⁸¹ Michael Byrne, “Bad Banks and the Urban Political Economy of Financialization: The Resolution of Financial–Real Estate Crises and the Co-Constitution of Urban Space and Finance,” *City* 20, no. 5 (2016): 687.

⁴⁸² Raquel Rolnik and Felipe Hirschhorn, *Urban Warfare: Housing under the Empire of Finance* (London: Verso, 2019), 21. See also *Housing Financialization*, 36.

⁴⁸³ See, for instance, Raquel Rolnik and Lidia Rabinovich, “Late-Neoliberalism: The Financialisation of Homeownership and the Housing Rights of the Poor,” in *Economic and Social Rights after the Global Financial Crisis*, ed. Aoife Nolan (Cambridge: Cambridge University Press, 2014), 57–89.

⁴⁸⁴ See Manuel B. Aalbers, “The Variegated Financialization of Housing,” *International Journal of Urban and Regional Research* 41, no. 4 (2017): 542–554.

⁴⁸⁵ See further Sergio Nasarre Aznar, *Los años de la crisis de la vivienda* (Valencia: Tirant lo Blanch, 2020).

⁴⁸⁶ See also James Heintz and Radhika Balakrishnan, “Debt, Power, and Crisis: Social Stratification and the Inequitable Governance of Financial Markets,” *American Quarterly* 64, no. 3 (2012): 387–409.

⁴⁸⁷ Ryan-Collins et al., *Rethinking the Economics of Land and Housing*, 138.

the mere sale of these financial products, irrespective of what actually occurs with the mortgages at the origin of those securities.⁴⁸⁸

The subprime mortgage crisis in the year 2008 evidenced how housing had become financialised to the point that the value of mortgaged housing had no relationship to the size of the debt attached to it.⁴⁸⁹ In order to extract value from households which would otherwise be excluded from more traditional mortgage finance circuits because of their low income, new financial products had to be developed: subprime mortgages.

Subprime mortgages allowed lenders to charge considerably higher interest rates for high-risk, lower income borrowers, while maintaining lower interest rates for low-risk, high-income borrowers, thus maximising their net profit.⁴⁹⁰ Ultimately, this led to massive mortgage indebtedness and home repossessions, often affecting the most disadvantaged households.⁴⁹¹

The term “predatory lending” describes precisely this practice of offering loans to targeted groups with substantially higher costs than what would otherwise be warranted by their risk profile. When destined to these groups, mortgage insurance was deliberately overpriced, and abusive clauses were often added to mortgage loan agreements. High-interest loans have led to increasing household indebtedness and economic insecurity, displacing and

⁴⁸⁸ See Saskia Sassen, “Predatory Logics: Going Well beyond Inequality,” in *Twenty-First Century Inequality & Capitalism: Piketty, Marx and Beyond*, ed. Lauren Langman and David A. Smith (Brill, 2018), 64–85.

⁴⁸⁹ See Saskia Sassen, “When Local Housing Becomes an Electronic Instrument: The Global Circulation of Mortgages – A Research Note,” *International Journal of Urban and Regional Research* 33, no. 2 (2009): 411–26; Heintz and Balakrishnan, “Debt, Power, and Crisis”; Saskia Sassen, “Finance as Capability: Good, Bad, Dangerous,” *Occasion* (blog), 2017, <https://arcade.stanford.edu/occasion/finance-capability-good-bad-dangerous>.

⁴⁹⁰ Rolnik and Rabinovich, “Late-Neoliberalism: The Financialisation of Homeownership and the Housing Rights of the Poor,” 69.

⁴⁹¹ Irene Sabaté, “Mortgage Indebtedness and Home Repossessions as Symptoms of the Financialisation of Housing Provisioning in Spain,” *Critique of Anthropology* 36, no. 2 (2016): 197–211; Aaron Gutiérrez and Antoni Domènech, “The Spanish Mortgage Crisis: Evidence of the Concentration of Foreclosures in the Most Deprived Neighbourhoods,” *Die Erde* 148, no. 1 (2017): 39–57; Seán Ó Riain, “The Crisis of Financialisation in Ireland,” *The Economic and Social Review* 43, no. 4 (2012): 497–533.

concentrating financial risks within individual households and disrupting the social relations of the home.⁴⁹²

This sociological overview of housing commodification and financialisation raises a number of legal questions with regard to antidiscrimination law. In the following sections, I explore from an antidiscrimination law perspective the role and responsibility of states, on the one hand, and of private actors, on the other hand, in creating and recreating the conditions necessary for housing commodification and financialisation to take place.

My aim is to analyse how states and private actors may have contributed to these processes and to what extent antidiscrimination law can be mobilised to address this conduct. In so doing, I show the contribution of antidiscrimination norms in this regard, and how these norms can be used as an effective bulwark against housing commodification and financialisation, building on a right to housing approach and particularly on the affordability component of housing adequacy.

6.3. The role of states in this context

Housing commodification and financialisation have been largely facilitated and sponsored by states. The existing legal framework for housing finance was in many countries deliberately adapted to the needs of lenders and investment banks, who wanted to expand the existing secondary mortgage market and free up capital for other uses.⁴⁹³

According to Raquel Rolnik, the former UN SRAH, the new paradigm of late neoliberalism consists precisely in the deliberate withdrawal of states from the housing sector and the implementation of policies designed to create stronger and larger market-based housing finance models.⁴⁹⁴

⁴⁹² Aalbers, “The Financialization of Home and the Mortgage Market Crisis,” 151–52; Aalbers, “Financialization.” See also Maurizio Lazzarato, *The Making of the Indebted Man: An Essay on the Neoliberal Condition*, Semiotext(e) Intervention Series 13 (Los Angeles, CA: Semiotext(e), 2012).

⁴⁹³ Aalbers and Christophers, “Centring Housing in Political Economy,” 379.

⁴⁹⁴ Rolnik, “Late Neoliberalism,” 1058.

Let us take a closer look at the role and function of markets in this context. The state plays a fundamental role in configuring markets and determining what is allowed to be traded in them and under what conditions. The relevant question here is not whether markets are free or regulated, but who benefits from the distributional outcomes configured by various modes of regulation, and how just those benefits are.⁴⁹⁵

For neoclassical economists, markets were automatic and neutral mechanisms with the role of registering individual desires and preferences, aggregating them, and yielding the results of this calculation in the form of prices.⁴⁹⁶ This conception of the market was premised in the absence of collective representations and conflicts within that mechanism: it viewed all participants as independent of each other and as having the same relative weight in the final determination of prices.⁴⁹⁷

Opposing this view, many contemporary economists have argued that value must be rather understood as a *sui generis* creation of market relations. It has its own valorisation logic, and its aim is not to satisfy consumers' needs but rather profitmaking and the "indefinite extension of the kingdom of commodities."⁴⁹⁸ Beyond utility, consumption often responds to a quest for prestige and social status, since some objects are not primarily geared towards need satisfaction but towards creating differentiation.⁴⁹⁹

The marketplace is in this sense analogous to a plutocracy, as each participant's influence on what gets produced depends on how much they spend and not on what they need or how much they need it. In other words, prices become no longer an indicator of scarcity and reflect the demand expressed by those with purchasing power.⁵⁰⁰

⁴⁹⁵ Jessica Whyte, "Powerless Companions or Fellow Travellers? Human Rights and the Neoliberal Assault on Post-Colonial Economic Justice," *Radical Philosophy* 2, no. 02 (2018): 21.

⁴⁹⁶ André Orléan, *L'empire de la valeur : refonder l'économie*, La couleur des idées (Paris: Seuil, 2011), 67.

⁴⁹⁷ Orléan, 113–15.

⁴⁹⁸ Orléan, 12.

⁴⁹⁹ Raj Patel, *The Value of Nothing: How to Reshape Market Society and Redefine Democracy* (New York: Picador, 2009), 37; Orléan, *L'empire de la valeur*, 108.

⁵⁰⁰ De Schutter and Rajagopal, "Property Rights from Below," 8.

What is more, the actions of market agents are often oriented towards what they anticipate other participants in the market will do or not do.⁵⁰¹ This means that, in some cases, actors will carry out market transactions purely in the hope that those transactions will reward them, in light of what they expect to be the reactions of other participants.

This leads to speculation, defined as “the assumption of the risk of loss in return for the uncertain possibility of a reward.”⁵⁰² Speculation consists in the purchase of a good for later resale, or the buying, holding, and selling of stocks, bonds, commodities, or any valuable financial instrument to profit from fluctuations in its price.

Market prices for housing are thus not predominantly linked to the costs of production or the quantity of labour used for its construction, or even the extent to which housing units are able to satisfy the housing needs of individuals and families, but rather to external factors like location, market segmentation, the scarcity of appropriately zoned land, and the interests of powerful market actors.

Consequently, if states favour arrangements which portray housing as a commodity and which allow actors to give precedence to the exchange value of housing over its use value, they will be reinforcing and legitimising a model where those who do not have sufficient means to access private housing markets to satisfy their housing needs are left helpless, while those with sufficient purchasing power hoard more and more housing, deviating it from its social function and turning it into an asset to store and accumulate capital.

This leads to more housing being generally unavailable for those who need it the most, and to housing prices soaring without any positive change in the situation or needs of rightsholders. This will ultimately occur because the state has relinquished its responsibility to secure the right to housing for all under nondiscriminatory conditions, to the benefit of private actors

⁵⁰¹ Orléan, *L'empire de la valeur*, 270.

⁵⁰² Miguel Robles, Maximo Torero, and Joachim von Braun, “When Speculation Matters,” IFPRI Issue Brief (Washington, DC: International Food Policy Research Institute, February 2009), 2, https://www.cftc.gov/sites/default/files/idc/groups/public/%40swaps/documents/file/plstudy_40_ifpri.pdf.

operating in housing markets who follow a logic of profitmaking and accumulation, instead of participatory parity, substantive equality, or need.

In closing, by enabling the turning of housing into a commodity and a financialised asset, states have legitimised the precedence of purchasing power above need as a distributive criterion for housing in our society, to the exclusion of those without sufficient means to access housing under existing market conditions.

As I further develop in Chapter 7, this can be contrasted to housing decommodification policies, which give priority to the right to housing without necessarily precluding a subsidiary use of dwellings as an asset that generates wealth for their owners, as long as this takes place under a legal framework ensuring that they fulfil first and foremost a socially embedded, rights-based function.

Importantly, the state can act to reclaim this vision of housing as a good embedded in society and can regulate housing markets so as to maximise welfare instead of profit, decommodifying and definancialising housing and giving precedence to its status as a human right. Because the state has been central in enabling the transformation of housing into a financialised commodity that circulates through market exchange, it can also be central in mitigating and reverting this situation to one where everyone can enjoy their right to housing under conditions of equality and nondiscrimination.

Following this argument, since housing commodification and financialisation pose acute problems not only in terms of the right to housing but also in terms of nondiscrimination, the question arises as to whether state action enabling, facilitating, or sponsoring this kind of policies can be seen as constituting a breach of antidiscrimination law.

Similarly, a parallel question is whether certain private actors can be seen as violating antidiscrimination norms in this context, and, if so, under what circumstances. To reply to these two questions and provide a clearer picture, I first refer to the responsibility of states under antidiscrimination law, to then examine the potential responsibility of private actors in this regard.

6.4. The responsibility of states under antidiscrimination law

In the previous sections, I have shown how housing commodification and financialisation have nefarious consequences for the realisation of the right to housing for all under nondiscriminatory conditions. By substituting the legitimate distributive criterion of need with that of purchasing power, housing commodification and financialisation policies have a disproportionate impact on disadvantaged groups, who are discriminated against and excluded in practice from housing markets.

Recalling the analysis developed in previous chapters, this exclusion may be grounded on their socioeconomic disadvantage as well as on status-based grounds. It is important to recall, in this context, that a measure having a disproportionate impact on a protected group will not constitute indirect discrimination if it is objectively justified by a legitimate aim and if the means to achieve that aim are appropriate and necessary.

I argue that many policies and practices leading to housing commodification and financialisation will be prohibited under antidiscrimination norms, as they can be qualified as discriminatory based on socioeconomic disadvantage or status-based grounds. In most cases, these two axes of discrimination will compound each other and intersect, so that the discrimination suffered by individuals and families is exacerbated.

Firstly, housing commodification and financialisation may discriminate against the poor on the basis of their socioeconomic disadvantage. This type of discrimination arises through public policies that enable, tolerate, or facilitate housing commodification and financialisation, or through the absence of public policies effectively dealing with the discriminatory consequences of these processes, which have a disproportionate impact on socioeconomically disadvantaged groups without an objective and appropriate justification.

Whenever access to adequate housing is premised on an individual's ability to access private housing markets, that is, on their purchasing power instead of their need, the logical consequence is that a significant part of lower income households will not be able in practice to secure adequate housing without incurring a significant overburden.

In this regard, the CESCR noted in its General Comment No. 24 that “states would violate their duty to protect Covenant rights, for instance, . . . by failing to regulate the real estate market and the financial actors operating on that market so as to ensure access to affordable and adequate housing for all.”⁵⁰³

Along the same lines, a report of the former UN SRAH, Leilani Farha, focusing on the financialisation of housing found that states are required under international human rights law “to ensure that private investors respond to the needs of residents for secure, affordable housing and do not cater only to the wealthy or purchase homes simply to leave them empty.”⁵⁰⁴

By enabling, tolerating, or facilitating housing commodification and financialisation, state action disproportionately impacts on socioeconomically disadvantaged groups. If the state does not regulate private housing markets in a way that protects lower income individuals and groups, or if it develops housing policies that neglect and compound the vulnerability of these groups, a plausible case of discrimination linked to socioeconomic disadvantage can be made, unless the state can offer a valid justification for its actions or omissions.

Such an obligation for states to regulate to ensure the effective access to housing of socioeconomically disadvantaged groups can be rendered more concrete with some examples and cases. Whereas states cannot legitimately require landlords to sell or to rent out dwellings to candidates on a first-come, first-served basis, prohibiting them from having any regard to the candidates’ socioeconomic status whatsoever, they can limit the impact of this factor on the landlord’s decision so as to avoid potential discrimination.

For instance, restrictions can be placed to the level of income that landlords may require potential tenants to prove in order to rent (for example, by establishing that landlords may demand that candidates’ income be at least

⁵⁰³ United Nations, Committee on Economic, Social and Cultural Rights, “General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities,” E/C.12/GC/24, para. 18 (10 August 2017).

⁵⁰⁴ United Nations, Human Rights Council, “Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context,” A/HRC/34/51 (18 January 2017), para. 15.

2.5 times the amount of the rent, but not more). Limits can also be established to the information that the landlord is permitted from requesting from potential tenants (for example, by allowing landlords to demand proof of income but not documents showing the sources of that income).

A notable example of discrimination on the basis of socioeconomic disadvantage are discriminatory mortgage lending practices. As mentioned above, these practices have systematically excluded lower income households or have offered them disproportionately worse conditions in comparative terms, including by adding abusive clauses in mortgage loan agreements in some cases.

Leaving aside the considerations relating to the responsibility of financial institutions themselves, which I explore in the next section, it can be observed that European states did not sufficiently regulate this conduct, as they did not introduce stringent regulations prohibiting these practices or establishing safeguards to prevent the massive transfer of financial risk from financial entities to low-income households.

Notably, lenders were in some cases allowed to enforce those abusive terms and clauses before national judicial systems, which did not afford borrowers sufficient protection or sometimes even the possibility to effectively defend themselves.

