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**Mobilising anti-discrimination law to defend housing
rights in Europe: Socioeconomic disadvantage and
the right to housing**

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This paper focuses on socioeconomic disadvantage as a significant source of inequality in the realm of housing. Taking into account international and European human rights law, as well as selected domestic systems, it will show how anti-discrimination law has a significant role to play in addressing socioeconomic inequalities in the field of housing. Part I will explore the notion of non-discrimination on the grounds of socioeconomic status. Part II will examine two specific mechanisms to incorporate socioeconomic considerations into anti-discrimination legislation: public sector equality duties, and the inclusion of socioeconomic disadvantage as a prohibited ground of discrimination. Part III brings the discussion further into the context of housing. The paper concludes by suggesting that anti-discrimination law can be mobilised to secure the effective exercise of the right to housing by socioeconomically disadvantaged groups.

Introduction

Anti-discrimination law ought to play a fundamental part in the defence of housing rights in Europe. If access to adequate and affordable housing for all is an unfulfilled promise, it is even more so with regard to the most vulnerable members of society. In order to ensure the effective exercise of the right to housing in the European Union—as the title of this conference suggests—, special attention must be paid to the situation of those whose interests lie farthest from the political centres of decision. By

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framing the discussion in terms of socioeconomic disadvantage, this paper addresses a painful reality: purchasing power, rather than need, determines the current unequal distribution of housing. Changing this reality will not be an easy endeavour. A modest step towards this change may arise, it will be argued, from within anti-discrimination law.

Part I. Non-Discrimination on the Grounds of Socioeconomic Status

Socioeconomic status is one of the major constraints preventing access to adequate housing for many. Under the current housing paradigm, supported by a highly commodified and financialised structure, the ability to access housing is increasingly determined by resources rather than need.¹ Ultimately, the extent to which the fundamental right to adequate housing is secured depends on an individual's position on the socioeconomic ladder.

The notion of 'socioeconomic status' has not been frequently used in legal scholarship. The concept is far more common in sociology, psychology, and public health, where it has been described as 'a composite measure that typically incorporates economic status, measured by income; social status, measured by education; and work status, measured by occupation.'² Socioeconomic status, understood in this sense, can be a valuable notion in order to reinforce the protection anti-discrimination law confers on the most vulnerable.

Prohibiting discrimination on grounds connected with an individual's economic and social status is not unbeknownst to international and European human rights law. The Universal Declaration of Human Rights bans in Article 2 any distinction to the rights and freedoms set forth therein on the grounds of social origin, birth, or

¹ UN Human Rights Council (HRC), Document A/HRC/34/51, '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', 18 January 2017.

² D. B. Dutton and S. Levine, 'Overview, Methodological Critique, and Reformulation', in *Pathways to Health*, ed. J. P. Bunker, D. S. Gomby, and B. H. Kehrner (Menlo Park, CA: The Henry J. Kaiser Family Foundation, 1989), 30. According to the American Psychological Association, 'Socioeconomic status is the social standing or class of an individual or group. It is often measured as a combination of education, income and occupation.' See American Psychological Association, 'Socioeconomic Status', 2017, <http://www.apa.org/topics/socioeconomic-status/>, accessed 18 April 2017.

property.³ A similar prohibition is contained both in the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.⁴ These three grounds are contained as well in Article 14 of the European Convention on Human Rights, and in Protocol No. 12 to the Convention.⁵ Regarding the European Social Charter, social origin is mentioned both in the 1961 Charter and the 1996 revised Charter. Birth is only contained in the revised Charter, whereas property is not featured in either of them.⁶ Finally, the Charter of Fundamental Rights of the European Union mentions social origin, birth, and property in Article 21 on non-discrimination.⁷

Despite this strong condemnation of discrimination on the basis of social origin, birth, and property, those prohibitions remain today underdeveloped. There is no substantive case law either at the international or European levels addressing discrimination based on the socioeconomic position of individuals through any of these grounds. Not a single case has been decided by the European Court of Human Rights, nor by the European Committee of Social Rights, concerning discrimination on the grounds of social origin. Cases concerning discrimination on the grounds of birth and property have addressed for the most part hereditary matters and divisions of real estate.⁸

³ UN General Assembly, Resolution 217 A (III), 'Universal Declaration of Human Rights', 10 December 1948.

