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## SOCIOECONOMIC PRECARIOUSNESS IN TIMES OF COVID-19: A HUMAN RIGHTS QUANDARY UNDER THE ECHR

**Abstract:** *The COVID-19 pandemic, and pandemics in general, affect socioeconomically disadvantaged people more severely. This is due not only to their precarious living, health, and working conditions, but also to public actions and omissions. However, their plight remains mostly invisible to the public, governments, and legislators, which raises many questions regarding respect of their fundamental rights. In this contribution, I explore these questions in light of the European Convention on Human Rights (ECHR). On the basis of the corpus of literature in the field and the European Court of Human Rights (ECtHR) case law, I show that the Strasbourg Court has developed some protection for people in a precarious situation, especially under the prohibition of inhuman and degrading treatment and the right to private and family life. This case law is likely to be relevant to the protection of socioeconomically underprivileged people during pandemics. However, this protection is limited and imbued with pitfalls. Against this background, I show that there is an urgent need for practitioners and courts to explore an additional tool under the ECHR: the prohibition of discrimination on grounds of socioeconomic status. This tool can be used to tackle issues of misrecognition which particularly affect socioeconomically underprivileged people, who are more severely affected by public actions and omissions in the context of the current pandemic.*

**Keywords:** COVID-19, discrimination, intersectionality, poverty, stereotypes

### INTRODUCTION

In September 2020, as Madrid experienced an upsurge in COVID-19, new quarantine measures were instituted in working-class areas of the city, while sparing affluent areas. The anger of the confined underprivileged neighborhoods of Madrid erupted after Isabel Díaz Ayuso, President of the Community of Madrid, declared that the spike was due to

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the way of life of migrants, who mostly inhabited the areas under lockdown.<sup>1</sup> Many residents from these neighborhoods expressed their sense of injustice and incomprehension towards the treatment they received and the stigma they were subjected to.

This case is just one example among many of how COVID-19 affects socioeconomically disadvantaged people more severely, not only because of the measures taken by governments but also because of the precarious living conditions these people experience, concerning their health and working conditions, etc. Socioeconomically disadvantaged people usually come from particularly vulnerable groups: single parents, people working in the informal sectors, sex workers, homeless people, non-skilled or irregular migrants etc. Various endogenous and exogenous factors linked to structural causes explain why these people are particularly affected by the pandemic (1). However, their plights and precarious situations are barely taken into account by policy makers and legislators, which is evidenced in states' omissions and inappropriate actions in the context of the pandemic regarding categories of socioeconomically underprivileged or precarious people – mainly people living in poverty, but not exclusively. This situation raises many questions in terms of respect for fundamental rights – whether political, civil or socioeconomic – especially in light of the European Convention on Human Rights (Convention or ECHR).

In light of the situation in Europe, I argue that the body and doctrine of fundamental rights is able to respond in part to situations of latent precariousness linked to growing inequalities and exacerbated by the pandemic. Although the Convention's primary objective is not the protection of socioeconomic interests, the European Court of Human Rights (ECtHR) has already to a certain extent operationalised some civil and political rights in the protection of precarious people, including the prohibition of inhuman and degrading treatment and the right to private and family life. This case law is based on the so-called “free-standing rights” (2).<sup>2</sup> Nevertheless, it has its limits. In this regard I argue that Art. 14 of the Convention (to be invoked in combination with another right of the Convention), read to prohibit discrimination on grounds of socioeconomic situation, is an additional tool with the potential to help protect the rights of disadvantaged people during the current pandemic (3).

## 1. PRECARIOUS PEOPLE ARE HIT THE HARDEST BY THE PANDEMIC

Socioeconomically disadvantaged people are the most affected by COVID-19: they are over-represented among people infected with the virus<sup>3</sup> as well as among people

<sup>1</sup> R. Minder, *In Madrid, Covid-19 Resurgence Divides Rich and Poor*, New York Times, 30 September 2020, available at: <https://nyti.ms/3qMacyf> (accessed 30 May 2021).