The saga of cases concerning the protection of mortgage borrowers in Spain before the CJEU, involving abusive clauses within mortgage loan agreements, can be recalled in this connection.⁵⁰⁵ The fact that Spain did not sufficiently regulate to forbid or to limit the use of these clauses, which had a disproportionate impact on socioeconomically disadvantaged groups, raises

⁵⁰⁵ See, among others, Court of Justice of the European Union, Judgment of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164; Court of Justice of the European Union, Judgment of 17 July 2014, *Sánchez Morcillo and Abril García*, C-169/14, EU:C:2014:2099; Court of Justice of the European Union, Judgment of 18 February 2016, *Finanmadrid EFC*, C-49/14, EU:C:2016:98; Court of Justice of the European Union, Judgment of 21 December 2016, *Gutiérrez Naranjo*, C-154/15, EU:C:2016:980; Court of Justice of the European Union, Judgment of 26 January 2017, *Banco Primus*, C-421/14, EU:C:2017:60; Court of Justice of the European Union, Judgment of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138.

in my view clear concerns in terms of nondiscrimination, although the nondiscrimination angle was not raised in these cases.⁵⁰⁶

The case of *Ben Djazia and Bellili* before the CESCR is useful to further illustrate this discussion. Again, although this case was not dealt with in terms of nondiscrimination, I argue that it shows the disproportionate effects that certain public housing policies linked to commodification and financialisation have on socioeconomically disadvantaged individuals and groups.⁵⁰⁷

The applicant in this case had been applying for social housing to the relevant Spanish authorities for the past thirteen years, without success. After losing his job and running out of unemployment benefits, the family (the applicant, his wife, and their two children, one and three years of age) were evicted from the rented room they shared in an apartment in Madrid.

In the absence of suitable alternative accommodation, the family was rendered homeless: they spent ten days in temporary accommodation, followed by four days when the parents and the two young children were forced to sleep in the family's car.⁵⁰⁸

The CESCR drew attention to the fact that the Madrid regional authorities had, at the time, sold a sizeable part of the public housing stock to investment

⁵⁰⁶ Briefly, some of those abusive clauses ("floor" clauses) allowed for interest rates in mortgage loans to freely raise as long as the reference index raised too, but they capped interest rates at a minimum level, meaning that lenders had much to gain from interest fluctuations but nothing to lose if these fluctuations did not go in their favour, as it happened in the financial and economic downturn. Another type of abusive clauses ("accelerated repayment" clauses) foresaw a very low number of missed repayments, sometimes even one, after which the lender could immediately initiate foreclosure proceedings and recover the entirety of the principal and interests, without any possibility for mortgagees to renegotiate their debt or to oppose the eviction.

⁵⁰⁷ Committee on Economic, Social and Cultural Rights, *Ben Djazia et al. v. Spain*. See also Committee on Economic, Social and Cultural Rights, *López Albán et al. v. Spain*. See further Juan Carlos Benito Sánchez, "Committee on Economic, Social and Cultural Rights Decisions on the Right to Housing in Spain (2017–2018): Ben Djazia et Al., Forced Evictions and Judicial Developments," in *Houses, Homes and the Law*, ed. Michel Vols and Christoph U. Schmid (The Hague: Eleven International Publishing, 2019), 147–64; Juan Carlos Benito Sánchez, "The UN Committee on Economic, Social and Cultural Rights Decision in López Albán v. Spain: The Need for a Proportionality Assessment in Eviction Procedures," *Lex Social, Revista de Derechos Sociales* 10, no. 1 (2020): 364–81.

⁵⁰⁸ *Ben Djazia et al. v. Spain*, para. 2.19.

funds, thus reducing housing availability even though the public housing stock was already considerably inferior to the demand.⁵⁰⁹ These investment funds typically seek high returns on investment through high leverage ratios: their interest in real estate arises from the possibility to turn a profit from disinvestment when the private housing market demand reactivates.⁵¹⁰

The sale of public housing to investment funds did not only significantly reduce the housing stock publicly available, but it entailed substantial changes for existing tenants. After expiry of their contracts, the dwellings in which they lived reverted to the private rental market, and the new landlord was able to set rent at market levels, thus altering the tenants' expectations that their homes would remain under a below-market, protected regime.⁵¹¹ It should be recalled, in this context, that Spain has one of the lower rates of social housing in Europe, at approximately 2.5 percent of the total housing market.⁵¹²

In spite of the critically low number of social housing units available, thousands of public dwellings were sold to investment groups for immediate profit, claiming that this was necessary due to budgetary constraints in the context of austerity.⁵¹³ This can be seen as having a clear disproportionate impact on lower income groups, who will see their possibility to access housing in the market further restricted as a result of this measure, without sufficient justification. The CESCR censured this measure as retrogressive and a breach of the right to housing, but did not directly examine the discriminatory implications of the case.

Coming back to my argument above, responsibility in these different contexts is primarily state-based, since it relates to policies designed and

⁵⁰⁹ *Ben Djazia et al. v. Spain*, para. 17.5.

⁵¹⁰ García Pérez and Janoschka, "Derecho a la vivienda y crisis económica," 225. See further Fernández Ramírez and Roch Peña, "La quiebra de la ciudad global y sus efectos en la morfología urbana."

⁵¹¹ García Pérez and Janoschka, "Derecho a la vivienda y crisis económica," 225.

⁵¹² "OECD Affordable Housing Database" (Organisation for Economic Co-operation and Development, 2020), <http://www.oecd.org/social/affordable-housing-database/>.

⁵¹³ See Committee on Economic, Social and Cultural Rights, *Ben Djazia et al. v. Spain*, para. 17.5.

implemented by public authorities (or the lack thereof), preventing those in a socioeconomically disadvantaged position from accessing adequate and affordable housing on equal terms with their peers. As I have shown in the previous sections, the existing favourable conditions for the development of housing commodification and financialisation processes are not fortuitous: states have actively promoted this state of things or at the very least they have not directly opposed it.

An antidiscrimination law-based obligation can therefore be devised for states to regulate housing markets in such a way that allows for the effective access of socioeconomically disadvantaged groups to adequate housing.

To be clear, my argument here is twofold. On the one hand, I argue that states should ensure that access to adequate housing is not left to the unhindered operation of markets, insofar as this may be discriminatory against lower income groups. This does not mean that everyone should access the house they desire independently of their level of income or wealth, but rather that housing markets should be regulated in such a way that everyone is able to access adequate housing under nondiscriminatory conditions.

On the other hand, states should actively promote decommodifying alternatives to existing housing markets, in order to truly secure the right to housing of those who could be excluded even from an adequately regulated market, and to prioritise need over purchasing power as a distributive criterion. This can be done, for example, through a combination of public housing and the promotion of alternative, “third sector” forms of housing, such as cooperatives, community land trusts, and similar models. I refer to this more in detail in Chapter 7.

I have referred until now mostly to indirect discrimination, insofar as these policies are likely to have a disproportionate impact on socioeconomically disadvantaged groups, which I argue will be difficult to justify in most cases. Direct discrimination could also be evoked if particular policies stigmatise socioeconomically disadvantaged individuals as undeserving, creating or fostering hostility and prejudice, or insofar as certain policies could create a

form of socioeconomic segregation linked with territorial stigmatisation, along the lines of what I developed in the previous chapter.

Finally, beyond socioeconomic discrimination, many public policies and practices linked to housing commodification and financialisation have a disproportionate negative impact on status-based disadvantaged groups, linked to grounds such as racial or ethnic origin, gender, or disability.

These groups may be disproportionately affected since housing commodification and financialisation policies and practices exacerbate the discriminatory and segregationist phenomena leading to their residential exclusion, following what I examined in Chapters 3 and 5. In the case of Spain evoked above, the wave of mortgage repossessions and evictions across the country had a proven disproportionate impact on women, migrants, and persons with disabilities, among others.⁵¹⁴

Consequently, when pursuing this sort of policies and practices, states must be ready to adequately justify their conduct in order to escape the prohibition of indirect discrimination linked to status-based grounds. The central question becomes whether the state can offer any objective, reasonable, and *sensu stricto* proportionate justification for its decisions.

This in turn highlights the responsibility of the state in elaborating and implementing policies that are diversity-conscious and all-inclusive, and which aim towards the protection of housing as a right rather than a commodity or a financial asset, as I discuss in the next chapter.

⁵¹⁴ See Beatriu Guarro, “La discriminación de las personas inmigradas en el acceso a la vivienda,” in *¿Derecho a la vivienda?: miradas críticas a las políticas de vivienda*, ed. Socorro Pérez Rincón Fernández and Rosa Tello i Robira (Barcelona: Edicions Bellaterra, 2012), 51–62; Koldo Casla, “The Rights We Live in: Protecting the Right to Housing in Spain through Fair Trial, Private and Family Life and Non-Retrogressive Measures,” *The International Journal of Human Rights* 20, no. 3 (2016): 285–297; Manuel Medina Guerrero, “Derecho a la vivienda y desahucios: la protección del deudor hipotecario en la jurisprudencia del TJUE,” *Teoría y Realidad Constitucional*, no. 36 (2015): 261–282; Gutiérrez and Domènech, “The Spanish Mortgage Crisis”; “*La crisis de la vivienda no ha terminado*: El derecho a la vivienda y el impacto de los desahucios de viviendas en alquiler sobre las mujeres en España (Madrid: Amnistía Internacional España, 2017), https://www.es.amnesty.org/uploads/media/Inf.Vivienda_FIN2.pdf; Juan Carlos Benito Sánchez, “Los pronunciamientos del Comité DESC sobre derecho a la vivienda relativos a España. Respuestas jurisprudenciales y legislativas,” *Lex Social, Revista de Derechos Sociales* 9, no. 2 (2019): 579–603.

To sum up, antidiscrimination law requires states to develop housing policies that aim towards rectifying existing housing inequalities, focusing on socioeconomically and status-based disadvantaged groups, and this through the regulation of the existing legal framework surrounding housing and housing finance but also through promoting decommodification.

More specifically, states should regulate existing market arrangements to approximate them to an understanding of housing as a human right and a social good, securing the realisation of the right to housing under conditions of nondiscrimination. At the same time, they should facilitate alternative housing arrangements aiming towards housing decommodification and definancialisation.

6.5. The role and responsibility of private actors

Besides states, private actors also play an important role and are potentially liable under antidiscrimination law for carrying out discriminatory practices linked with housing commodification and financialisation.

As advanced earlier in this chapter, housing and urban real estate have become the preferred investment for corporate finance actors, a “safety deposit box in the sky” for the wealthy, and a repository of capital and excess liquidity from emerging markets.⁵¹⁵ In a financialised context, the built environment is seen by financial institutions as an opportunity for profit, “by directing capital to the highest and best uses, and by withdrawing and subsequently redirecting capital from low pay-offs to potentially higher ones.”⁵¹⁶ This occurs because housing acts as a highly valued form of

⁵¹⁵ See United Nations, Human Rights Council, “Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context,” A/HRC/34/51. See also, for the case of London, Nick Gallent, Dan Durrant, and Neil May, “Housing Supply, Investment Demand and Money Creation: A Comment on the Drivers of London’s Housing Crisis,” *Urban Studies* 54, no. 10 (2017): 2204–2216.

⁵¹⁶ Aalbers, *Place, Exclusion and Mortgage Markets*, 36. See also Kevin Fox Gotham, “Creating Liquidity out of Spatial Fixity: The Secondary Circuit of Capital and the Subprime Mortgage Crisis,” *International Journal of Urban and Regional Research* 33, no. 2 (2009): 356.

collateral: it has a relatively secure fixed value and a highly standardised institutional framework for collecting income streams.⁵¹⁷

At the same time, private actors like real estate investment trusts (REITs) or asset management companies have provided global investors with easy and low-cost access to local markets, allowing them to benefit from investment opportunities arising from distressed housing scenarios.⁵¹⁸

By opening up real estate investment to actors without knowledge of the local market conditions, these mechanisms transform the political economy of housing: institutional investors can now take advantage of opportunities anywhere in the world, capitalising on advantageous market conditions wherever they may exist.⁵¹⁹ Under these conditions, financial actors have more to gain from increasing the scarcity of usable land in particular selected locations than from putting housing to its productive and economically beneficial uses.⁵²⁰

As a result, financial institutions play a significant role in restructuring urban neighbourhoods, in residential differentiation and in creating and recreating housing submarkets through their decisions on where to direct financial flows.⁵²¹ These large-scale actors may directly shape and influence housing markets in a particular geographical area, at the neighbourhood, municipal, or regional level.

If they leverage their power in a discriminatory manner, disproportionately affecting lower income or status-based groups while perpetuating an

⁵¹⁷ Aalbers, “The Variegated Financialization of Housing,” 544.

⁵¹⁸ See Byrne, “Bad Banks and the Urban Political Economy of Financialization.”

⁵¹⁹ Desiree Fields, “Unwilling Subjects of Financialization,” *International Journal of Urban and Regional Research* 41, no. 4 (2017): 590.

⁵²⁰ Richard Florida, *The New Urban Crisis* (New York: Basic Books, 2017), 26. See also David Birchall, “Human Rights on the Altar of the Market: The Blackstone Letters and the Financialisation of Housing,” *Transnational Legal Theory* 10, no. 3–4 (2019): 446–71.

⁵²¹ Aalbers, *Place, Exclusion and Mortgage Markets*, 37. See also Jaime Palomera, “How Did Finance Capital Infiltrate the World of the Urban Poor? Homeownership and Social Fragmentation in a Spanish Neighborhood,” *International Journal of Urban and Regional Research* 38, no. 1 (2014): 218–35; Richard Waldron, “The ‘Unrevealed Casualties’ of the Irish Mortgage Crisis: Analysing the Broader Impacts of Mortgage Market Financialisation,” *Geoforum* 69, no. February 2016 (2016): 53–66.

understanding of housing as a commodity and a financial asset, they may encounter antidiscrimination law as a barrier to these practices.

Perhaps the clearest example of discriminatory practices by private actors in this context is that of predatory lending. As pointed out above, subprime loans were often issued by financial entities to targeted lower income households, containing disproportionately less favourable conditions than standard loans, such as excessively higher interest rates and abusive clauses. This may in itself constitute discrimination based on socioeconomic disadvantage, as it can be argued that this type of disadvantage formed the objective basis for the decision to charge them disproportionately high interests and to include abusive clauses in their mortgage loan agreements.

It has been additionally documented how these practices disproportionately affected ethnic minorities, in particular people of colour in the US and migrants in Europe, but also women, in particular single mothers.⁵²² If predatory mortgage lenders are not able to successfully prove that these distinctions were justified according to some objective factors, predatory lending will be considered an indirectly discriminatory practice on the basis of racial or ethnic origin, migrant status, gender, or potentially other grounds.

In a similar manner, some financial entities have carried out discriminatory “redlining” practices. Redlining is defined as the refusal to extend credit to residents of specific geographic areas due to the income, race, or ethnicity of the majority of inhabitants.⁵²³ It refers to “the practice of denying loans to an area because of loan providers’ assessments of lower current or future values, which signals that the area’s homes are bad investments.”⁵²⁴ In the US, this has been acknowledged as a discriminatory and illegal practice.⁵²⁵ Plaintiffs

⁵²² See Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (New York: Liveright Publishing Corporation, 2017), vii–viii; Heintz and Balakrishnan, “Debt, Power, and Crisis.”

⁵²³ United States, *Hargraves v. Capital City Mortgage Corp.*, 140 E Supp. 2d 7, 20 (D.D.C. 2000); United States, *Honorable v. Easy Life Real Estate Sys.*, 100 F. Supp. 2d 885, 887–92 (N.D. Ill. 2000).

⁵²⁴ Pattillo, “Housing: Commodity versus Right,” 513.

⁵²⁵ See United States, “Discrimination in the sale or rental of housing and other prohibited practices,” 42 U.S.C. § 3604(b) (2000). This section of the Fair Housing Act prohibits discrimination “against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of

must prove, as is standard to establish discrimination under US antidiscrimination law, that they were intentionally targeted on the basis of race or that there was a disparate impact on the basis of race.⁵²⁶

Redlining therefore affects in a discriminatory and disproportionate manner neighbourhoods where ethnic minorities predominantly live. These practices do not only affect ethnic minorities, but everyone in that redlined neighbourhood: redlining is not a form of individual-based exclusion but a form of place-based social exclusion. This brings up concerns in terms of discrimination by association, along the lines of the *CHEZ* case presented earlier.

Another example would be the bulk purchase of housing units below market price, often as distressed assets coming from bank restructuring and risk offsetting processes or from public authorities.

In some countries like Spain and Ireland, the mass entrance of so-called “vulture funds” into housing markets after the 2008 crisis drastically redefined local housing market conditions. By entering markets at a time of economic depression and bulk purchasing distressed assets, these funds substantially modified local housing scenarios and prices, in many cases completely changing the conditions of previous tenants and redefining the shape of local markets.⁵²⁷

In particular, many of these companies used their overwhelming market power to release formerly protected public housing units into the private

services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.”