⁴ UN General Assembly, Resolution 2200A (XXI), 'International Covenant on Economic, Social and Cultural Rights', 16 December 1966, art. 2.2.; UN General Assembly, Resolution 2200A (XXI), 'International Covenant on Civil and Political Rights', 16 December 1966, art. 2.1.

⁵ Council of Europe, ETS No.005, 'Convention for the Protection of Human Rights and Fundamental Freedoms', 4 November 1950; Council of Europe, ETS No.177, 'Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms', 4 November 2000, art. 1.1.

⁶ Council of Europe, ETS No.035, 'European Social Charter', 18 October 1961, Preamble; Council of Europe, ETS No.163, 'European Social Charter (revised)', 3 May 1996, art. E.

⁷ European Union, Document 2012/C 326/02, 'Charter of Fundamental Rights of the European Union', 26 October 2012.

⁸ See, inter alia, European Court of Human Rights (ECtHR), First Section, *Camp and Bourimi v. the Netherlands*, Application no. 28369/95, ECHR 2000-X; European Court of Human Rights (ECtHR), Grand Chamber, *Fabris v. France*, Application no. 16574/08, ECHR 2013 (extracts). Discrimination on the grounds of birth has also been examined in the context of the rights of children born out of wedlock. Discrimination on the grounds of property has also been examined in the context of taxation.

Whereas the three cited grounds have not yet been applied to socioeconomic disadvantage, some steps have been taken towards the recognition of this type of discrimination at the international level. Importantly, the Committee on Economic, Social and Cultural Rights stated in its General Comment No. 20 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 [...].⁹

In the field of housing, the former United Nations Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Raquel Rolnik, advanced in her 2012 Report to the General Assembly 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 to affordable housing for the poor and marginalized and not benefit already advantaged social groups at the expense of others.¹⁰

The task to define discrimination on the grounds of socioeconomic status is not easy. Several conceptual issues may immediately be raised. For instance, does every economic, social, and cultural rights violation not have by definition a disproportionate impact on socioeconomically disadvantaged groups? What does a notion of non-discrimination on the basis of socioeconomic status add then, if anything, to existing economic, social, and cultural rights adjudication? Does it not suffice to resort to other explicitly prohibited grounds such as social origin, birth, or property?

To offer an answer to these questions, an interesting starting point lies in one of the decisions from the European Committee of Social Rights in the context of social assistance measures. *European Roma Rights Centre (ERRC) v. Bulgaria* concerns the withdrawal of social assistance benefits, in the form of maximum time limits on

⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), '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)', 2 July 2009, para. 35.

¹⁰ UN General Assembly, Document A/67/286, 'Special Rapporteur on adequate housing as a component of the right to an adequate standard of living', 10 August 2012, para. 17.

eligibility.¹¹ In this case, the Committee found a violation of the right to social assistance set out in the European Charter, and went on to examine whether there was a further violation of Article E on non-discrimination. After acknowledging that the Roma are an especially disadvantaged group, the Committee however deemed 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.’¹² In other words, it considered that the claim of non-discrimination on the basis of socioeconomic status could be subsumed under the wider violation of the right to social assistance, since social assistance measures are targeted at socioeconomically disadvantaged groups.

One of the dissenting opinions took a different view on this point.¹³ It was argued therein that the Committee should have found a violation of Article E, since the withdrawal had had a disproportionate impact on unemployed persons. Noting the particularly disadvantaged situation of this group, two members of the Committee 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.’¹⁴ They therefore argued, against the majority, that the withdrawal of benefits indirectly discriminated against the most vulnerable.