<sup>2</sup> Meaning that they exist independently and do not have to be invoked in combination with another right of the Convention, as opposed to Art. 14 ECHR.

<sup>3</sup> See generally B. Burström, W. Tao, *Social Determinants of Health and Inequalities in COVID-19*, 30(4) *European Journal of Public Health* 617 (2020); J. Patel, *Poverty, Inequality and COVID-19: The Forgotten Vulnerable*, 183 *Public Health* 110 (2020), pp. 110–111.

who develop complications and die from it.<sup>4</sup> Several studies have shown the same phenomenon in the context of previous pandemics, such as the Spanish flu of 1918, which mainly affected the working classes, whether in India, Norway, or the United States.<sup>5</sup> It was no different with the H1N1 flu of 2009.<sup>6</sup> Various factors explain this and should be highlighted.

First, these people fall within the “at risk” groups because of their over-representation among people suffering from cardiovascular disease, diabetes, cancer and chronic diseases.<sup>7</sup> It has been shown that the risks of serious illness and death during the COVID-19 pandemic are highest among people with poor health, inadequate nutrition, and suffering from chronic conditions.<sup>8</sup> Second, the living conditions of disadvantaged people make them more vulnerable to the virus: they live in more densely populated areas, in particular in urban areas where, by definition, the virus is more likely to circulate. Furthermore, disadvantaged neighborhoods are more likely to contain overcrowded houses, smaller dwellings with little outdoor space, and less access to common green spaces – i.e. in an environment conducive to the spread of the virus.<sup>9</sup> Third, when employed these people are more exposed to the virus because of the nature of their work, especially in the service sector (mass distribution, cleaning, deliveries, care etc.). They are often found among key workers and are therefore forced to travel to work and use public transport, which implies additional exposure to the virus.<sup>10</sup> Fourth, even where healthcare is in principle available, these people have increased difficulty in accessing it, raising the problem of “non-take-up.” The non-take-up phenomenon concerns situations where people have rights on paper but do not exercise them or benefit from them in practice, for a variety of reasons: administrative and practical obstacles, linguistic issues, stigma etc.<sup>11</sup> Moreover, this situation is part of a context

<sup>4</sup> See generally R. Blundell, *COVID-19 and Inequalities*, 41(2) Fiscal Studies 311 (2020), pp. 311-313; Cl. Bambra et al., *The COVID-19 Pandemic and Health Inequalities*, 74 Journal of Epidemiological Community Health 964 (2020); E. Sydenstricker, *The Incidence of Influenza among Persons of Different Economic Status during the Epidemic of 1918: Commentary*, 36(4) Public Health Reports 154 (1931).

<sup>5</sup> Bambra et al., *supra* note 4, pp. 964-948.

<sup>6</sup> *Ibidem*.

<sup>7</sup> *Ibidem*; Burström, Tao, *supra* note 3, pp. 617-618.

<sup>8</sup> *Ibidem*.

<sup>9</sup> See generally Bambra et al., *supra* note 4, pp. 964-948; M. Buheji et al., *The Extent of COVID-19 Pandemic Socioeconomic Impact on Global Poverty. A Global Integrative Multidisciplinary Review*, 10(4) American Journal of Economics 220 (2020).

<sup>10</sup> See generally Bambra et al., *supra* note 4, pp. 964-948; K. Pouliakas, J. Branka, *EU Jobs at Highest Risk of Covid-19 Social Distancing: Is the pandemic Exacerbating the Labour Market Divide?* Cedefop Working Paper no. 1 (2020). See also L. Gamio, *The Workers Who Face the Greatest Coronavirus Risk*, New York Times, 15 March 2020, available at: <https://nyti.ms/3wk545F> (accessed 30 May 2021).