⁵²⁶ See also United States, *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507 (2015). See further “Fair Housing Act — Disparate Impact and Racial Equality — Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.,” *Harvard Law Review* 129 (2015): 321–30.

⁵²⁷ See Riain, “The Crisis of Financialisation in Ireland”; Waldron, “The ‘Unrevealed Casualties’ of the Irish Mortgage Crisis”; Gutiérrez and Domènech, “The Spanish Mortgage Crisis”; Palomera, “How Did Finance Capital Infiltrate the World of the Urban Poor?”; Sabaté, “Mortgage Indebtedness and Home Repossessions as Symptoms of the Financialisation of Housing Provisioning in Spain.” See however Gertjan Wijburg and Manuel B. Aalbers, “The Alternative Financialization of the German Housing Market,” *Housing Studies* 32, no. 7 (2017): 968–89.

rental market, substantially raising rents and forcing most of the existing tenants, who benefited until then from a protected tenancy, to leave those units.

Most of these tenants had been living there for long periods of time and had been able to access and stay in public housing precisely because of their socioeconomic disadvantage. In many cases, evicted households were made up of older tenants, tenants with disabilities, migrant households, single-parent households, etc.

We can thus question whether actions like this call in themselves for the application of antidiscrimination norms. My response is in the affirmative. In order to fully guarantee the right to nondiscrimination (as well as the right to housing), structural actions by private actors that destabilise housing markets and have a disproportionate impact on lower income or status-based groups without an appropriate and objective justification must be considered as prohibited, since they are constitutive of indirect discrimination.

In all these situations, besides the responsibility of states to develop norms and policies that protect socioeconomically and status-based disadvantaged groups from the discriminatory practices of private actors, the responsibility of these actors themselves must be highlighted.

The justification threshold here is similar to that in place with regard to state policies. If at all, it could be argued that the proportionality test in relation to *prima facie* discriminatory practices carried out by individuals can be slightly more lenient at the stage of *sensu stricto* proportionality, since individuals do not have a general duty to protect disadvantaged groups when they act but simply to remain within the boundaries of the law.

In closing, private actors also play a significant role in creating and entrenching housing commodification and financialisation. Through practices like predatory lending or redlining, private actors may discriminate against individuals and groups on the basis of socioeconomic disadvantage or status-based grounds, including by association in some cases. Large private actors like investment funds or REITs may also have a structural impact on housing market conditions in certain circumscribed geographical areas. If those policies or practices directly target socioeconomically

disadvantaged or status-based groups, or if they have a disproportionate impact on them without an objective and appropriate justification, this will constitute discrimination and also be prohibited.

6.6. Conclusion

In this chapter, I have dealt with the processes of housing commodification and financialisation, showing their harmful impact in terms of nondiscrimination. I have shown how these phenomena must be addressed through an antidiscrimination law lens in order to be fully apprehended, beyond an approach that exclusively relies on the right to housing.

I have firstly built on the analysis developed in the fields of urban sociology and urban geography to further define and understand what are housing commodification and housing financialisation. Housing commodification arises when housing is detached from its rights and needs-based function, considered as a mere commodity to be produced and then sold for profit. Housing financialisation, for its part, represents one further step in this process, as housing becomes an asset in which financial flows of capital can be invested and disinvested and where profit is generated mainly through financial channels.

Secondly, I have explored more in depth the role and responsibility of states, on the one hand, and of private actors, on the other hand, under antidiscrimination law in this context.

I have argued that states have a central role in enabling and sponsoring housing commodification and financialisation. Notably, by promoting the distributive criterion of purchasing power instead of need, these policies and practices have a disproportionate impact on disadvantaged groups, who are discriminated against and excluded in practice from accessing housing markets.

Finally, private actors also play a role in housing commodification and financialisation through practices like predatory lending or redlining, and, in the case of some large actors like investment funds or REITs, through structural actions affecting housing market conditions in circumscribed

geographical areas. I have defended that all these policies and practices can be tackled through antidiscrimination law in various ways.

In Chapter 7, I move to a discussion about how to elaborate and implement housing policies and practices that are diversity-conscious and all-inclusive, following the line of what I have argued until now. The goal of these policies and practices is the realisation of the right to nondiscrimination and the right to housing for everyone under conditions of substantive equality and participatory parity, whereby everyone is able to effectively participate as an equal in society.

Chapter 7

Diversity-conscious, all-inclusive housing policies

The previous chapters have all shown the need for states to elaborate and implement housing policies which are mindful of the diversity of individuals and groups and which are inclusive, incorporating the lessons derived from the application of antidiscrimination law to the field of housing.⁵²⁸ These policies must be compatible with the achievement of the four identified aims of antidiscrimination norms: eliminating hostility, prejudice, and stigma; respecting cultural diversity and avoiding misrecognition; transforming existing housing structures; and ensuring a fair housing distribution.

To further explore this issue, I look in this chapter at potential avenues to ensure the elaboration and implementation of diversity-conscious, all-inclusive housing policies. I first consider procedural avenues, in particular public sector equality duties, concluding that they are useful tools to cast light on the situation and needs of disadvantaged groups. However, echoing the concerns I advanced in Chapter 2 as regards the need to ensure substantive outcomes beyond procedural tools, and after having observed that public sector equality duties do not always succeed in achieving real change, I argue that a series of substantive policies must also be developed, especially decommodification policies.

I firstly advance some considerations around different types of equality duties and positive action (Section 7.1). I then delve into a specific type of equality duties that I label as “public sector equality duties” (PSEDs), heavily relying on the UK as a case study to exemplify this sort of obligations and

⁵²⁸ Some of the findings presented in this chapter regarding the achievement of diversity-conscious, all-inclusive housing policies have been published in Spanish in the form of a short research note. See Juan Carlos Benito Sánchez, “Hacia políticas públicas de vivienda inclusivas y diversas: derecho a la vivienda y derecho a la igualdad y no discriminación,” *Notes per a la reflexió TransJus* (Universitat de Barcelona, 2019), <http://diposit.ub.edu/dspace/handle/2445/132377>.

proposing that they be extended to other legal orders (7.2). The functioning of PSEDs can be best understood through an examination of the British case law involving these duties in the field of housing (7.3). I also explore the possibility of developing PSEDs concerning socioeconomic disadvantage, beyond status-based grounds (7.4).

Moving from procedural to substantive avenues to achieve diversity-conscious, all-inclusive housing policies, I consider decommodification policies articulated through strong social housing systems (7.5). As an alternative, decommodification can also be achieved through commons-based governance models, which in the housing context are closely linked to the idea of the right to the city (7.6). Finally, some additional substantive measures can be implemented to ensure diversity and inclusion (7.7). A final section concludes (7.8).

7.1. Equality duties and positive action

The first part of this chapter focuses on equality duties as a procedural avenue to help to achieve diversity-conscious, all-inclusive housing policies through antidiscrimination law mechanisms. These duties typically require public authorities, and private actors in some cases, to examine the impact that the policies or practices they elaborate and implement have on disadvantaged groups. Consequently, they create an obligation to take the particular situation and needs of these groups into account when public action is envisaged.

Equality duties can be seen as part of a continuum arising from the obligation to prohibit discrimination and from the realisation that introducing such a prohibition in law is not enough, but that an active promotion of substantive equality is rather needed. A general distinction can be made at this point between equality duties, on the one hand, and positive action measures, on the other hand.

As advanced in Chapter 1, positive action measures are specific measures seeking to proactively remedy factual inequalities experienced by certain groups as compared with the rest of the population in one or multiple areas of social life, or to counter the ongoing effects of those inequalities. Positive

action measures are characterised by their collective dimension, having substantive equality as their main rationale and the redress of structural inequalities as their central aim.⁵²⁹

The notion of positive action encompasses a wide range of potential measures, including monitoring, outreach, and the preferential treatment of members of disadvantaged groups. Positive action must be circumscribed and limited in scope to what is necessary to achieve specific aims, being proportionate to the aims sought and subject to periodic review.

The approach to positive action measures differs between legal orders: whereas in EU law these measures are optional and encounter fairly restrictive limits, in UN law these are termed “temporary special measures” and have a greater scope for justification, potentially being required in some circumstances.⁵³⁰

In this connection, Anderson has theorised four models of positive action (“affirmative action,” in the US terminology), which she understands as “any policy that aims to increase the participation of a disadvantaged social group in mainstream institutions,” either through outreach or preference.⁵³¹

These four models are the compensatory model, which focuses on compensating the effects of past discrimination; the diversity model, which conceives of positive action as a means to increase the cultural and epistemic diversity of society; the discrimination-blocking model, which seeks to counteract ongoing discrimination; and the integrative model, which regards positive action as a means of integrating disadvantaged groups in society, unblocking their access to public and consumer goods and fighting pervasive stigmatisation and discrimination.⁵³²

Although equality duties share many of these rationales and aims, they are conceived of as permanent or semi-permanent requirements in decision-

⁵²⁹ Hachez and Ringelheim, “L’action positive,” 353. See also McCrudden, *Gender-Based Positive Action in Employment in Europe: A Comparative Analysis of Legal and Policy Approaches in the EU and EEA*.

⁵³⁰ See further Hachez and Ringelheim, “L’action positive.”

⁵³¹ Anderson, *The Imperative of Integration*, 135.

⁵³² Anderson, 135–36.

making processes that embed equality and nondiscrimination considerations as a fundamental part of those decisions, rather than as targeted programmes catering to specified groups and limited in scope.

This does not mean that equality duties should substitute positive action measures or that they yield similar substantive outcomes. As I develop later, equality duties are generally reflected in procedural obligations that do not always lead in practice to substantive policy changes. Positive action schemes will thus still be necessary to address particular instances of inequality, introducing more stringent measures resulting in real change in the short and medium term.

For example, targeted positive action schemes may be introduced to remedy the precarious housing situation of certain individuals or groups in a specific setting, say a segregated Roma community, by setting up preferential programmes for access to adequate housing which are open to the members of this community but not to all local residents.

Equality duties, by contrast, seek to ensure that public authorities, when developing general housing policies, say the construction of a new public housing project destined to all local residents, consider the impact of this project on disadvantaged groups, like the aforementioned segregated Roma community.

Equality duties thus focus on long-term change in policy making. I argue that equality duties represent useful procedural avenues to embed nondiscrimination considerations in decision-making when developing public housing policies, so that their potential discriminatory impact is limited at the state of policy formulation. Public authorities should specifically consider the possibility of elaborating and implementing policies in a way that takes due regard of the situation of disadvantaged groups, the need to achieve substantive equality in practice, and the goal of ensuring the full participation of these groups as equals in society.

Equality duties have become important public law obligations in most European countries.⁵³³ Within the Council of Europe, the Commissioner for

⁵³³ See Niall Crowley, *Making Europe More Equal: A Legal Duty?* (Brussels: Equinet, 2016),

Human Rights has recommended that states parties include positive duties in their equal treatment legislations, noting that “public sector organisations should be required to have due regard to equality in carrying out their functions [and] private sector organisations should be required to be planned and systematic in their approach to equality.”⁵³⁴

Equality duties may take a number of forms, including equality mainstreaming, equality plans, coordination-based equality duties, and process-based equality duties.

Firstly, equality mainstreaming involves the integration of an equality perspective into the preparation, design, implementation, monitoring, and evaluation of policies, regulatory measures, and spending programmes, with a view to promoting equality and combating discrimination.⁵³⁵ It requires the mobilisation of policies and measures specifically for the purpose of achieving equality, by actively and openly taking into account their possible effects on disadvantaged groups at the planning stage.⁵³⁶

Secondly, equality plans are elaborated in order to analyse situations and experiences of discrimination and inequality. They contain objectives, targets, and concrete measures to address these experiences, usually formulated in collaboration with organisations representing disadvantaged groups through participative planning processes.⁵³⁷ Their goal is to give coherence to policy making by ensuring that this process furthers the

https://www.archive.equineteurope.org/IMG/pdf/positiveequality_duties-finalweb.pdf; Sandra Fredman, *Making Equality Effective: The Role of Proactive Measures* (Brussels: European Network of Legal Experts in the Field of Gender Equality, 2009), <http://ec.europa.eu/social/BlobServlet?docId=4551>.

⁵³⁴ Council of Europe, Commissioner for Human Rights, “Opinion of the Commissioner for Human Rights on National Structures for Promoting Equality,” CommDH(2011)2 20 (21 March 2011).

⁵³⁵ *What Is Gender Mainstreaming?* (Luxembourg: European Institute for Gender Equality, 2016), 5, <http://eige.europa.eu/sites/default/files/documents/mho216878enn.pdf>.

⁵³⁶ European Union, “Communication from the Commission to the Council and the European Parliament: Programme of Action for the Mainstreaming of Gender Equality in Community Development Co-Operation,” COM(2001) 295 final (21 June 2001), 17.

⁵³⁷ Crowley, *Making Europe More Equal*, 36.

equality objectives established in the plan.⁵³⁸ There is a certain overlap with positive action measures on this point, as equality plans may also be considered as a form of positive action.

Thirdly, coordination-based equality duties focus on coherence and mutual support between public authorities to achieve commonly agreed equality objectives. This type of duties may entail the development of common measuring instruments to track progress, as well as benchmarking through comparison of performances and the exchange of best practices.⁵³⁹

At the EU level, coordination-based duties provide a framework for cooperation between Member States, whose national policies must be directed towards agreed common objectives.⁵⁴⁰ For instance, through the so-called “Open Method of Coordination,” Member States are evaluated by each other through peer review, with the European Commission supervising this process.

The European Pillar of Social Rights is another example of coordination-based duties within the EU framework.⁵⁴¹ Primarily conceived for euro area countries, the implementation of the European Pillar is supported by a “social scoreboard,” whose function is to track trends and performances across Member States, feeding into the European Semester of economic policy coordination.⁵⁴² As advanced in Chapter 1, Principle 19 of the Pillar notes that “access to social housing or housing assistance of good quality shall be provided for those in need.”

⁵³⁸ *Compendium of Practice on Non-Discrimination/Equality Mainstreaming* (Luxembourg: Publications Office of the European Union, 2011), 19, http://ec.europa.eu/justice/discrimination/files/compendium_mainstreaming_equality_en.pdf.

⁵³⁹ Crowley, *Making Europe More Equal*, 60.

⁵⁴⁰ Crowley, 37.

⁵⁴¹ European Union, “Interinstitutional Proclamation on the European Pillar of Social Rights,” 5.

⁵⁴² “Social Scoreboard: Supporting the European Pillar of Social Rights” (European Commission, 2020), <https://composite-indicators.jrc.ec.europa.eu/social-scoreboard/>. See further Catharina Germaine, “The Growing Importance of Public Procurement to Achieve Social Goals,” *European Equality Law Review* 2017, no. 2 (2017): 40–52.

Finally, process-based equality duties typically resort to other public law mechanisms to advance equality, like grant making and public procurement. For instance, elements such as diversity programmes or the workforce composition of a given company may be taken into account when granting public subsidies or awarding contracts.⁵⁴³

In sum, equality duties can be distinguished from positive action measures in various respects, notably their open-ended character and their general focus on procedure rather than on substantive outcomes. This does not mean that these two options are mutually exclusive: ideally, both equality duties and positive action measures should be combined to achieve the full realisation of substantive equality and the right to nondiscrimination of disadvantaged groups.

7.2. Public sector equality duties

I now focus on so-called public sector equality duties or PSEDs, borrowing from the UK terminology. PSEDs are a subtype of equality mainstreaming duties which are more targeted and concrete, characterised by the obligation for public bodies and certain private actors to justify that they have taken into account certain diversity and inclusion-related considerations in their decision-making processes.

With the term PSEDs I am referring to specific duties placed on particular actors, oriented towards predefined goals set out by legislation, requiring concrete procedural steps, and usually subject to judicial review. Although I take for the most part the UK (and more particularly the British) model of PSEDs as a reference, I consider it as a generalisable model that I argue should be transposed into other European domestic legal orders.

PSEDs can therefore be defined as legal obligations, binding on public authorities as well as private bodies exercising public functions, to take certain procedural steps to ensure that they act in a way that is conducive to reducing inequalities, and to evaluate the consequences that their actions may have in disfavoursing disadvantaged groups. These duties have been used

⁵⁴³ Crowley, *Making Europe More Equal*, 38.

for the most part regarding status-based grounds, such as racial or ethnic origin, gender, and disability.