European Roma Rights Centre (ERRC) v. Bulgaria illustrates well some of the questions surrounding the notion of non-discrimination on the grounds of socioeconomic status. First, it might be hard indeed to delimit the instances where discrimination should come into play, as most violations of economic, social, and cultural rights will admittedly have a disproportionate impact on socioeconomically disadvantaged groups. However, it is argued that even if social assistance measures target, by definition, groups who are underprivileged in socioeconomic terms, a separate finding of discrimination may be conceivable if their particular needs have not been sufficiently taken into account in the framework of an underdeveloped system of economic, social, and cultural rights protection. This may well happen when policies further economic, social, and cultural rights in such a way as to benefit the

¹¹ European Committee of Social Rights (ECSR), *European Roma Rights Centre (ERRC) v. Bulgaria*, Collective complaint No. 48/2008, 18 February 2009.

¹² *Ibid.*, para. 45.

¹³ European Committee of Social Rights (ECSR), *European Roma Rights Centre (ERRC) v. Bulgaria*, Dissenting Opinion of Mr Petros Stangos, Joined by Mr Jean-Michel Belorgey, p. 13.

¹⁴ *Ibid.*, p. 15.

wealthier segments of the population to the detriment of the poorer. It may equally happen, as is the case here, when cutbacks to social entitlements disproportionately affect the most disadvantaged, instead of devising a fair distribution throughout all levels of the socioeconomic ladder.

Second, it is submitted that a specific notion of non-discrimination on socioeconomic grounds is better tailored for this purpose than the criteria of social origin, birth, or property. As noted above, such criteria have never been used in case law to address this particular kind of discrimination. Moreover, they all appear to refer either in a deterministic manner to immutable characteristics of individuals (social origin, birth), or 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. Socioeconomic status encompasses the circumstances surrounding individuals' birth and upbringing, but also contemplates the possibility of mishap at a later stage of their lives.

Finally, going beyond social origin, birth, and property to accommodate the notion of discrimination on socioeconomic grounds should not encounter any decisive formal obstacles. Most of the cited international and European human rights instruments foresee some kind of open-ended clause when prohibiting discrimination, often under the name 'other status.' As General Comment No. 20 of the Committee on Economic, Social and Cultural Rights reflects, international human rights law supports a conceptual extension of the scope of non-discrimination to cover material disadvantage. The lack of previous case law to this effect, although a practical hurdle, should not impede this development.

Examining the concrete modalities of how legal action should proceed in such a case is outside the scope of this paper. However, it does not seem far-fetched that judges or rights adjudicators reason incrementally, expanding on existing case law in the field of non-discrimination.¹⁵ For instance, the overlap of socioeconomic disadvantage with many of the prohibited grounds in anti-discrimination law may be a useful reference point from which to address this issue.¹⁶

¹⁵ See Jeff King, *Judging Social Rights*, Cambridge Studies in Constitutional Law (Cambridge: Cambridge University Press, 2012).

¹⁶ The linkages between socioeconomic disadvantage and racial and ethnic origin have been evidenced by the European Committee of Social Rights and the European Court of Human Rights in cases concerning Roma applicants. See, for instance, European Committee of Social

Part II. Incorporating Socioeconomic Status into Anti-Discrimination Legislation

This second part addresses two different avenues whereby socioeconomic status can be incorporated into anti-discrimination legislation. It first examines public sector equality duties, understood as mandates to public authorities to consider the impact policies may have on the most vulnerable. Because of the extent to which it has been developed, the public sector equality duty in the United Kingdom is taken as an example. The incorporation of socioeconomic status as a prohibited ground of discrimination will then be examined. To illustrate this possibility, reference will be made to the Belgian anti-discrimination legislation and the notion of ‘*fortune*.’

1. Public sector equality duties

A first possibility to incorporate the notion of discrimination on the grounds of socioeconomic status into legislation would be through the establishment of ex ante public sector equality duties. They consist of a legal obligation, binding on public authorities as well as private bodies exercising public functions, to consider the consequences that their actions may have in disfavoured groups who share a protected characteristic. In short, they require of the relevant body a prior evaluation of the impact public policies are likely to have with regard to vulnerable groups.

Public sector equality duties seek to mainstream the particular needs of vulnerable groups into policy-making and policy implementation. By creating a procedural obligation to take these considerations into account, they highlight the fact that the results of a given policy might affect different groups differently. Ultimately, public sector equality duties do not preclude any particular substantive outcomes. However, they may prove helpful to change structural decision-making practices, especially in the long term.