<sup>11</sup> V. Hernanz et al., *Take-up of Welfare Benefits in OECD Countries: A Review of the Evidence*, OECD Social, Employment and Migration Working Papers no. 17 (2004); See also B. Baumberg, *The Stigma of Claiming Benefits: A Quantitative Study*, 45(2) Journal of Social Policy 181 (2016); M. Fuchs et al., *Falling through the Social Safety Net? Analysing Non-take-up of Minimum Income Benefit and Monetary Social Assistance in Austria*, 54 Social Policy Administration 827 (2020); S. Chareyron, P. Domingues,

wherein public health systems have deteriorated globally since the early 2000s, and even more since the financial crisis of 2008, as underlined in a recent report by the UN Rapporteur on extreme poverty and human rights.<sup>12</sup> Fifth, workers who are undeclared or hired in the informal sectors – overrepresented among irregular migrants – are left without income and social protection. Sixth, the closure of schools involving temporary online teaching has obvious and significant consequences for the most precarious populations. The digital divide is a major obstacle for these people.<sup>13</sup> Seventh, while lockdown measures have been difficult for the entire population at a global level, they have *de facto* hit more severely people who live in cramped, unsanitary, overcrowded housing without green space. They also have an important deterrent impact on people who find themselves in social and human situations of distress, such as women victims of domestic violence, single mothers,<sup>14</sup> or people with mental disorders.<sup>15</sup> Eighth, people in a precarious situation have also been subject to specific measures taken by public authorities, such as the lockdown measures in certain working-class neighborhoods in Madrid. They have also been particularly targeted by the police in comparison to the rest of the population, often in the context of non-compliance with lockdown measures, confirming the studies relating to “facial control” or “ethnic profiling”<sup>16</sup>, which reveal latent discrimination against people perceived as belonging to ethnic minorities, which in turn are over-represented among the poor.<sup>17</sup> In addition to the continued stigmatisation of these precarious populations, viewed from a socio-economic perspective financial penalties are likely to further affect them, especially when

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*Take-up of Social Assistance Benefits: The Case of the French Homeless*, 64(1) *Review of Income Wealth* 170 (2018).

<sup>12</sup> Special Rapporteur on extreme poverty and human rights, *Looking Back to Look Ahead: A Rights-based Approach to Social Protection in the Post-COVID-19 Economic Recovery*, United Nations, 2020, para. 53.

<sup>13</sup> See E. Beauoyer et al., *COVID-19 and Digital Inequalities: Reciprocal Impacts and Mitigation Strategies* 111 *Computer Human Behavior* 1 (2020); M.M. Jæger, E.H. Blaabæk, *Inequality in Learning Opportunities during Covid-19: Evidence from Library Takeout*, 68 *Research of Social Stratification and Mobility* 1 (2020); Special Rapporteur on extreme poverty and human rights, *supra* note 12, para. 44.

<sup>14</sup> E.g. S. Hennette-Vauchez, *L'urgence (pas) pour tou(te)s*, *La Revue des droits de l'homme* 1 (2020).

<sup>15</sup> E.g. R. Armitage, L.B. Nellums, *The COVID-19 Response Must be Disability Inclusive*, 5 *The Lancet* 257 (2020); UN, *Preventing Discrimination against People with Disabilities in COVID-19 response*, 19 March 2020, available at: <https://news.un.org/en/story/2020/03/1059762> (accessed 30 May 2021).

<sup>16</sup> E.g. S. Body-Gendrot, *Police Marginality, Racial Logics and Discrimination in the Banlieues of France*, 33(4) *Ethnic and Racial Studies* 656 (2010); F. Jobard et al., *Mesurer les discriminations selon l'apparence: une analyse des contrôles d'identité à Paris*, 3(67) *Population* 423 (2012).