The most salient form of status-based PSEDs in Europe can be found in the field of gender, especially through the obligation to elaborate gender impact assessments.⁵⁴⁴ According to the European Institute for Gender Equality, gender impact assessments consist of “an *ex-ante* evaluation, analysis or assessment of a law, policy or programme that makes it possible to estimate in a preventative way the likelihood of a given decision to have positive, negative or neutral consequences for the state of equality between women and men.”⁵⁴⁵

These gender impact assessments evolved in some countries into multi-ground equality impact assessments, encompassing a greater scope of situations. For instance, in the field of disability, a clear obligation to consider the consequences of decision-making for persons with disabilities arises in the context of accessibility, as discussed in Chapter 3. Today, equality impact assessments are one of the core obligations through which PSEDs are discharged.

A particularly illuminating case study to show the functioning of status-based PSEDs is the articulation of this instrument under UK law, and more particularly under British law.⁵⁴⁶ A public sector equality duty was initially introduced in Great Britain in 2000, exclusively with regard to race.⁵⁴⁷ In

⁵⁴⁴ See further *Gender Impact Assessment: Gender Mainstreaming Toolkit* (Luxembourg: European Institute for Gender Equality, 2017), http://eige.europa.eu/sites/default/files/eige_gender_impact_assessment_gender_mainstreaming_toolkit.pdf.

⁵⁴⁵ “Gender Impact Assessment: Gender Mainstreaming Tool” (European Institute for Gender Equality, 2020), <https://eige.europa.eu/gender-mainstreaming/methods-tools/gender-impact>.

⁵⁴⁶ See further *The Essential Guide to the Public Sector Equality Duty: England (and Non-Devolved Public Authorities in Scotland and Wales)* (London: Equality and Human Rights Commission, 2014), https://www.equalityhumanrights.com/sites/default/files/psed_essential_guide_-_guidance_for_english_public_bodies.pdf.

⁵⁴⁷ United Kingdom, Race Relations (Amendment) Act 2000, c. 34. For a well-known case reviewing compliance with the race equality duty, see United Kingdom, *R (Elias) v. Secretary of State for Defence*, [2005] EWHC 1435 (Admin).

2005 and 2006, additional statutory duties were created respectively concerning disability and gender.⁵⁴⁸

With the passing of the Equality Act 2010, these duties converged into a single PSED, applicable to the previous three grounds as well as to several new protected characteristics. Since April 2011, the duty concerns the following grounds: age, disability, gender reassignment, pregnancy and maternity, race, religion and belief, sex, and sexual orientation.⁵⁴⁹ This duty extends to England, Scotland, and Wales; Northern Ireland having its own, separate duty.⁵⁵⁰

According to the British PSED, authorities must, in the exercise of their functions, have “due regard to the need to” eliminate discrimination, harassment, and victimisation; advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and foster good relations. Public sector equality duties are considered as “an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.”⁵⁵¹

The concept of due regard is central for understanding how the public sector equality duty is implemented in practice. A significant amount of case law in the framework of judicial review proceedings has contributed to defining the meaning and scope of this concept, clarifying its limits.⁵⁵² More specifically, six principles (so-called “Brown Principles”) have been developed by the judiciary to give concretion to the PSED.⁵⁵³ These six principles can be

⁵⁴⁸ United Kingdom, Disability Discrimination Act 2005, c. 13 (7 April 2005); United Kingdom, Equality Act 2006, c. 3 (16 February 2006).

⁵⁴⁹ United Kingdom, Equality Act 2010, c. 15 (8 April 2010), s. 149.

⁵⁵⁰ United Kingdom, Northern Ireland Act 1998, c. 47 (19 November 1998), s. 75.

⁵⁵¹ United Kingdom, *Moore and Coates v. Secretary of State for Communities and Local Government*, [2015] EWHC 44 (Admin), para. 130.

⁵⁵² See further Aileen McColgan, “Litigating the Public Sector Equality Duty: The Story So Far,” *Oxford Journal of Legal Studies* 35, no. 3 (2015): 453–485; Fredman, “The Public Sector Equality Duty.”

⁵⁵³ United Kingdom, *R (Brown) v. Secretary of State for Work and Pensions*, [2008] EWHC 3158 (Admin), paras. 90–96. This case concerned the closure of thousands of local post offices, and the disproportionate impact that these closures had on persons with disabilities and other groups (such as the elderly and those without access to public transport).

summarised as: completeness, timeliness and conscientiousness, substantiveness and rigour, nondelegation, continuity, and record keeping as a good practice.

The PSED concerns “the impact of the proposal on all persons with the protected characteristic,” and also, specifically, “upon any particular class of persons within a protected category who might most obviously be adversely affected by the proposal.”⁵⁵⁴ Through the development of an obligation to have due regard, PSEDs highlight the idea that the results of a particular policy or practice may impact different groups differently.⁵⁵⁵ Albeit of a procedural character, PSEDs require the relevant bodies to consider the potential and the eventual consequences of their decisions on disadvantaged groups, mainstreaming their particular needs into policy making and policy implementation.⁵⁵⁶

Overall, however, it has become clear that the imposition of a duty to have “due regard” to the various identified needs does not entail a duty to achieve particular substantive outcomes.⁵⁵⁷ Although the duty constrains public action by requiring due regard to the need to eliminate discrimination, the weight to be given to the countervailing factors is a matter for the public

⁵⁵⁴ United Kingdom, *Moore and Coates v. Secretary of State for Communities and Local Government*, para. 110.

⁵⁵⁵ See, for instance, United Kingdom, *R (Kaur and Shah) v. London Borough of Ealing*, [2008] EWHC 2062, also known as the *Southall Black Sisters* case, where an organisation providing services to Asian and Afro-Caribbean women victims of gender-based violence challenged the Borough’s decision to fund groups which provided services to *all* women experiencing violence, rather than just Black and ethnic minority women. The court found that the impact assessment had failed to correctly evaluate the available statistics, which showed that the level of domestic violence experienced by Black and minority ethnic women was substantially higher than that of white women.

⁵⁵⁶ See Tom Hickman, “Too Hot, Too Cold or Just Right? The Development of the Public Sector Equality Duties in Administrative Law,” *Public Law* 2013, no. April (2013): 334.

⁵⁵⁷ United Kingdom, *R (Brown) v. Secretary of State for Work and Pensions*, para. 81.

authority concerned.⁵⁵⁸ In addition, the strictly procedural character of these duties creates the risk that they are reduced to “box-ticking” exercises.⁵⁵⁹

Nevertheless, some authors have found that the deliberative and participative processes incorporated in some cases as a response to the British public sector equality duty reveal that a degree of mainstreaming is occurring.⁵⁶⁰ The British PSED incorporates an inclusionary, participatory, and transformative dimension which aims “to alter the behaviour of the regulated party prospectively, rather than to enforce rules following their breach.”⁵⁶¹

The question then is to what extent PSEDs have been able in practice to course-correct public policies with a discriminatory impact on disadvantaged groups. An examination of the case law involving the British PSED in the field of housing provides several answers in this regard.

7.3. The British public sector equality duty case law

The results of the British public sector equality duty case law in the field of housing have been mixed. Generally speaking, even though the duty has cast light on the situation of certain disadvantaged groups who have experienced the consequences of some policies differently from the majority of the population, it has had a limited effect in leading to substantive policy changes.

Two strands of case law particularly support this conclusion: cases concerning planning permissions for Travellers in the “Green Belt,” and cases concerning the so-called “bedroom tax.”

The first strand of cases relates to the refusal of planning permission for Traveller sites in the London Green Belt area. Green Belts are open areas surrounding large urban centres where a restrictive planning policy is

⁵⁵⁸ United Kingdom, *R (Baker) v. Secretary of State for Communities and Local Government*, [2008] EWCA Civ 141, para. 31.

⁵⁵⁹ See Simonetta Manfredi, Lucy Vickers, and Kate Clayton-Hathway, “The Public Sector Equality Duty: Enforcing Equality Rights Through Second-Generation Regulation,” *Industrial Law Journal* 47, no. 3 (2018): 375.

⁵⁶⁰ Manfredi, Vickers, and Clayton-Hathway, 366–67.

⁵⁶¹ Manfredi, Vickers, and Clayton-Hathway, 367.

implemented in order to protect the countryside and to assist in urban regeneration.⁵⁶² Traveller sites in this area, whether permanent or temporary, are generally considered as inappropriate development which is not to be approved except in very special circumstances.

Several judicial cases have been brought by Travellers against this policy, arguing that it did not sufficiently take into account their particular situation and claiming a breach of the PSED. Leaving aside the substantive legal issues concerning the lack of sufficient adequate sites for Travellers, which I examined in depth in Chapter 3, the focus is now placed on the role of PSEDs as an instrument to bring about policy change.

Judicial review concerning the public sector equality duty in this strand of cases has focused on whether the inspectors in charge of issuing or denying the corresponding planning permissions had considered all relevant circumstances before them, and therefore whether they had fully discharged the duty in connection with the Traveller ethnic origin of the applicants.⁵⁶³

One of the key judgments in this regard was delivered in the *Baker* case,⁵⁶⁴ where a court of appeal confirmed that the weight to give to the various factors at play is a matter for the judgement of the planning inspector.⁵⁶⁵ The court found that, in the case at hand, the planning inspector had correctly balanced the importance of the areas of life of Travellers affected by inequality of opportunity, on the one hand, and all the countervailing factors,

⁵⁶² “National Planning Policy Framework” (Ministry of Housing, Communities & Local Government, 2012), paras. 133–147, <https://www.gov.uk/guidance/national-planning-policy-framework/13-protecting-green-belt-land>.

⁵⁶³ See, among others, United Kingdom, *O’Brien v. South Cambridgeshire District Council*, [2008] EWCA Civ 1159; United Kingdom, *Basildon District Council v. McCarthy*, [2009] EWCA Civ 13; United Kingdom, *Medhurst v. Secretary of State for Communities and Local Government*, [2011] EWHC 3576 (Admin).

⁵⁶⁴ United Kingdom, *R (Baker) v. Secretary of State for Communities and Local Government*.

⁵⁶⁵ *R (Baker) v. Secretary of State for Communities and Local Government*, para. 34.

on the other hand.⁵⁶⁶ The refusal of planning permission to the applicants was upheld, in the absence of a breach of the public sector equality duty.

A second relevant case is that of *Moore and Coates*.⁵⁶⁷ Here, the Secretary of State had taken steps to decide planning appeals by himself when they related to proposals for mobile home pitches for Travellers within the Green Belt. This led to considerable delays in the hearing and determination of those appeals, disproportionately affecting Travellers, given that other kinds of appeals were simply determined by the corresponding planning inspector.

This case highlighted the vulnerable position of Travellers in administrative decision-making, and the need for special consideration to be given to their needs. This practice of selective decision-making was ruled in breach of the public sector equality duty. The High Court clarified that: “in the context of a policy, if a choice exists between a method which discriminates against an ethnic group, and one which does not, . . . there must be good proportionate reason advanced by the policy maker to choose the former.”⁵⁶⁸

The impact of the PSED on Green Belt cases is limited: although judicial review confirmed that the content of the decision refusing planning permission to Travellers will be scrutinised for evidence of due regard, it also shows the duty’s limitations. No changes to the Green Belt policy, nor to its implementation, resulted as a consequence of these challenges, apart from the arbitrary administrative practice which in itself did not affect the systematic denial of planning permissions to Travellers.

The second strand of cases showing the influence of the PSED in the field of housing concerns the reduction of housing benefit, in particular with regard to the so-called “bedroom tax.” The “bedroom tax” consists in a limitation to the amount of housing benefit received by beneficiaries in cases of deemed underoccupation of social housing.

⁵⁶⁶ *R (Baker) v. Secretary of State for Communities and Local Government*, paras. 40–44.

⁵⁶⁷ United Kingdom, *Moore and Coates v. Secretary of State for Communities and Local Government*.

⁵⁶⁸ *Moore and Coates v. Secretary of State for Communities and Local Government*, para. 123.

The housing benefit is a means-tested benefit that helps claimants with their rental costs. Following this policy change, claimants who were living in social housing units with an “extra” bedroom when compared to the size of their household would see the amount of housing benefit to which they were entitled reduced.⁵⁶⁹ The general calculation was one bedroom for each couple or single adult, whereas it was expected that children of the same sex would share rooms until the age of sixteen and children of different sex would share rooms until the age of ten.⁵⁷⁰

A series of legal challenges to this policy, based on substantive antidiscrimination norms rather than the PSED, had led to carving out exceptions for groups who were in need of an extra room by reason of disability. Notably, children unable to share a bedroom due to their disability and adults who required overnight carers were exempted from the statutory cap.⁵⁷¹

In other cases, judicial review examined the compliance of this policy with the PSED in relation to racial or ethnic origin, disability, and gender. Firstly, the *Child Poverty Action Group* case concerned a challenge to the imposition

⁵⁶⁹ See further Jed Meers, “Shifting the Place of Social Security’: The ‘Bedroom Tax’, Discrimination and Discretionary Housing Payments,” *Journal of Social Welfare and Family Law* 36, no. 1 (2014): 85–87; Jed Meers, “The Bedroom Tax in the Supreme Court: Implications of the Judgment,” *Journal of Poverty and Social Justice* 25, no. 2 (2017): 181–187.

⁵⁷⁰ Rolnik and Hirschhorn, *Urban Warfare*.

⁵⁷¹ See United Kingdom, *Burnip v. Birmingham City Council*, [2012] EWCA Civ 629. The ECtHR recently had the occasion to review the “bedroom tax” policy in the *J.D. and A.* case, where it found a violation of Article 14 ECHR in conjunction with the right to private and family life (Art. 8 ECHR). See European Court of Human Rights, First Section, *J.D. and A. v. the United Kingdom*, Applications nos. 32949/17 and 34614/17 (24 October 2019). The CRPD Committee similarly examined this policy, finding that it entailed grave and systematic violations of the rights of social housing tenants with disabilities. See Committee on the Rights of Persons with Disabilities, “Inquiry concerning the United Kingdom of Great Britain and Northern Ireland carried out by the Committee under article 6 of the Optional Protocol to the Convention: Report of the Committee,” CRPD/C/15/R.2/Rev.1 (6 October 2016), para. 113. See also United Nations, Human Rights Council, “Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context on her mission to the United Kingdom of Great Britain and Northern Ireland (29 August–11 September 2013),” A/HRC/25/54/Add.2 (30 December 2013), paras. 46–51.

of limits on housing benefit which particularly disadvantaged single parents and large families residing in London and South East England.⁵⁷²

The claimants in this case argued that the policy had a disproportionate impact on female-headed households and on ethnic minorities, and that public authorities had not sufficiently taken into consideration the particular situation of these groups in policy making. The High Court ruled, however, that the government had adequately gathered and considered the necessary information to satisfy the statutory duty, as the measures in question were implemented in light of “the strong socio-economic imperatives in play.”⁵⁷³

Secondly, the Supreme Court case of *Carmichael and Rourke* concerned a challenge to the “bedroom tax” by a diverse group of claimants.⁵⁷⁴ Some of them required, because of the disability of one of the members of their household, what would be termed as an “extra” bedroom under the new policy, without their situation being covered by the exemptions foreseen in legislation. One of the claimants was a woman living in a “sanctuary scheme” accommodation, set up to protect victims of gender-based violence.

They all argued that they were discriminated against by the “bedroom tax” policy on the basis of substantive antidiscrimination provisions, but also that public authorities had not duly discharged the public sector equality duty with regard to their situation.

In relation to the PSED challenges, the majority of the Supreme Court ruled that the government had taken sufficiently into account the needs of persons with disabilities.⁵⁷⁵ The majority also reached the conclusion that the public sector equality duty had been duly discharged concerning women in sanctuary scheme accommodations.⁵⁷⁶

⁵⁷² United Kingdom, *Child Poverty Action Group v. Secretary of State for Work and Pensions*, [2011] EWHC 2616 (Admin).

⁵⁷³ United Kingdom, *Child Poverty Action Group v. Secretary of State for Work and Pensions*, para. 77.

⁵⁷⁴ United Kingdom, *R (Carmichael and Rourke) v. Secretary of State for Work and Pensions*, [2016] UKSC 58.