A particularly illuminating case study to show the functioning of this instrument is the public sector equality duty existing under British law. This duty, which was initially introduced by the Race Relations (Amendment) Act 2000 exclusively with

Rights (ECSR), *European Roma Rights Centre (ERRC) v. Bulgaria*, Collective Complaint No. 31/2005, 18 October 2006; European Committee of Social Rights (ECSR), *Centre on Housing Rights and Evictions (COHRE) v. Italy*, Collective Complaint No. 58/2009, 25 June 2010.

regard to race, has experienced a significant evolution over the years.¹⁷ In 2005 and 2006, additional statutory duties were created, respectively concerning disability and gender.¹⁸ With the passing of the Equality Act 2010, these duties converged into a single public sector equality duty ('PSED'), applicable to the previous three grounds as well as to several 'new' protected characteristics.¹⁹ Since April 2011, the duty thus applies to the following grounds: age, disability, gender reassignment, pregnancy and maternity, race, religion and belief, sex, and sexual orientation.²⁰

The U.K. public sector equality duty is not a substantive, but a procedural duty.²¹ Authorities must, in the exercise of their functions, 'have due regard to the need to' eliminate discrimination, harassment, and victimisation; advance equality of opportunity; and foster good relations with regard to these characteristics.²² According to the U.K. judiciary, 'equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.'²³

The PSED has generated a fair amount of case law in the framework of judicial review proceedings.²⁴ According to this case law, the duty has been interpreted as involving a conscious approach and state of mind.²⁵ It is a continuing duty, and must be discharged before and at the time that a particular policy is being considered.²⁶ It must be exercised in substance and with rigour, as opposed to merely requiring a 'box-ticking' exercise. An incomplete or erroneous appreciation of the duties will mean that

¹⁷ See Race Relations (Amendment) Act 2000. See also *R (Elias) v. Secretary of State for Defence* [2005] EWHC 1435 (Admin).

¹⁸ See Disability Discrimination Act 2005, Equality Act 2006.

¹⁹ See Equality Act 2010.

²⁰ *Ibid.*, s. 149.

²¹ See further Equality and Human Rights Commission, 'The Essential Guide to the Public Sector Equality Duty: England (and Non-Devolved Public Authorities in Scotland and Wales)', 2014.

²² Equality Act 2010, s. 149.

²³ *Moore and Coates v. Secretary of State for Communities and Local Government* [2015] EWHC 44 (Admin), para. 130.

²⁴ 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; 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.

²⁵ *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), para. 91.

²⁶ *Ibid.*, para. 95.

due regard has not been given to them.²⁷ In any case, the weight to be given to the countervailing factors is a matter for the public authority concerned.²⁸

Overall, it is clear that ‘the imposition of a duty to have “due regard” to the various identified “needs” does not impose a duty to achieve results.’²⁹ As one commentator has written:

whilst the PSED do[es] not set out individual “rights” as such, [it is] intended as a mechanism for enhancing political protection of rights and equality, by improving the standard of political and administrative decision-making, ensuring that equality considerations are put at the forefront of public service provision.³⁰

The repercussions of the U.K. public sector equality duty in the field of housing have been notable. Two strands of case law particularly show this: the cases concerning planning permissions for Travellers in the ‘Green Belt’, and the cases concerning the so-called ‘bedroom tax.’³¹

The first strand of case law concerns the refusal of planning permissions for Travellers in the Green Belt, a protected green area surrounding London. For the purposes of the ‘Green Belt’ policy, geared towards preventing urban sprawl, Traveller sites in this area are considered as inappropriate development. In the cases in hand, judicial review has focused on whether the inspectors in charge of issuing the corresponding planning permissions had considered all relevant circumstances before them, and therefore whether they had complied with the public sector equality duty in connection with the Traveller origin of the applicants.³² Although for the most part judicial review upheld the refusals to issue permissions, the positive obligation to have due regard to the particular needs and lifestyle of Travellers led to an increased awareness of their situation in policy discourse and administrative decision-making.³³

²⁷ Ibid., para. 90.

²⁸ *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141, para. 31.

²⁹ *R (Brown) v Secretary of State for Work and Pensions*, para. 81.

³⁰ Tom Hickman, ‘Too Hot, Too Cold or Just Right? The Development of the Public Sector Equality Duties in Administrative Law’, *Public Law* Apr (2013): 334.

³¹ For an application of the public sector equality duty to housing in a different context, see *Poshteh v Royal Borough of Kensington And Chelsea* [2015] EWCA Civ 711.

³² See *R (Baker) v Secretary of State for Communities and Local Government*; *Moore and Coates v. Secretary of State for Communities and Local Government*.

³³ See also European Court of Human Rights (ECtHR), Grand Chamber, *Chapman v. the United Kingdom*, Application no. 27238/95, ECHR 2001-I.

The second strand of case law concerns a statutory cap on housing benefits in cases of deemed under-occupation of social sector housing. This cap, commonly referred to as the 'bedroom tax', is part of a policy for reducing public expenditure aiming to ensure that social sector tenants who were occupying premises with more bedrooms than required moved into smaller accommodation. In these cases, compliance with the public sector equality duty has been examined by the judiciary with regard to disability and gender. In particular, the judges have evaluated whether the situation of certain categories of persons with disabilities and of women living in sanctuary scheme accommodations had been sufficiently taken into account by the government in the elaboration and implementation of the policy. Judicial review led to carving out exemptions for some of these groups, thus minimising the impact of the 'bedroom tax' on the most vulnerable.³⁴

As we have seen, public sector equality duties are an effective instrument to raise attention upon the exclusionary effects public policies might have on the most vulnerable. Following this reasoning, the question arises whether public sector equality duties could be extended to cover socioeconomic disadvantage.

In particular, this would help to remedy the situation whereby policies which have a negative impact on underprivileged, low-income groups fall only within the scope of the equality duty if those groups can be defined at the same time by one of the protected characteristics. In other words, insofar as the public sector equality duty broadly tends to protect the socioeconomically disadvantaged, it can do so only with regard to individuals or groups of individuals who can 'gather under the banner'³⁵ of racial and ethnic origin, gender, disability, age, religion, sexual orientation, etc. As Sandra Fredman has noted, the risk here is 'that the duty gives priority to groups who can congregate under a 'status' label to the detriment of those living in poverty more generally.'³⁶

An equality duty regarding socioeconomic disadvantage would be quite significant in the field of housing, where the socioeconomic position determines to a large extent the effective access to this social good. In the current housing paradigm, housing is for the most part distributed on the basis of an individual's ability to access

³⁴ See, inter alia, *Hurley v Secretary of State for Work And Pensions* [2015] EWHC 3382 (Admin); *R (Carmichael and Rourke) v Secretary of State for Work and Pensions* [2016] UKSC 58.

³⁵ See Sandra Fredman, 'The Public Sector Equality Duty', *Industrial Law Journal* 40, no. 4 (2011): 405–427.

³⁶ *Ibid.*, 407.

housing markets, and, consequently, on the basis of wealth and economic resources. If public authorities—and private actors exercising public functions—were required to have due regard to the need to improve the situation of the socioeconomically underprivileged, this would prevent (or at least render more cumbersome) the elaboration and implementation of housing policies that reinforce the position of the wealthier to the detriment of those excluded from housing markets.

The particular configuration of such a duty to reduce socioeconomic inequalities might take different forms, and the severity of the legal obligations it imposes on policy-makers may be adapted to political sensitivities.³⁷ However, as the U.K. case reveals, public sector equality duties may ultimately play a substantial role in policy decisions. Public authorities will take extra steps to make sure that they do not disregard it, thus mainstreaming the specific situation of groups of population who might not have a great input in the political process, or might not have the capacity to influence decision-making to the extent to which more resourceful groups do.³⁸

2. Socioeconomic status as a prohibited ground of discrimination

A second possibility to introduce the notion of discrimination on the grounds of socioeconomic status into legislation would be through an extension of the list of prohibited grounds. By adding socioeconomic disadvantage to the prohibited grounds of discrimination, the major concepts of anti-discrimination law, such as direct and indirect discrimination, harassment, victimisation, sharing of the burden of proof, etc., would apply to socioeconomic inequalities.