⁵⁷⁵ United Kingdom, *R (Carmichael and Rourke) v. Secretary of State for Work and Pensions*, para. 68.

⁵⁷⁶ *R (Carmichael and Rourke) v. Secretary of State for Work and Pensions*, paras. 70–71.

A strong dissenting opinion by Lady Hale, with whom Lord Carnwath agreed, argued to the contrary.⁵⁷⁷ In Lady Hale's view, the public sector equality duty requires public authorities to consider the impact of their decisions and actions specifically on the victims of gender-based violence, and the equality impact assessment in this case had not sufficiently considered their situation.

She noted that the impact assessment had "addressed the impact on gender in three paragraphs . . . concluding that there was no differential impact by gender. There was nothing about women who are victims of gender-based violence or those within sanctuary schemes."⁵⁷⁸ She characterised gender-based violence as a disadvantage suffered by women which creates specific needs not required for other groups, which call for due regard to be given to their situation.

Overall, as occurred with the Green Belt cases, the result of the "bedroom tax" cases is mixed. Judicial review examined the impact assessments put forward by the relevant authorities for evidence of due regard, but it did not find that those authorities had failed to discharge the public sector equality duty.⁵⁷⁹ It has become clear from an examination of the case law that the British PSED is strictly procedural, and that the judgement as to the countervailing factors and the appropriate course of action remains in each case with the decision maker.

Other than safeguarding against administrative arbitrariness and ensuring consistency in policy implementation, the PSED has not led to a substantive review of these policies in light of their impact on status-based disadvantaged groups. At most, the obligation to have due regard to the particular needs and lifestyle of these groups may have led to an increased awareness of their situation within policy making processes.

⁵⁷⁷ *R (Carmichael and Rourke) v. Secretary of State for Work and Pensions*, paras. 72–81.

⁵⁷⁸ *R (Carmichael and Rourke) v. Secretary of State for Work and Pensions*, para. 79.

⁵⁷⁹ See further Colm O'Cinneide, "Legal Accountability and Social Justice," in *Accountability in the Contemporary Constitution*, ed. Nicholas Bamforth and Peter Leyland (Oxford: Oxford University Press, 2013), 389–409.

In the next section, I explore the idea of PSEDs referred to socioeconomic disadvantage instead of status-based grounds, before moving on to consider substantive avenues of achieving diversity-conscious, all-inclusive housing policies.

7.4. Socioeconomic public sector equality duties

PSEDs are valuable tools to raise attention upon the exclusionary effects that some public policies have on the most disadvantaged. My examination of this instrument has concerned until now status-based grounds, such as racial or ethnic origin, gender, and disability.

The question arises, however, as to whether PSEDs could also be foreseen in relation to socioeconomic disadvantage, along the lines of what I have developed in previous chapters. I argue that a duty to have due regard to the need to eliminate discrimination on the basis of socioeconomic disadvantage and to advance socioeconomic equality could be useful to further the identified aims of antidiscrimination norms, especially that of ensuring a fair distribution of housing linked to need rather than purchasing power.

PSEDs aimed towards reducing socioeconomic inequalities would be generally consistent with the rationale underpinning equality duties: socioeconomically disadvantaged individuals are likely to experience the consequences of many public policies, especially those relating to economic, social, and cultural rights, in a different manner from individuals who are socioeconomically better off.

More specifically, socioeconomically disadvantaged individuals will be especially affected when the realisation of the right to housing is excessively premised on market access and on purchasing power, unless states promote decommodification policies allowing those individuals to effectively realise their housing needs in spite of market exclusion.

If public authorities seek to elaborate or implement a particular policy, it would not seem unreasonable, from this perspective, to require them to examine in advance how that policy is likely to impact on socioeconomically disadvantaged groups. Even though PSEDs will not necessarily prevent such policy choices from being made in the first place, they may draw attention to

the severity of the consequences that certain policies are likely to have on socioeconomically disadvantaged individuals and families.

The particular configuration of such a duty to reduce socioeconomic inequalities may take different forms. An example from the UK may again be used to illustrate this point: besides the public sector equality duty based on status grounds, the UK Equality Act 2010 contains a public sector duty regarding socioeconomic inequalities.

Section 1 of the Act reads:

An authority to which this section applies must, when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage.⁵⁸⁰

The language in which this duty is framed is noteworthy. As one moves from status-based grounds towards socioeconomic criteria, the obligation is no longer to have due regard “to the need” to advance equality of opportunity, but rather to have due regard “to the desirability” of doing so.

If the judicial review threshold for complying with the due regard standard for status-based grounds was not very stringent, as seen in the cases examined in the previous section, the constraints set on public action by the socioeconomic duty are even less exacting. Furthermore, the socioeconomic duty concerns exclusively decisions “of a strategic nature,” such as priority setting or budgetary choices, and no longer operational decisions generally taken by public authorities in the exercise of their functions.⁵⁸¹

In any case, the socioeconomic duty’s potential remains an open question, as Section 1 of the Equality Act 2010 is currently not in force, pending a “commencement order” by the relevant minister. This means that the duty is not generally applicable to public authorities across Great Britain.

⁵⁸⁰ United Kingdom, Equality Act 2010, s. 1.

⁵⁸¹ See *The Equality Bill: Duty to Reduce Socio-Economic Inequalities; A Guide* (London: Government Equalities Office, 2010), 17, www.equality-ne.co.uk/downloads/512_equality-bill-duty.pdf. See also “Explanatory Notes to the Equality Act 2010” (The National Archives, 2020), paras. 23–33, <http://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/1>.

However, the Scottish government has legislated to introduce a socioeconomic public sector equality duty for Scotland, which is in force since April 2018.⁵⁸² The Welsh Government, for its part, has manifested its intention to implement such a duty by the end of 2020.⁵⁸³ Moreover, certain municipal authorities in England have declared unilaterally that they consider themselves bound by this duty, and have started to apply it with regard to their budgeting processes, through cumulative or integrated impact assessments that combine status-based grounds with socioeconomic criteria.⁵⁸⁴

The British socioeconomic duty thus offers some insights into how a PSED concerning socioeconomic disadvantage could operate in practice. As stated before, the strictly procedural nature of these duties and the risk that they become formalistic requirements must be kept in mind. In the absence of stringent judicial review, a genuine consideration of the circumstances of disadvantaged groups may be substituted by a bureaucratic “box-ticking” exercise.

Nonetheless, as occurred with status-based PSEDs, these obligations will bring clarity and transparency to decision-making processes, ultimately allowing for political accountability, safeguarding against arbitrariness, and ensuring consistency and good administration.

One potential concern of PSEDs concerning socioeconomic disadvantage is that they may generate competition for scarce resources between status-based groups, on the one hand, and individuals more generally disadvantaged from a socioeconomic perspective, on the other hand,

⁵⁸² This is known as the “Fairer Scotland Duty.” See United Kingdom, Scotland, The Equality Act 2010 (Commencement No. 13) (Scotland) Order 2017, No. 403 (C. 30) (21 November 2017).

⁵⁸³ See United Kingdom, Wales Act 2017, c. 4 (31 January 2017), s. 45.

⁵⁸⁴ See, for instance, “Shaping Our Future Together: Our Medium-Term Plan Update for 2020-21. Appendix 3 – Cumulative Impact Assessment” (Newcastle City Council, 2020), <https://www.newcastle.gov.uk/sites/default/files/Appendix%203%20-%20Cumulative%20impact%20assessment%202020-21.pdf>. See further *Joint Submission to the Scottish Government’s Consultation on the Introduction of the Socio-Economic Duty in Scotland* (London: The Equality Trust, Just Fair, 2017), <https://1forequality.files.wordpress.com/2017/09/jf-tet-submission-scotgov-consultation-s1-sept2017-final.pdf>.

possibly leading to conflict if the interests of these two different groups demand divergent solutions.⁵⁸⁵ This is however not a new issue, as this could occur already in relation to different status-based groups with conflicting interests.

It is here where intersectionality comes into play: where possible, equality assessments and the due regard obligation should balance the concerns of different groups from an intersectional perspective, aiming to accommodate different situations and needs rather than essentialising groups and confronting their interests.

Additionally, PSEDs should allow for the meaningful participation of all groups, which should be able to intervene by making their voices heard but also by having a certain degree of effective influence in the policies and decisions that are ultimately adopted.

All things considered, a socioeconomic duty is likely to raise attention to the link between status-based and socioeconomic disadvantage, and especially to the situation of individuals located at the intersection of these two axes of discrimination. Broad principles should guide the design, implementation, and enforcement of PSEDs, and definitions of socioeconomic inequality should be broad enough to capture wide-ranging lived experiences of inequality.⁵⁸⁶

Echoing the concerns advanced in Chapter 2 as to the need for antidiscrimination norms to ensure substantive outcomes beyond procedural fairness, and after having observed that PSEDs do not always succeed in achieving real change, I argue that a series of substantive policies must also be developed in parallel to these duties.

I firstly consider decommodification policies, which ensure that status-based and socioeconomically disadvantaged groups are able to realise their right to housing without excessively relying on housing markets, where they suffer from exclusion, discrimination, and stigmatisation.

⁵⁸⁵ See Fredman, “The Public Sector Equality Duty,” 407.

⁵⁸⁶ See David Barrett, “The Effective Design, Implementation and Enforcement of Socio-Economic Equality Duties: Lessons from the Pupil Premium,” *Journal of Social Welfare and Family Law* 40, no. 1 (2018): 57–77.

7.5. Decommodification policies and social housing systems

As advanced in the previous chapter, housing commodification and financialisation are pervasive phenomena with a discriminatory impact on status-based as well as socioeconomically disadvantaged groups.

One of the main consequences of housing commodification is that the realisation of the right to housing is premised on purchasing power and the ability of individuals to access housing markets, yet disadvantaged groups are often excluded in practice from these markets due to their socioeconomic status or to discrimination and stigmatisation linked to status-based prohibited grounds.

Decommodification policies therefore represent a necessary substantive avenue to achieve diversity-conscious and all-inclusive policies in the housing context, ensuring a fair housing distribution based on need instead of purchasing power. The most common way to secure housing decommodification is through the development of strong social housing systems, where access to housing is not premised (or at least not entirely) on market-based criteria.

I take here a broad definition of social housing, understood as those housing arrangements targeting individuals and families who have problems realising their right to housing in the market because of their limited economic resources and/or the existence of discrimination. In this sense, social housing is generally characterised by below-market prices or rents, and its mission is to fill a gap in the housing supply, catering for a segment of the population that private housing markets fail to properly accommodate.⁵⁸⁷

Social housing may be provided through homeownership or rental arrangements, and its providers are usually public actors or not-for-profit organisations, although some social housing systems foresee for-profit providers. In turn, the subsidies and financial support needed to provide

⁵⁸⁷ Kathleen Scanlon, Melissa Fernández Arrigoitia, and Christine Whitehead, “Social Housing in Europe,” *European Policy Analysis* 17 (2015): 4.

social housing can be funded by the state or by private entities, although the state tends to be the driving force behind most social housing systems.⁵⁸⁸

A brief overview of the history of social housing in Europe is useful to further understand its relation to decommodification. Before the 19th century, what we now call social housing was generally provided for particular groups of the population by religious orders, charities, or employers. From the 19th century onwards, the state takes a more active role in this regard, due to the need to adequately plan rapidly growing urban areas, to provide affordable housing in cities for the newly arrived workforce in the context of industrialisation, and to ensure the maintenance of political power.⁵⁸⁹

Early mass social housing construction took place in most of Europe after WWII, since the war had caused an extreme shortage of housing due to the destruction of buildings and the standstill of the construction industry. This new orientation was linked to a Keynesian economic approach, as well as the need to accommodate a large population growth in urban centres.⁵⁹⁰ This mass new social housing was generally not allocated to the poorest households, but to working and middle-class households. From the 1950s to the early 1970s, housing was still high on the social and political agenda, with governments financing much of new housing and investing in policies of rehabilitation and urban renewal.⁵⁹¹

In the mid-1970s, governments reverted to a more limited conception of housing provision, targeting the poorest sections of the population and those otherwise excluded from private housing markets.⁵⁹² Fiscal housing policies shifted from supply-side subsidies (i.e. subsidies to developers and builders to construct housing) to demand-side subsidies (i.e. subsidies to households

⁵⁸⁸ Anna Granath Hansson and Björn Lundgren, “Defining Social Housing: A Discussion on the Suitable Criteria,” *Housing, Theory and Society*, 2018, 13.

⁵⁸⁹ Scanlon, Fernández Arrigoitia, and Whitehead, “Social Housing in Europe,” 2.

⁵⁹⁰ Michael Harloe, “Social Housing—Past, Present and Future,” *Housing Studies* 9, no. 3 (1994): 409.

⁵⁹¹ Hugo Priemus, “A Comparative View on European Housing Policies in the Nineties,” *Scandinavian Housing and Planning Research* 10, no. 4 (1993): 235.

⁵⁹² Harloe, “Social Housing—Past, Present and Future,” 411.

in need of housing). This was linked to the promotion of homeownership and a reduction in the public funds directed towards housing in general.⁵⁹³ In addition, many publicly owned dwellings were privatised, rent controls were eliminated in many countries, and the competences relating to housing policies were decentralised to regional and municipal authorities.⁵⁹⁴

From the beginning of the 1980s, this change in the orientation and conceptualisation of housing policies had been consolidated. The budget for social housing was drastically reduced in many countries, evidencing the withdrawal of the state from its direct involvement in the provision of housing and leaving the market as the main vehicle for housing allocation.⁵⁹⁵

Nowadays, we are in a phase of recommodification where the production and allocation of housing increasingly occurs through market channels, within a paradigm of homeownership promotion and waning government involvement. This is coupled with the creation of new financial products to extract value from existing dwellings, like subprime mortgages and mortgage securitisation, as discussed in the previous chapter.

This general overview of social housing policies in Europe can be nuanced by underlining that national and local contexts often differed, as the approaches taken by states varied substantially.⁵⁹⁶ A categorisation of the various social housing models present across Europe can be elaborated by building on Esping-Andersen's proposed typology of welfare states.

For Esping-Andersen, welfare states can be reduced to three ideal-typical regimes: social democratic welfare state regimes, found in Scandinavian countries, where the provision of welfare services is dominated by the state; corporatist welfare state regimes, where the state is fairly active in the provision of welfare services but without this leading to income

⁵⁹³ Julie Pollard, "Soutenir le marché : les nouveaux instruments de la politique du logement," *Sociologie du Travail* 52, no. 3 (2010): 326–28.

⁵⁹⁴ See Dinse, *Consortium Comparison*, 10. See also Richard Disney and Guannan Luo, "The Right to Buy Public Housing in Britain: A Welfare Analysis," *Journal of Housing Economics* 35 (2017): 51–68.

⁵⁹⁵ Marianna Filandri and Giovanni Semi, "Housing Inequality: The Need for a Shift in Public Policy Intervention," *Sociological Research Online*, 2018.

⁵⁹⁶ Joe Doherty, "European Housing Policies: Bringing the State Back In?," *European Journal of Housing Policy* 4, no. 3 (2004): 253–60.

redistribution, as the existing societal hierarchy is maintained; and liberal welfare state regimes, characterised by little state interference and a strong market orientation, where private companies are responsible for the majority of welfare services.⁵⁹⁷

Esping-Andersen grounded this classification in factors like decommodification, stratification, and the arrangements between state, market, and family.⁵⁹⁸ Decommodification is defined as the degree to which a social service or a social security benefit is secured, enabling a person or a family to maintain a livelihood without relying on the market.⁵⁹⁹ Decommodification of a good or benefit thus means that one does not need to generate income in order to acquire, access, or maintain it.⁶⁰⁰

Applying this definition to housing, the level of housing decommodification is linked to the rules of access to social housing and the rules governing the ability of residents to continue living in their dwelling when, for whatever reason, their income or family circumstances change.⁶⁰¹ Decommodification means, in the housing context, “the extent to which households can provide their own housing, independent of the income they acquire on the labour market.”⁶⁰²

Although Esping-Andersen did not himself apply this framework to the field of housing, other authors have sought to do so, building on his

⁵⁹⁷ Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Cambridge: Polity Press, 1990), 25–27. See also Wil A. Arts and John Gelissen, “Models of the Welfare State,” in *The Oxford Handbook of the Welfare State*, ed. Francis G. Castles et al. (Oxford: Oxford University Press, 2010).