Although this possibility might sound radical, many European countries already include, at least formally, socioeconomic status as a prohibited ground of

³⁷ In the U.K., Section 1 of the Equality Act 2010 already foresees a public sector equality duty regarding socioeconomic inequalities. This duty has, however, not entered into force owing to the opposition of the Conservative party. See Amelia Gentleman, 'Theresa May Scraps Legal Requirement to Reduce Inequality', *The Guardian*, 17 November 2010, sec. Inequality, <https://www.theguardian.com/society/2010/nov/17/theresa-may-scraps-legal-requirement-inequality>, accessed 18 April 2017. Section 1 of the Equality Act 2010 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.*'

³⁸ See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA and London: Harvard University Press, 1980).

discrimination in their domestic legislations.³⁹ Moreover, the introduction of this ground would not necessarily mean that the protection against socioeconomic discrimination should attain the same level as the best protected of grounds in all circumstances (*'hierarchy of grounds.'*)⁴⁰ As suggested in the previous section, and in order to overcome political hostility, its scope could be also restricted, for instance, to areas in which particularly important social goods—such as housing—are at stake.

The practical implementation of this ground in countries which foresee socioeconomic disadvantage in anti-discrimination legislation has not been very straightforward. Due to the general lack of precedent or guidelines for its application, practitioners, courts, and national equality bodies seem wary to rely on it to combat inequality. Although further research would be required in this regard, our working assumption is that few case law is available at the national level in which socioeconomic status has genuinely been used as a prohibited discrimination ground.

The case of Belgium may be used to cast some light on this uncertainty. The Belgian Law of 10 May 2007 seeking to combat certain forms of discrimination includes the notion of *'fortune'* amongst the protected characteristics.⁴¹ *'Fortune'*, which translates roughly into English as *'property'*, refers to an individual's livelihood, resources and income.⁴²

³⁹ According to the last report of the European network of legal experts in gender equality and non-discrimination, nearly half of the 28 EU Member States include *'social standing'*, *'social class'*, *'social status'*, *'social descent'*, or *'social condition'* amongst the protected grounds of discrimination in domestic legislation, whether at the federal or the regional level. See European network of legal experts in gender equality and non-discrimination, *'A Comparative Analysis of Non-Discrimination Law in Europe. 2016'* (Luxembourg: European Commission, Directorate-General for Justice and Consumers, December 2016), 11–14.

⁴⁰ This notion refers to the fact that different prohibited grounds have varying degrees of protection at the EU level and often at the national level. For instance, unequal treatment on the grounds of age can be justified in more circumstances, and in a wider array of situations, than unequal treatment on the basis of racial or ethnic origin, or gender. See, inter alia, Päivi Johanna Neuvonen, *"Inequality in Equality" in the European Union Equality Directives: A Friend or a Foe of More Systematized Relationships between the Protected Grounds?*, *International Journal of Discrimination and the Law* 15, no. 4 (2015): 222–240.

⁴¹ *Loi du 10 mai 2007 tendant à lutter contre certaines formes de discriminations*, M.B., 30 mai 2007 / *Wet van 10 mei 2007 ter bestrijding van bepaalde vormen van discriminatie*, B.S., 30 mei 2007, art. 4, § 4°.

⁴² See *'Baromètre de La Diversité Logement'* (Brussels: Centre interfédéral pour l'égalité des chances, October 2014), 1, 28. Interestingly enough, the (authentic) French linguistic version of the European Convention on Human Rights includes *'fortune'* amongst the prohibited discrimination grounds in Article 14, whereas the (equally authentic) English linguistic version refers to *'property.'*

In the field of housing, '*fortune*' has been mostly applied to prevent discrimination based on the sources of income of an individual or family, especially in the private rented sector.⁴³ Whereas evaluating the ability of a potential tenant to afford rent payments is allowed, discrimination may occur if the landlord refuses certain candidates a priori on the sole basis of where their revenue stems from. For instance, a landlord will discriminate against potential tenants if she places an ad reading 'Unemployed persons or persons living on benefits need not apply.'⁴⁴ The same will be true if the landlord refuses to rent to an individual or a family on the grounds that their income is made up from social, family, or disability allowances, instead of 'gainful employment.' Another example would be the case where the refusal is merely based on the potential tenant not having a permanent employment contract or not being able to prove stable income. Some case law seems to be emerging in Belgium in this direction.⁴⁵ As the Belgian National Equality Body, *Unia*, has advanced, it is key in these cases to evaluate 'the proportionality of these requirements in light of the objective pursued.'⁴⁶

This may serve as guidance on how to incorporate socioeconomic status as a prohibited ground of discrimination from a practical perspective. Ultimately, this approach can coexist with public sector equality duties, so that socioeconomic inequalities are addressed holistically by anti-discrimination law both from an ex ante and an ex post perspective.

Part III. Housing, Non-Discrimination, and Socioeconomic Disadvantage

It has been argued that a notion of discrimination on the grounds of socioeconomic status can represent a valuable addition to anti-discrimination law. Moreover, the paper has briefly examined two concrete modalities in which such a

⁴³ See Ibid., 28–30.

⁴⁴ It is not difficult to find entries in classified ads websites including this or some similar warnings (In French, '*Chômeurs et CPAS s'abstenir.*')

⁴⁵ In 2015, a civil court made a finding of discrimination on the grounds of socioeconomic status ('*fortune*') regarding a landlord who required of potential tenants proof of a permanent employment contract or income higher than €2,000 per month. The court issued a prohibitory injunction. See Tribunal de première instance de Namur, Judgment of 5 May 2015.

⁴⁶ 'Baromètre de La Diversité Logement', 28–29.

notion can be materialised in practice. This part now seeks to further contextualise the discussion in the field of housing by means of a specific example.

In light of the housing situation preventing many from accessing affordable housing in the market, socioeconomic considerations play a major role in this field. When public authorities fail to sufficiently consider the impact of certain housing policies on the socioeconomically disadvantaged, or when they elaborate and implement policies which have a disproportionate impact on them without an objective and reasonable justification, the notion of discrimination on the basis of socioeconomic status, as it has been presented here, will be engaged.

The case of *Garib v. The Netherlands* at the European Court of Human Rights illustrates extremely well this discussion.⁴⁷ It concerns legislation allowing a number of municipalities to take measures in designated areas restricting the concession of housing permits—necessary to take up residence—based on the income of new residents.⁴⁸ The applicant in this case was denied a housing permit, and was therefore prevented to move to another property in the same district she lived in, on the grounds that she had not been resident in the Rotterdam Metropolitan Region for the requisite period (six years) and did not meet the income requirement, since her income consisted exclusively of social welfare benefits.⁴⁹

In its judgment, the Chamber examined Article 2 of Protocol No. 4 to the European Convention on Human Rights—freedom to choose residence—and concluded that the policy pursued a legitimate aim and that it was reasonable, suited to achieving the legitimate aim pursued, and proportionate.⁵⁰ In order to reach this conclusion, it examined the particular circumstances surrounding the situation of the applicant, such as the fact that she had given no reasons for not wanting to reside in other areas of the city.⁵¹

A dissenting opinion to the judgment emphasises the fact that the applicant belonged to the socioeconomically underprivileged, and points out that the policy in

⁴⁷ European Court of Human Rights (ECtHR), Third Section, *Garib v. the Netherlands*, Application no. 43494/09, 23 February 2016 [referred to the Grand Chamber].

⁴⁸ See Inner City Problems (Special Measures) Act (*Wet bijzondere maatregelen grootstedelijke problematiek*), 22 December 2005.

⁴⁹ See further European Court of Human Rights (ECtHR), Third Section, *Garib v. the Netherlands*, paras. 5–15.

⁵⁰ *Ibid.*, paras. 110 et seq.