⁵⁹⁸ Esping-Andersen, *The Three Worlds of Welfare Capitalism*, 10.

⁵⁹⁹ See Arts and Gelissen, “Models of the Welfare State,” 571. See also Jean-David Gerber and Julien-François Gerber, “Decommodification as a Foundation for Ecological Economics,” *Ecological Economics* 131 (2017): 552.

⁶⁰⁰ Ivo Balmer and Tobias Bernet, “Housing as a Common Resource? Decommodification and Self-Organization in Housing – Examples from Germany and Switzerland,” in *Urban Commons: Moving Beyond State and Market*, ed. Agnes Katharina Müller et al. (Berlin: De Gruyter, 2015), 178–95.

⁶⁰¹ See John Doling, “De-Commodification and Welfare: Evaluating Housing Systems,” *Housing, Theory and Society* 16, no. 4 (1999): 158.

⁶⁰² Joris Hoekstra, “Housing and the Welfare State in the Netherlands: An Application of Esping-Andersen’s Typology,” *Housing, Theory and Society* 20, no. 2 (2003): 60. See also Laurent Ghekière, *Le développement du logement social dans l’Union européenne* (La Défense: Dexia éditions, 2007).

classification.⁶⁰³ In this sense, the most commonly used categorisation for European social housing models distinguishes between universalist and targeted models, which can be in turn generalist or residual.⁶⁰⁴

Universalist models, like the Swedish or the Danish models, consider housing to be a responsibility of the public sector and provide social housing for everyone alongside private housing, without setting income requirements.

Targeted models, by contrast, consider that the market is primarily in charge of allocating housing to individuals, and their objective is to satisfy a segment of the housing demand that is not sufficiently accommodated by the market. Targeted models can in turn be residual, as the Spanish or British models, where housing is directed only to the most disadvantaged groups, or generalist, as the French or the Belgian models, where housing is targeted at lower income groups in a more general manner. In practice, however, generalist models can resemble residual models when there is not enough social housing available.⁶⁰⁵

In light of this classification, the model that is in theory best aligned with the idea of decommodification is the universalist model, which recognises the importance of housing as a social good and foresees public mechanisms to ensure that housing is rendered affordable for everyone, independently of their purchasing power. This system guarantees a higher degree of decommodification than targeted models, be they generalist or residual, where social housing is only targeted at those excluded from housing markets without generally questioning the central role of markets in allocating housing in society.

However, two caveats can be made. Firstly, the practical reach of universalist social housing models is limited within the EU, as a consequence

⁶⁰³ See Mark Stephens, "Using Esping-Andersen and Kemeny's Welfare and Housing Regimes in Comparative Housing Research," *Critical Housing Analysis* 3, no. 1 (2016): 24.

⁶⁰⁴ Michela Braga and Pietro Palvarini, "Social Housing in the EU" (Brussels: European Parliament, Directorate-General for Internal Policies, 2013). See also Mark Stephens, "Housing Regimes Twenty Years after Kemeny," Working Papers (The Urban Institute, Herriot-Watt University, 2017).

⁶⁰⁵ See also Ringelheim and Bernard, *Discrimination in Housing*, 51.

of the European Commission's understanding that social housing systems should be targeted exclusively at lower income households in order to be compatible with EU state aid rules. Secondly, even though universalist models may in theory reduce socioeconomic discrimination, status-based discrimination may well still be present. I consider these two objections in turn.

Firstly, the European Commission's restrictive approach towards universalist social housing models is linked with the EU legal concept of "service of general economic interest" (SGEI). This legal concept allows for some exceptions to competition rules, in light of private actors' pursuit of legitimate public interest aims.

State aid is defined as any form of assistance from the public or a publicly funded body to selected undertakings which has the potential to distort competition and affect trade between EU Member States.⁶⁰⁶ State aid is generally prohibited under EU law.

The EU legislative framework allows nonetheless for the social housing sector to escape this prohibition, since access to housing is enshrined in Article 34(3) CFREU and it is therefore in principle considered a SGEI.

However, according to the interpretation developed by the European Commission in the mid-2000s, in order to qualify as a SGEI social housing actors must supply housing for disadvantaged groups who due to income constraints are unable to obtain housing in the market. This narrow interpretation clashes with the universalist model of social housing provision, where the defining element is precisely the provision of social housing to everyone.

As a consequence of this narrow interpretation, countries with a universalist model had to take different approaches for their social housing sectors to be compliant with EU state aid rules. The Netherlands chose to restrict its notion of social housing, by limiting state aid to certain social

⁶⁰⁶ Kathleen Scanlon, Christine Whitehead, and Melissa Fernández Arrigoitia, eds., *Social Housing in Europe*, Real Estate Issues (Chichester: Wiley Blackwell, 2014), 336. See also Koen Lenaerts and Piet Van Nuffel, *European Union Law*, 3rd ed. (London: Sweet & Maxwell, 2011), 370–73.

housing providers and establishing maximum income requirements for candidates to be able to obtain subsidised housing.⁶⁰⁷ Sweden, by contrast, chose to remove social housing from the category of SGEIs altogether, requiring public housing providers to act in a market-like manner.⁶⁰⁸

An argument can be made regarding the discriminatory impact of the European Commission's restrictive approach to social housing. By limiting the possibility for countries to pursue universalist housing models, this approach reinforces the idea that the market is the most appropriate distributive mechanism for housing, therefore legitimising purchasing power instead of need as the distributive criterion for housing in society.

On the other hand, even though the universalist social housing model is the most appropriate to ensure a fair distribution of housing, status-based discrimination may still arise in this type of systems. It is important to note that ethnic minorities and migrants tend to be overrepresented in social housing.⁶⁰⁹ This can lead to place-based discrimination whenever social housing developments attract processes of territorial stigmatisation, as explained in Chapter 5.

Generally speaking, the more universal and broadly accessible social housing is rendered, the less likely that territorial stigmatisation will occur. In any case, states should remain vigilant of the potential discriminatory ramifications of social housing, even when a universalist model is chosen.

In closing, even though social housing policies represent powerful tools to eliminate housing discrimination and to foster a diversity-conscious and an all-inclusive approach to housing provision, there is a need to be mindful of antidiscrimination law when elaborating and implementing such policies.

⁶⁰⁷ See Céline Vanhecke, "Le financement du logement social à l'épreuve du principe de non-discrimination: Une analyse du cas néerlandais Stichting Woonlinie e.a. c. Commission," *Cahiers de droit européen* 52, no. 3 (2016): 909–956.

⁶⁰⁸ See Darinka Czischke, "Social Housing and European Community Competition Law," in *Social Housing in Europe*, ed. Kathleen Scanlon, Christine M. E. Whitehead, and Melissa Fernández Arrigoitia, Real Estate Issues (Chichester: Wiley Blackwell, 2014), 333–48. See also Marja Elsinga and Hans Lind, "The Effect of EU-Legislation on Rental Systems in Sweden and the Netherlands," *Housing Studies* 28, no. 7 (2013): 960–70.

⁶⁰⁹ Scanlon, Fernández Arrigoitia, and Whitehead, "Social Housing in Europe," 5.

As noted in Chapter 6, markets are social institutions, created and modified over time, and they do not exist free and unregulated. They are based on political choices, and the role of the state is crucial in order to transition towards a society where housing is progressively decommodified. In this sense, states should promote organisational and legal structures seeking to withdraw housing from the market, as well as institutional and financial instruments aiming to counter a purely profit-driven model of housing production.⁶¹⁰

7.6. The right to the city and the housing commons

In the previous section, I explored social housing systems as the most established way to ensure housing decommodification. However, decommodification can also be achieved by means of the provision and allocation of housing through collective and community-based mechanisms.

This section considers the idea of the housing commons as an avenue to achieve decommodification beyond the state and the market, arguing that the state has a role to play in creating the legal conditions to facilitate these alternative mechanisms. In the housing context, the idea of the commons is strongly connected with the concept of the right to the city. I therefore address these two issues in a combined manner.

A “right to the city” was famously proposed by Lefebvre in his groundbreaking book *Le droit à la ville*.⁶¹¹ At the core of Lefebvre’s conception of the right to the city is the idea of the city as an *œuvre*, that is, a piece of work produced through the labour and daily actions of city residents.⁶¹²

The right to the city entails the right to inhabit the city and to produce urban life on new terms shielded from the demands of commodification and financialisation.⁶¹³ This is key to highlight the fact that the distribution of

⁶¹⁰ See Sabine Horlitz, “Movements and Initiatives to Decommodify Housing” (Resourceful Cities, Berlin: RC 21 Conference 2013, 2013).

⁶¹¹ Lefebvre, *Le droit à la ville*.

⁶¹² Lefebvre, *Writings on Cities*, 66.

⁶¹³ See Kafui A. Attoh, “What Kind of Right Is the Right to the City?,” *Progress in Human Geography* 35, no. 5 (2011): 669–85. See also Kempin Reuter, “Human Rights and the City,” 385.

access, power, representation, rights, goods, and services in cities is skewed in favour of the elites, while disadvantaged groups usually remain excluded and marginalised.⁶¹⁴

The right to the city is linked to the idea that housing policies must reduce discrimination and build inclusiveness, diversity, and equality, and that citizens and civil society actors should be the driving force behind city transformations.

This understanding is reflected in the UN New Urban Agenda in the following terms:

We share a vision of cities for all, referring to the equal use and enjoyment of cities and human settlements, seeking to promote inclusivity and ensure that all inhabitants, of present and future generations, without discrimination of any kind, are able to inhabit and produce just, safe, healthy, accessible, affordable, resilient and sustainable cities and human settlements to foster prosperity and quality of life for all.⁶¹⁵

The idea of a housing commons can be situated in this context. Housing commons can be defined as “an ensemble of experiences where groups of active citizens self-organise from below to take charge directly of urban real estate goods, often underexploited or abandoned buildings, with the aim to manage them through open and shared governance mechanisms.”⁶¹⁶

These shared governance mechanisms have the aim to guarantee collective services, directly linked to the social cohesion of the local community and the realisation of fundamental rights. Housing commons thus represent a noteworthy avenue to promote housing decommodification, besides more traditional social housing mechanisms.

The idea of the commons has a long conceptual history, evolving from Hardin’s “tragedy of the commons” to Ostrom’s work on common pool

⁶¹⁴ Kempin Reuter, “Human Rights and the City,” 387.

⁶¹⁵ United Nations, General Assembly, “New Urban Agenda,” A/RES/71/256 (25 January 2017), para. 11.

⁶¹⁶ Antonio Vercellone, “L’expérience des biens communs en Italie. Espaces urbains, propriété privée, droits fondamentaux,” *European Journal of Human Rights / Journal européen des droits de l’homme*, forthcoming, 13. My translation.

resources.⁶¹⁷ The commons represent a novel form of property relations located beyond private property and the state's monopoly, where public authorities move from a top-down approach to a collaborative approach based on horizontal subsidiarity and rooted in a parity relationship between citizens and public institutions.⁶¹⁸ Common goods escape from a profit-based logic and are rooted in the premise that value is rather created through cooperation.

The premise of the commons is that local communities are capable, under certain conditions, of managing common resources in ways that are more sustainable and effective than either the private market or the state, as these communities are better placed to design the governance system that is most adequate to the local context and conditions.⁶¹⁹ The commons movement thus seeks to reclaim democratic and collective control over decisions about the city and the urban, and to promote greater access to space and resources for its inhabitants, particularly the most disadvantaged.⁶²⁰

⁶¹⁷ The "tragedy of the commons" refers to the idea that common resources which are not privatised will be depleted, as every user will take out as much as possible from the resource without due regard to its sustainability. See Garrett Hardin, "The Tragedy of the Commons," *Science* 162, no. 3859 (1968): 1243–48. See also Olivier De Schutter and Katharina Pistor, "From the 'Tragedy of the Commons' to the Tragedy of Enclosures," *The World Financial Review*, 2016. Ostrom, by contrast, observed that there were multiple examples of cooperation between users who created and enforced rules to use and manage resources in a sustainable way, developing a theory for the governance of the commons. See Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action*, Political Economy of Institutions and Decisions (Cambridge: Cambridge University Press, 1990).

⁶¹⁸ De Schutter and Rajagopal, "Property Rights from Below," 9.

⁶¹⁹ Olivier De Schutter and Balakrishnan Rajagopal, "Conclusion: The Revival of the 'Commons' and the Redefinition of Property Rights," in *Property Rights from Below: Commodification of Land and the Counter-Movement*, ed. Olivier De Schutter and Balakrishnan Rajagopal, Routledge Complex Real Property Rights Series (Abingdon: Routledge, 2020), 210.

⁶²⁰ Sheila Foster and Christian Iaione, "The City as a Commons," *Yale Law & Policy Review* 34, no. 2 (2016): 284; Sheila R. Foster, "Urban Commons, Property, and the Right to the City," in *Property Rights from Below: Commodification of Land and the Counter-Movement*, ed. Olivier De Schutter and Balakrishnan Rajagopal, Routledge Complex Real Property Rights Series (Abingdon: Routledge, 2020), 179.

Different models to secure housing de commodification can be considered in light of these reflections. I look here at two of these models: limited equity cooperatives and community land trusts.⁶²¹

Firstly, limited equity cooperatives members are generally both tenants and, collectively, the owners of a housing development. Residents do not directly hold a property title to their individual unit, but they own shares in the cooperative. The price of these shares is not determined by the real estate market, but rather by a resale formula contained in the cooperative's bylaws. Since affordability is a fundamental concern, there are restrictions to who and for how much money the housing units (or, more precisely, the respective shares) can be resold.

Although membership is based on shares, the assemblies of these cooperatives usually work on a one person, one vote basis, regardless of the value of each member's shares. Since the members of the cooperative have no incentive to extract profit from themselves, they will, as a matter of principle, manage their housing development as a "non-commodified means of fulfilling people's needs."⁶²² The possible equity of individual households remains limited in order to guarantee the permanent affordability of all housing units within the development.⁶²³

Secondly, community land trusts (CLTs) represent a particularly well-suited modality to ensure housing de commodification, with very similar characteristics to a limited equity cooperative.

The CLT model was developed "from below" in the US in the 1970s, but it was mostly developed around the world following the 2008 economic crisis. A CLT is a non-profit organisation under private law, whose objective is to promote access to housing for lower income groups through the offer of

⁶²¹ See further Horlitz, "Movements and Initiatives to De commodify Housing," 7–9; Balmer and Bernet, "Housing as a Common Resource? De commodification and Self-Organization in Housing – Examples from Germany and Switzerland," 190–91.

⁶²² Balmer and Bernet, "Housing as a Common Resource? De commodification and Self-Organization in Housing – Examples from Germany and Switzerland," 188.

⁶²³ Horlitz, "Movements and Initiatives to De commodify Housing," 4. See also Lorenzo Vidal, "El cooperativismo, una alternativa posible a la financiarización de la vivienda," Notes internacionals (Barcelona: CIDOB, November 2018).

below-market priced dwellings. Its goal is also to promote the participative governance of urban spaces, incorporating the needs and wishes of local communities and the surrounding environment.⁶²⁴

The key principle of CLTs is the dissociation between the ownership of the land and the ownership of the corresponding housing units. Homeowners buy and own their respective dwellings, but they do not own the underlying land. The land remains the property of the trust itself, which leases it to the homeowners by means of a long-term ground lease.

This ground lease establishes in turn certain restrictions to control the use and future affordability of the dwellings. It usually contains, among others, stipulations regarding income eligibility thresholds for future buyers and formulas to determine resale prices. The trust also has the right of first refusal when a homeowner wishes to sell their housing unit.

CLTs are community-based organisations whose membership is open to any person living within the surrounding area.⁶²⁵ Consequently, they are not only governed by homeowners, but also by the community at large. Since they confer time-limited property rights over the housing units, CLTs protect the land from individual appropriation and privatisation, minimising the risk of commodification and financialisation for profit-making reasons.⁶²⁶ CLTs thus anchor housing to its rights-based and needs-based function, ensuring decommodification through participative and common governance.