⁵¹ *Ibid.*, para. 131.

hand 'is linked to source of income and is thus implicitly connected to the social origin and gender of the persons concerned.'⁵² The two dissenting judges understood that the applicable principles concerning discrimination should have guided the majority ruling.⁵³ In their view, an income-based restriction such as the one contained in this statute leads to stigmatisation of the poor. A restriction on choosing one's residence based on income is not necessary or proportionate, they argued.⁵⁴

Examining the situation in terms of discrimination on the grounds of socioeconomic status could significantly add to the discussion. The European Convention on Human Rights contains an open-ended clause 'other status', which the Court has interpreted to cover other grounds not initially specified in Article 14.⁵⁵ Should the Court consider socioeconomic status as embodied by this open-ended clause, the *Garib* case could be framed more clearly as an indirect discrimination case. The test would then be whether the policy in question has had a disproportionate impact on the socioeconomically underprivileged as a group, without it being necessary and proportionate. The legal analysis would thus move from a specific one regarding the circumstances of the applicant to a general one related to the impact on the disadvantaged group as a whole. Taking into account the particular situation of the applicant in order to determine the proportionality of the restriction, as the Chamber judgment did, would no longer be warranted.

The suggested approach would probably be better tailored from a legal perspective, and address more precisely the specific harm suffered by the socioeconomically disadvantaged on account of the policy in this case. Let this very brief legal analysis of a case which is currently under the spotlight serve as an indicator of the deep changes the notion of discrimination on the grounds of socioeconomic status may bring to housing issues. There is no doubt that anti-discrimination law can be mobilised, in this sense, to secure the effective exercise of the right to housing by socioeconomically disadvantaged groups.

⁵² European Court of Human Rights (ECtHR), Third Section, *Garib v. the Netherlands*, Joint Dissenting Opinion of Judges López Guerra and Keller, para. 14.

⁵³ *Ibid.*

⁵⁴ *Ibid.*, para. 21.

⁵⁵ The Court has expanded in its case law the open-ended clause 'other status' to cover disability, age, sexual orientation, fatherhood, marital status, membership of an organisation, military rank, parenthood of a child born out of wedlock, and place of residence. See 'Handbook on European Non-Discrimination Law' (Luxembourg: European Union Agency for Fundamental Rights and Council of Europe, July 2010).

Conclusion

Socioeconomic status, understood as an individual's economic, social, and work status, is one of the major constraints preventing access to adequate housing. Prohibiting discrimination on grounds connected with an individual's economic and social status is not unbeknownst to international and European human rights law. In fact, the former seems to support a conceptual extension of the scope of non-discrimination to cover material disadvantage. This would capture the specific nature of socioeconomic disadvantage better than existing grounds like social origin, birth, or property; and should not encounter any decisive formal obstacles in its implementation. Such a notion would protect individuals whose needs have not been sufficiently taken into account in the framework of an underdeveloped system of economic, social, and cultural rights protection.

Two possibilities to incorporate socioeconomic status into anti-discrimination legislation are public sector equality duties and an extension of the list of prohibited grounds. The first consists of a legal obligation, binding on public authorities and private bodies exercising public functions, to evaluate ex ante the impact of public policies on vulnerable groups. As the experience in the U.K. shows, public sector equality duties can constitute powerful grounds of judicial review. A public sector equality duty can be devised with regard to socioeconomic inequalities, thus mainstreaming the needs of the less affluent segments of the population into policy-making. The second possibility concerns the inclusion of socioeconomic disadvantage amongst the prohibited grounds of discrimination by law. Whereas several European Union Member States foresee this already, the practical aspects of it are not straightforward. The case of Belgium might give some guidance in this regard.

Non-discrimination on socioeconomic grounds will play a very significant role in the field of housing, where the individual's socioeconomic position determines their effective access to this social good. The recent case of *Garib v. The Netherlands* at the European Court of Human Rights illustrates well this point. Had the case been analysed from the standpoint of discrimination on the basis of socioeconomic status, the specific harm suffered by disadvantaged groups on account of the policy at stake would have been addressed more precisely. Anti-discrimination law can be mobilised, in this sense, to secure the effective exercise of the right to housing by socioeconomically disadvantaged groups.