In summary, these models serve to insulate housing from the profit-making logic of private markets and from commodification and financialisation. However, in order to achieve this goal under nondiscriminatory conditions, the governance structures embedded in these models must be compatible with antidiscrimination law, allowing individuals belonging to status-based

⁶²⁴ Vercellone, “L’expérience des biens communs en Italie,” 24.

⁶²⁵ See Horlitz, “Movements and Initiatives to Decommodify Housing,” 5–7.

⁶²⁶ See Nicolas Bernard, “Le community land trust comme nouveau paradigme de l’habitat acquisitif (ou les communs appliqués à la propriété du logement),” *Revue interdisciplinaire d’études juridiques* 81, no. 2 (2019): 243–65.

and socioeconomically disadvantaged groups to effectively participate as equals in decision-making.⁶²⁷

A critique can be advanced to the effect that many of these collaborative models may not necessarily challenge the root causes and dynamics of housing inequality, since (although this varies depending on the particular structure and funding arrangements of each organisation) access to these models is usually premised on a certain minimum level of purchasing power.⁶²⁸ As a result, access to these models will usually not be open to the poorest groups in society, and therefore not to those at the greatest need for housing.⁶²⁹ These models represent, in any case, a valuable way forward in reimagining housing governance and in promoting housing decommodification, serving as a bulwark against housing commodification and financialisation.

In this connection, states have the important mission of creating the legal preconditions allowing for these alternative mechanisms to operate. In light of their antidiscrimination law based obligation to promote decommodification, states ought to develop the necessary normative framework and to promote the development of these models, beyond the establishment of strong social housing systems.

In conclusion, if set up in a diversity-conscious, all-inclusive manner, a governance model based on the housing commons will lead to more egalitarian processes of participation and decision-making in the housing context, ensuring the realisation of this right for disadvantaged groups and allowing them to effectively participate in decisions involving their housing and the surrounding community. As occurred with regard to social housing systems, strong antidiscrimination safeguards must be in place if commons-based governance mechanisms are to represent a true inclusive alternative to the traditional dichotomy between market and state.

⁶²⁷ De Schutter and Rajagopal, "Conclusion," 219.

⁶²⁸ Stuart Hodgkinson, "The Return of the Housing Question," *Ephemeria* 12, no. 4 (2012).

⁶²⁹ Doling, "De-Commodification and Welfare," 160.

7.7. Substantive measures to ensure diversity and inclusion

Besides decommodification housing policies, articulated through social housing systems or through commons-based governance models linked to the right to the city, a number of substantive policies and measures can be envisaged to contribute to a diversity-conscious and all-inclusive realisation of the right to housing for all.⁶³⁰

In this section, I seek to present a catalogue of potential measures that states could develop in this sense. These examples are inspired by the observation of the practice of various states, and can therefore be understood as a list of “good practices” to secure diversity and inclusion in housing policies.

Firstly, publicly owned housing can be linked to the fulfilment of public interests for as long as possible or in perpetuity, prohibiting that it be sold and that it revert to the private market.

The public housing stock should be allocated on the basis of need, ideally in the form of variable and capped rentals commensurate with levels of income (for instance, by setting rent at 30% of a household’s net disposable income). Expanding the public housing stock (be it through direct provision, public procurement, right of first refusal, or collaboration with associations and other service providers) is key to achieve a high level of housing decommodification and to ensure the effective access of lower income groups to adequate housing.

Where possible, access to public housing should be configured as a result-based obligation for states when beneficiaries meet certain conditions.⁶³¹ In

⁶³⁰ See Ponce Solé, “The European Union Role in Ensuring Access to Affordable Housing and in Fighting Against Urban Segregation and Gentrification”; Ponce Solé, *El derecho de la Unión Europea y la vivienda*, 57–100. See also Lorenzo Vidal, “Promoting the Right to Housing at EU Level,” Policy Brief (Barcelona: CIDOB, May 2019); Sonia Olea Ferreras et al., “El sistema público de vivienda en el Estado español. Sin estrategia ni fundamentación en los Derechos humanos,” VIII Informe FOESSA, Documento de trabajo 4.13 (Madrid: Fundación FOESSA, 2019), <https://caritas-web.s3.amazonaws.com/main-files/uploads/sites/16/2019/05/4.13.pdf>.

⁶³¹ See Nico Moons, *The Right to Housing in Law and Society*, Routledge Research in Human Rights Law (New York: Routledge, 2018), chap. 4.

this context, the “right to enforceable housing” (DALO) in France serves as an important example.⁶³²

In many cases, however, the DALO procedure has not resulted in recognised rightsholders effectively obtaining housing. Moreover, although a judicial remedy is available for beneficiaries in this situation, this procedure does not result in a sum to be paid to the affected household.⁶³³ It has also been shown that the DALO legislation excludes those who do not have a legal right of residence and that its implementation is thwarted by the low number of dwellings available in practice and the large number of families in priority lists.⁶³⁴

These mechanisms must consequently be set up in a way that does not result in de facto discrimination against certain status-based groups or in the lack of effective access of lower income groups to the dwellings they are entitled to.

Supply-side subsidies (also known as “bricks and mortar” subsidies) can also be envisaged by states. These subsidies promote the construction of affordable housing through low-interest loans and non-repayable contributions. Nonetheless, if subsidised housing units are destined to eventually be privatised, supply-side subsidies will offer at best a temporary barrier to housing commodification.⁶³⁵ States ought to couple supply-side subsidies with strong requirements that subsidised dwellings fulfil a public interest for a significant period of time, ideally in perpetuity.

⁶³² See Nicolas Bernard and Noria Derdek, “Le DALO, un droit au logement vraiment « opposable » ?,” *Revue trimestrielle des droits de l’homme* 2016, no. 107 (2016): 713–731.

⁶³³ See further Camille Mialot and Juli Ponce Solé, “Ten Years of the French DALO and the Catalan Right to Housing Act: European Innovation in the Fields of Land Use Planning and Housing,” *Journal of Comparative Urban Law and Policy* 2, no. 1 (2017).

⁶³⁴ Claire Lévy-Vroelant, “The Right to Housing in France: Still a Long Way to Go from Intention to Implementation,” *Journal of Law and Social Policy* 24 (2015): 88–108.

⁶³⁵ Balmer and Bernet, “Housing as a Common Resource? Decommodification and Self-Organization in Housing – Examples from Germany and Switzerland,” 184–85.

Demand-side subsidies, for their part, provide beneficiaries with a monetary contribution towards the payment of their rent. Insofar as these subsidies do not address the underlying issue of the allocation of housing through market mechanisms and the systematic exclusion of disadvantaged groups, demand-side subsidies can be seen as reinforcing arrangements that do not ultimately guarantee the right to adequate housing for all.⁶³⁶ Moreover, it has been noted that these subsidies tend to be captured by landlords, thus possibly reinforcing commodification and financialisation.⁶³⁷

Additionally, rent control and rent intermediation measures can be introduced. Rent control mechanisms can be set up according to various different models.⁶³⁸ In Germany, they are articulated through a “rental brake” whereby the rental price of housing units in certain areas cannot be set at more than a fixed percentage above the local comparative rental price reflected in a state-elaborated index.⁶³⁹ In Sweden, this occurs through rent negotiations between tenant unions and landlords.⁶⁴⁰

Rental intermediation, for its part, enables the private housing stock to be used to provide accommodation for disadvantaged households while

⁶³⁶ Balmer and Bernet, 183–84; Rolnik and Rabinovich, “Late-Neoliberalism: The Financialisation of Homeownership and the Housing Rights of the Poor,” 72–79.

⁶³⁷ See Pollard, “Soutenir le marché.”

⁶³⁸ See Elga Molina Roig, *Una Nueva Regulación Para Los Arrendamientos de Vivienda En Un Contexto Europeo*, Derecho de La Vivienda (Valencia: Tirant lo Blanch, 2018), 341–75.

⁶³⁹ See *Ethical Renting: Mobilise the Private Rental Market to Provide Social Solutions in Europe*, Access to Decent and Affordable Housing in Europe: Case Studies and Innovative Solutions (Paris and Brussels: Fondation Abbé Pierre and FEANTSA, 2018), 7, <https://www.feantsa.org/download/ethical-renting-english1101238753028295562.pdf>. In France, some general rent control measures have been introduced in the largest metropolitan areas, inspired by the German model. See Rozen Noguellou, “La loi ELAN : présentation rapide des dispositions sur le logement,” *RFDA*, 2019, 30; Philippe Nogue, “Loi ELAN et logement : tour d’horizon des mesures intéressant les communes,” *AJ Collectivités Territoriales*, 2019, 26; Patricia Rapi, “Face au bulldozer « ELAN », le Conseil constitutionnel reste de béton: À propos de la décision n° 2018-772 DC du 15 novembre 2018, Loi portant évolution du logement, de l’aménagement et du numérique,” *Revue des droits de l’homme*, 2019.

⁶⁴⁰ *Ethical Renting*, 8. See further Haymanot Baheru, “Swedish Legislation of Residential Tenancies: An Interaction between Collective Bargaining and Mandatory Regulation,” *Revista Electrónica de Direito* 2017, no. 3 (2017).

providing security to private landlords. This is done by means of different guarantees provided by public bodies or by associations who act as intermediaries. In Catalonia, large housing owners have the obligation to make a social rent proposal before evicting disadvantaged households, and they must, under certain circumstances, cede dwellings to local public authorities to be used as social rental units.⁶⁴¹

Furthermore, restrictive planning and zoning regulations can be adopted. This can be done, for instance, by means of “inclusionary zoning” measures, whereby public authorities require that all developers who plan to build in housing-constrained areas include a certain number of affordable housing units within their developments.⁶⁴²

These areas can be defined by reference to the street, neighbourhood, district, or municipality level, and the restrictions can apply once a certain level of mismatch between the housing supply and demand is attained in that particular “hotspot” area. For example, in Barcelona all new developments and integral renovations above a certain square footage must include 30% of protected affordable housing.⁶⁴³

These measures must be carefully designed keeping in mind antidiscrimination principles to ensure their effectiveness and to avoid territorial stigmatisation. For instance, affordability should be defined

⁶⁴¹ Observatorio DESC and Instituto de Investigación TransJus, eds., *La ley del derecho a la vivienda de Catalunya: diez años de vigencia. Balance y futuro* (Cizur Menor: Thomson Reuters Aranzadi, 2018); Mialot and Ponce Solé, “Ten Years of the French DALO and the Catalan Right to Housing Act.” See also Vicente Pérez Daudí, “La obligación de ofrecer un alquiler social y el proceso judicial,” *Diario La Ley*, no. 9433 (11 June 2019).

⁶⁴² Juli Ponce Solé, “Reservas para vivienda protegida en suelo urbano no consolidado: un nuevo paradigma contra la segregación urbana,” *Revista de Derecho Urbanístico y Medio Ambiente*, no. 326 (2018): 19–57. See also Rafael Fernández Bautista, “Colaboración público-privada para la provisión de vivienda pública, asequible y de ocupación temporal. El caso particular de la vivienda en suelo dotacional” (PhD Thesis, Barcelona, University of Barcelona, 2012).

⁶⁴³ See Irene Escorihuela, “30% de vivienda protegida para Barcelona,” *Crítica Urbana. Revista de Estudios Urbanos y Territoriales* 2, no. 4 (2019). See further David H. Falagán, ed., *Innovación en vivienda asequible: Barcelona 2015–2018* (Barcelona: Concejalía y Gerencia de Vivienda y Rehabilitación, Ajuntament de Barcelona, 2019).

according to local housing markets, and it should not result in too high of a burden in practice for the poorest segments of the population.

The practice of so-called “poor doors” has also been documented in this context, meaning that affordable housing beneficiaries in private housing developments where inclusionary zoning operates are forced to use segregated entrances and common areas within those developments. Measures should be taken to ensure that mixed developments remain effectively mixed between those living in affordable housing units and those living in other units, avoiding discriminatory practices.

Fiscal and budgetary measures may also be leveraged as partial solutions to housing commodification and financialisation processes, thereby reducing the exclusion suffered by lower income groups in private housing markets.

“Luxury taxes” can thus be implemented, targeting high-value purchases of residential real estate not destined for residence. The real or fictitious revenue streams deriving from housing units can also be taxed, meaning that owners of residential real estate who leave their properties vacant for a long period of time without releasing them to the private rental market can be taxed as if they were effectively renting out those properties, commensurate to the rent levels in that neighbourhood or area.

A more stringent regulation of financial actors, such as pension funds, REITs, and asset management companies can be foreseen, such as limitations on their ability to invest on certain products, like mortgage-based securities, or on certain assets, like housing units sold below their market value as a result of risk offsetting and debt restructuring processes.⁶⁴⁴

Finally, more budgetary resources should be allocated to housing, including through predistributive mechanisms where necessary.⁶⁴⁵

⁶⁴⁴ See Raquel Rodríguez Alonso and Mario Espinoza Pino, *De la especulación al derecho a la vivienda. Más allá de las contradicciones del modelo inmobiliario español*, Útiles (Madrid: Traficantes de Sueños, 2017), https://www.traficantes.net/sites/default/files/pdfs/util_20_vivienda_web_0.pdf.

⁶⁴⁵ See Carme Trilla Bellart and Jordi Bosch Meda, *El parque público y protegido de viviendas en España: un análisis desde el contexto europeo*, Documento de trabajo 197/2018 (Madrid: Fundación Alternativas, 2018), https://www.fundacionalternativas.org/public/storage/laboratorio_document

Administrative sanctions and fines can also be considered, including sanctions for homeowners who leave their properties vacant for prolonged periods of time. These sanctions rely on the precedence of the social function of housing, and the recognition that the failure to give residential real estate any productive social use should be administratively sanctioned. Alternatively, forced leases can be used to put these vacant properties back into the market.

States may also consider eminent domain and expropriation mechanisms to tackle these situations. For example, the state can temporarily expropriate the use of a dwelling to rent it out to households in need, in such a way that the unit will revert to its owner after a prescribed period of time.⁶⁴⁶

Overall, these substantive measures should be rooted in antidiscrimination law, along the lines of what I have discussed throughout this thesis. Housing policies must be rendered all-inclusive by ensuring the effective realisation of the right to housing for disadvantaged groups.⁶⁴⁷ Recalling the analysis developed in Chapter 3, diversity shall also be ensured by taking into account diverse cultural practices concerning housing, as occurs in the case of Travellers, as well as the specific needs of persons with disabilities.

For example, in Portugal, the Basic Housing Law in force since late 2019 emphasises that the state must guarantee housing as a human right and that public housing policies must follow the principles of universality and citizen participation, including protections for disadvantaged groups such as families with children, persons with disabilities, and older persons.⁶⁴⁸

os_archivos/df921boeb942doce4c114e5463934e1a.pdf. On the issue of predistribution, see Borja Barragué, *Desigualdad e igualitarismo redistributivo*, El Derecho y la Justicia (Madrid: Centro de Estudios Políticos y Constitucionales, 2017).

⁶⁴⁶ See further Cristina Argelich Comelles, *La expropiación temporal del uso de viviendas* (Madrid: Marcial Pons, 2018).

⁶⁴⁷ See Inés Sánchez de Madariaga, “La igualdad efectiva en las políticas de vivienda y en el planeamiento urbanístico,” in *El derecho a la igualdad efectiva de mujeres y hombres: una evaluación del primer decenio de la Ley Orgánica 3/2007*, ed. Asunción Ventura Franch and Santiago García Campá (Pamplona: Aranzadi, 2018), 601–620.

⁶⁴⁸ Portugal, Law no. 83/2019, of 3 September, Housing Basic Law, *Diário da República*, Series I, no. 168/2019 (3 September 2019). See Leilani Farha, “Portugal: UN Expert Welcomes New Law Protecting the Right to Housing”

The participation of disadvantaged groups in this context must be realised not only through mechanisms of consultation and contribution, but also by ensuring their involvement at all stages of policy and decision-making, from the design to the implementation and monitoring of housing policies. This shall be accompanied by appropriate channels of participation that are accessible and consistent with the cultural identities of disadvantaged groups and the situation of those at risk of residential exclusion.

The ultimate aim of these policies and measures should be to secure substantive equality and participatory parity, understood as the ability for everyone to realise their right to housing under nondiscriminatory conditions and to participate in society as equals. At the same time, there must be room to adapt and adjust those policies and measures to the local economic, political, and social contexts where they will be implemented, and to the specific needs and cultural identities of those affected.

7.8. Conclusion

In this chapter, I have answered the question as to how to elaborate and implement diversity-conscious and all-inclusive housing policies which contribute to eliminating hostility, prejudice, and stigma; to respecting diverse cultural identities and avoiding misrecognition; to transforming existing housing structures; and to ensuring a fair housing distribution.

I have done so by examining in turn procedural and substantive avenues of rendering housing policies more inclusive and respectful of diversity. As procedural tools, I have highlighted equality duties, in particular PSEDs, which I consider helpful obligations to mainstream the situation and needs of disadvantaged groups in decision-making and policy making, building on the British PSED as a case study that I argue should be transposed into other legal orders. I have noted, however, that PSEDs have a limited effect in promoting substantive policy changes, despite their demonstrable impact in enhancing transparency and good administration, as well as safeguarding

(Special Rapporteur on the right to adequate housing, 1 October 2019), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25083>.

against administrative arbitrariness and ensuring consistency in policy implementation.

I have consequently argued that states ought to pursue substantive avenues to guarantee substantive outcomes, beyond procedural fairness. In particular, I have focused on decommodification policies, which improve the realisation of the right to housing of status-based and socioeconomically disadvantaged groups by committing to a fair distribution of housing based on need instead of purchasing power. Decommodification policies ensure that disadvantaged groups are effectively able to access housing beyond private markets, where they often experience exclusion, stigmatisation, and discrimination.

Decommodification policies can be mainly articulated through strong social housing systems, on the one hand, and through commons-based governance models linked to the right to the city, on the other hand. Furthermore, other substantive measures can be envisaged to secure diversity-conscious, all-inclusive housing policies. I have referred to several of them, including the protection of publicly owned housing, supply-side subsidies, rent control and rent intermediation, stricter planning and zoning regulations, fiscal and budgetary measures, a more stringent regulation of financial actors, administrative sanctions and fines, and eminent domain and expropriation mechanisms.

These substantive measures should be rooted in antidiscrimination law, ensuring the meaningful participation of disadvantaged groups at all stages of policy and decision-making, the incorporation of diverse cultural practices and the specific needs of certain groups, and the realisation of substantive equality and participatory parity for everyone.

General Conclusion

The central argument of this thesis has been that the application of antidiscrimination law to the field of housing complements and enriches a right to adequate housing approach in two ways: firstly, it helps to elaborate and expand the rationale and implications of certain components of the right to housing; secondly, it allows us to address human rights concerns that cannot be adequately tackled through the right to housing alone. I have reached this conclusion through an analysis of the conceptual and practical implications arising from the application of antidiscrimination norms to the housing context, from a legal perspective. In terms of geographical scope, the focus has been placed on Europe, looking at international, regional, and national human rights law.

In the first chapter, I introduced the legal and conceptual framework concerning antidiscrimination law, on the one hand, and the right to housing, on the other hand. This chapter was more descriptive in nature and it set the stage for the legal enquiry deployed in subsequent chapters.

The most distinctive trait of antidiscrimination norms is their emphasis on the elimination of structural differences in treatment based on certain characteristics or elements deemed fundamental to a human existence lived in dignity. For its part, the right to housing is understood in international and European human rights law as a right to *adequate* housing. This means that certain adequacy components along with a series of more general requirements must be secured in order for this right to be realised.

In the second chapter, I explored the philosophical foundations of antidiscrimination law to elucidate the aims that antidiscrimination norms ought to pursue. I considered the most relevant theories of justice to arrive at an understanding of substantive equality centred on the notion of participatory parity and relational equality, that is, the idea that all individuals should be able to interact with one another as equals in society. Whereas elaborating a comprehensive theory of antidiscrimination law is beyond the scope of my enquiry, I sketched out some of the main

characteristics of the account of antidiscrimination law I deploy as a basis for my analysis.

Putting the notion of substantive equality, understood in this sense, at the core of my account of antidiscrimination law, I argued that four specific aims should be pursued by antidiscrimination norms: eliminating hostility, prejudice, and stigma; recognising cultural diversity and avoiding misrecognition; adapting existing structures; and ensuring a fair distribution of certain important social goods.

These four central aims have guided my enquiry in subsequent chapters regarding the legal and practical implications of applying antidiscrimination norms to the field of housing. To reach these four aims, I identified a number of wrong-making characteristics of discriminatory acts. Acknowledging that there is not one single characteristic rendering discrimination wrong, I opted for a pluralistic account of antidiscrimination law that encompasses all these aspects.

Substantive equality serves as a foundational principle for my account, insofar as it allows us to address discriminatory conduct in a holistic, complex, and nuanced manner, encompassing different dimensions like redistribution, recognition, the elimination of hostility, prejudice, and stigma, and the transformation of existing structures. I then advanced some theoretical considerations regarding what a fair distribution of housing would mean under this framework.

In the third chapter, I looked at how the first three identified aims (eliminating hostility, prejudice, and stigma; respecting cultural diversity and avoiding misrecognition; transforming existing structures) can be achieved by antidiscrimination norms in the field of housing. I argued that antidiscrimination law is essential to complement and enrich certain right to adequate housing components currently lacking concreteness, and to address additional dimensions that the right to housing alone is ill-equipped to tackle.

To support this argument, I looked at various antidiscrimination legal concepts, considering to what extent they can be mobilised to achieve those aims in the housing context and what changes should be operated in order to

best realise those objectives. I specifically considered direct discrimination, discriminatory harassment, indirect discrimination, the refusal of reasonable accommodation, and accessibility.

Firstly, the aim of eliminating hostility, prejudice, and stigma can be mostly addressed through direct discrimination. Antidiscrimination law has an added value here insofar as it casts light on the group-based dimension of the hostility, prejudice, and stigma suffered by individuals, which breaches their substantive equality and their participatory parity in such a way that transcends the limits of a right to adequate housing approach, as a symbolic harm is present beyond the material harm stemming from a deprivation of adequate housing. This can clearly be seen by looking at the case of Roma in Europe. Moreover, housing harassment is a helpful (albeit underused) concept to achieve this first aim, as it focuses on the existence of a persistent undesirable conduct linked to one of the prohibited grounds and it does not require a comparative element.

Secondly, the aim of recognising cultural diversity and avoiding misrecognition can be chiefly achieved through the prohibition of indirect discrimination. This points to the observation that housing laws and policies must accommodate different conceptions of what “home” means and what the realisation of the right to housing entails for different groups. This becomes especially clear when considering the case of Travellers in Europe. Antidiscrimination law complements here a right to adequate housing approach by further clarifying the rationale and implications of the cultural adequacy component of this right and by offering concrete legal avenues to better realise it.

Thirdly, the aim of transforming existing housing structures can be best achieved through antidiscrimination legal concepts like reasonable accommodation and accessibility. These concepts help to realise the social model of disability. In the housing context, this translates into obligations to adapt or to render accessible housing in multiple ways. Antidiscrimination law complements in this regard the accessibility component of the right to adequate housing, clarifying its equality rationale and what this entails in the housing context and offering additional pathways to secure it through antidiscrimination legal norms.

In the fourth chapter, I considered the last identified aim of antidiscrimination norms, that of ensuring a fair housing distribution. I argued that this fourth aim prompts a reflection around the concept of socioeconomic disadvantage and how discrimination on this basis can be effectively addressed by antidiscrimination law.

The fact that purchasing power currently dominates the distribution of housing in our societies raises questions as to whether socioeconomic disadvantage can be legitimately used to justify distributive differences, and the role of antidiscrimination norms in combatting discrimination based on socioeconomic grounds. Socioeconomic discrimination can be here mobilised in two ways: to eliminate socioeconomic discrimination in distributive processes or, going a step beyond, to eliminate *de facto* socioeconomic inequalities.

From the outset, I observed that several international and European human rights instruments already foresee socioeconomic criteria among the grounds of discrimination they prohibit. Whereas socioeconomic criteria are not included as prohibited discrimination grounds in EU law, they can be found in the ECHR, the ICESCR, and the RESC.

However, the specific criteria included in these instruments and their material scope differ substantially between instruments. Moreover, even when socioeconomic grounds have been incorporated in human rights instruments or in domestic legal orders, a lack of sufficient conceptual articulation and practical application deprive these grounds of much of their practical effectiveness.

I first considered the possibility of incorporating socioeconomic disadvantage as a prohibited discrimination ground from a theoretical standpoint, exploring what this would imply and pondering the philosophical responses to the question of why it is morally wrong to treat someone differently on the basis of some characteristics but not others. I also explored the notion of socioeconomic disadvantage by contrasting it to other concepts like social origin, property, birth, or socioeconomic status.

I then considered how socioeconomic disadvantage is incorporated in different antidiscrimination legal orders. International human rights law as

well as the interpretation of the ECSR offer inroads for this possibility, although the corresponding bodies still have to develop this ground further in order for it to be applicable in practice. By contrast, the ECtHR's interpretation (notwithstanding some dissenting opinions to the contrary) as well as the potential incorporation of this ground into EU law are less promising. By looking at selected national examples, I have argued that the French, Belgian, and Quebec cases all show how a socioeconomic ground could be used to tackle particular instances of socioeconomic discrimination.

Overall, I demonstrated that antidiscrimination law is conceptually equipped to target differences in treatment based on socioeconomic disadvantage. This does not mean that antidiscrimination law alone will succeed in combating socioeconomic inequalities: public policies striving towards more redistribution and towards the effective fulfilment of economic, social, and cultural rights, notably decommodification policies, will remain necessary to reach this goal.

In the fifth chapter, I further explored the identified aims of antidiscrimination law by looking at the phenomenon of housing segregation. I argued that housing segregation raises important nondiscrimination concerns. Moreover, antidiscrimination law helps to clarify the approach taken by treaty-monitoring bodies as regards the legal qualification of housing segregation, providing a clearer analytical framework to address this issue. I also showed that an antidiscrimination law perspective offers an added value when compared to a right to adequate housing approach to segregation issues, by allowing us to specifically address the group-based hostility, prejudice, and stigma suffered by residents of segregated areas.

I first advanced that the CERD has interpreted the prohibition of segregation contained in the ICERD as extending to *de facto* segregation, and I offered some insights derived from urban sociology to better understand the legal context and the dynamics at play in segregation processes. In particular, I highlighted the notion of territorial stigmatisation as a useful concept in this regard. This notion refers to the external marker imposed on segregated neighbourhoods by societal structures, generating hostility, prejudice, and stigma against the residents of those areas.

Bearing these insights in mind, I evaluated different situations from an antidiscrimination law perspective. States may actively create segregation, or design and implement housing policies which have a segregationist impact on disadvantaged groups without an adequate justification. In these situations of state-enforced segregation, it is the separation of certain groups as such which raises antidiscrimination law concerns, as these policies can be seen as inherently stigmatising.

States may also remain inactive faced with a situation of *de facto* segregation linked to territorial stigmatisation. In this last case, I argued for an antidiscrimination law-based obligation for states to desegregate, insisting that this obligation must be carried out under nondiscriminatory conditions and avoiding other human rights violations, in particular of the right to adequate housing and the right of the persons affected not to be displaced. This is not an obligation of result, to definitively end all outstanding instances of *de facto* segregation, but rather an obligation to take measures to endeavour inasmuch as possible to achieve this aim.

Finally, I highlighted the issue of institutionalisation, qualifying it as a form of segregation on grounds of disability and arguing that it represents a clear violation of antidiscrimination law.

In the sixth chapter, I chose another case study to further show the contribution of antidiscrimination law, looking at the processes of housing commodification and financialisation. Antidiscrimination law provides an analytical framework to approach these issues, as well as a legal framework to tackle certain discriminatory instances of housing commodification and financialisation.

I firstly resorted to urban sociology and urban geography to further define and understand what housing commodification and housing financialisation mean. Housing commodification arises when housing is detached from its rights and needs-based function, considered as a mere commodity to be produced and then sold for profit. Housing financialisation, for its part, represents one further step in this process, as housing becomes an asset in which financial flows of capital can be invested and disinvested and where profit is generated mainly through financial channels.

I also explored the role and responsibility under antidiscrimination law in this context of states, on the one hand, and of private actors, on the other hand. I argued that states have played a central role in enabling and sponsoring housing commodification and financialisation. Notably, by promoting the distributive criterion of purchasing power instead of need, these policies and practices have a disproportionate impact on status-based and socioeconomically disadvantaged groups, who are discriminated against and excluded in practice from accessing housing markets.

Private actors also play a role in housing commodification and financialisation through practices like predatory lending or redlining, and, in the case of some large actors, through structural actions affecting housing market conditions in circumscribed geographical areas. I claimed that all these harmful practices can be tackled through antidiscrimination law in various ways.

Lastly, in the seventh chapter, I moved to a discussion about how to elaborate and implement housing policies and practices that are diversity-conscious and all-inclusive, building on the arguments set out in previous chapters.

The goal of these policies and practices is the realisation of the right to nondiscrimination and the right to housing for everyone under conditions of substantive equality and participatory parity. These policies must be compatible with the achievement of the four identified aims of antidiscrimination norms: eliminating hostility, prejudice, and stigma; respecting cultural diversity and avoiding misrecognition; transforming existing housing structures; and ensuring a fair housing distribution.

To explore this dimension, I examined both procedural and substantive avenues. As procedural tools, I highlighted equality duties, in particular PSEDs, which are helpful to mainstream the situation and needs of disadvantaged groups in decision-making and policy making, building on the British PSED as a case study that should be transposed into other legal orders.

I noted, however, that PSEDs have a limited effect in promoting substantive policy changes, despite their demonstrable impact in enhancing

transparency and good administration, as well as safeguarding against administrative arbitrariness and ensuring consistency in policy implementation.

I therefore argued that states ought to pursue substantive avenues to guarantee substantive outcomes, beyond procedural fairness. In particular, I discussed decommodification policies, which improve the realisation of the right to housing for status-based and socioeconomically disadvantaged groups by committing to a fair distribution of housing based on need instead of purchasing power. Decommodification policies ensure that disadvantaged groups are effectively able to access housing beyond private markets, where they often suffer from exclusion, stigmatisation, and discrimination.

Decommodification policies can be mainly articulated through strong social housing systems, on the one hand, and through commons-based governance models linked to the right to the city, on the other hand. Furthermore, other substantive measures can be envisaged to secure diversity-conscious, all-inclusive housing policies. I referred to several of them, including the protection of publicly owned housing, supply-side subsidies, rent control and rent intermediation, stricter planning and zoning regulations, fiscal and budgetary measures, a more stringent regulation of financial actors, administrative sanctions and fines, and eminent domain and expropriation mechanisms.

These substantive measures should be rooted in antidiscrimination law, ensuring the meaningful participation of disadvantaged groups in policy and decision-making, the incorporation of diverse cultural practices and the specific needs of certain groups, and the realisation of substantive equality and participatory parity for all.

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In a nutshell, the central argument of this thesis is that the application of antidiscrimination law to the field of housing complements and enriches a right to adequate housing approach. I have arrived at this argument through an analysis of the conceptual and practical implications arising from the application of antidiscrimination norms to the housing context. This legal analysis, based on a human rights law methodology, has been enriched through references to political and legal philosophy and to urban sociology.

An enquiry into the philosophical foundations of antidiscrimination law has led me to identify four aims that antidiscrimination norms ought to pursue: eliminating hostility, prejudice, and stigma; respecting cultural diversity and avoiding misrecognition; transforming existing structures; and ensuring a fair distribution of important goods in society. Applying this framework to the field of housing, I have found that various antidiscrimination legal concepts can be mobilised to achieve those four aims, among which direct and indirect discrimination, discriminatory harassment, and reasonable accommodation. I have also defended the usefulness of incorporating and mobilising socioeconomic disadvantage as a prohibited ground of discrimination to this end.

I have then built on two case studies, housing segregation, on the one hand, and housing commodification and financialisation, on the other hand, to demonstrate the contribution of antidiscrimination law in this regard. Finally, I have proposed several procedural and substantive avenues to achieve diversity-conscious, all-inclusive housing policies in light of the analysis developed throughout this thesis, looking in particular at equality duties and at housing decommodification policies.

It is by understanding and putting into effect the lessons learned from this legal analysis of the application of international and European antidiscrimination law to the field of housing that we will ultimately secure housing for all in diverse European societies.

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