<sup>17</sup> For instance, an Amnesty International report showed that during the first wave of the pandemic, 10% of fines in France were imposed in Seine Saint Denis, the poorest department in *Ile de France*, where the majority of inhabitants originate from West or North Africa. This figure of 10% – three times higher than in the rest of the country – according to Amnesty International indicates that the department has been controlled disproportionately, not to mention the recurrent illegal use of force by the authorities in these neighborhoods. Amnesty International, *Policing the Pandemic Human Rights Violations in the Enforcement of COVID-19 Measures in Europe*, 24 June 2020, p. 5, available at: <https://bit.ly/3hxDAUs> (accessed 30 May 2021).

finances reach exorbitant amounts, as they do in Switzerland or the United Kingdom (EUR 10,000).<sup>18</sup>

Even when protection measures toward these groups have been adopted they are far from sufficient, owing to the temporary nature of these programmes, the inadequacy of the grants and support payments provided, the failure to take into account the situation of people working in informal sectors or precarious employment (who represent 61.2% of the global workforce), the lack of measures to support irregular migrants or to tackle gender issues, etc.<sup>19</sup> Moreover, the practical and administrative obstacles to effectively benefiting from these measures constitute a major problem, especially in the Member States of the European Union, where “many programs include conditions that are unsuitable for the realities of people living in poverty or in precarious employment.”<sup>20</sup> Indeed, “many schemes include conditions that are maladapted to the realities of people living in poverty or those in precarious employment.” According to the Special Rapporteur on extreme poverty and human rights, “applications often include complex procedures and bureaucratic jargon, and are not provided in appropriate languages, despite evidence that these are key obstacles to people’s ability to take up benefits.”<sup>21</sup>

Finally, the vaccine appears to be of utmost importance to protect the aforementioned poor people mainly affected by the pandemic. However, poor people are among the sections of the population which are the least vaccinated,<sup>22</sup> not only because of practical and administrative obstacles<sup>23</sup> but also because of their higher vaccination hesitancy with respect to both the vaccine and even the health system, which is partly explained by their experiences of long-standing discrimination, as poor people usually belong to minorities and discriminated groups.<sup>24</sup> This is, for instance, the case of the Roma community in Hungary,<sup>25</sup> as well as black people in the UK<sup>26</sup> and the US<sup>27</sup> in the

<sup>18</sup> See e.g. T. Helm, M. Savage, R. McKie, £10,000 *Fines Warning for Failing to Self-isolate as England Covid Infections Soar*, The Guardian, 19 September 2020, available at: <https://bit.ly/2TvjDQ9> (accessed 30 May 2021).

<sup>19</sup> Special Rapporteur on extreme poverty and human rights, *supra* note 12, para. 28.

<sup>20</sup> *Ibidem*, para. 28.

<sup>21</sup> *Ibidem*, para. 20.

<sup>22</sup> E.g. P. Peretti-Watel et al., *Attitudes toward Vaccination and the H1N1 Vaccine: Poor People’s Unfounded Fears or Legitimate Concerns of the Elite?*, 109 *Social Science Medicine* 10 (2014).

<sup>23</sup> See D. Gruener, *Immunity Certificates: If We Must Have Them, We Must Do It Right*, COVID-19 Rapid Response Impact Initiative – White Paper 12 (2020); B. Dreyfus, *Les refus de soins opposés aux bénéficiaires de la CMU-C, de l’ACS et de l’AME*, 46(2) *Regards* 41 (2014).

<sup>24</sup> E.g. V. Gamble, *Under the Shadow of Tuskegee: African Americans and Health Care*, 87 *American Journal of Public Health* 1773 (1997).

<sup>25</sup> See M. Dunai, *Falling Like Flies: Hungary’s Roma Community Pleads for COVID Help*, Reuters, 31 March 2021, available at: <https://www.reuters.com/article/us-health-coronavirus-hungary-roma-idUSKBN2BN2R7> (accessed 30 May 2021).

<sup>26</sup> See M. Razai et al., *Covid-19 Vaccine Hesitancy among Ethnic Minority Groups*, 372 *British Medical Journal* 513 (2021).

<sup>27</sup> See L. Bogart et al., *COVID-19 Related Medical Mistrust, Health Impacts, and Potential Vaccine Hesitancy Among Black Americans Living with HIV*, 86(2) *Journal of Acquired Immune Deficiency Syndromes* 200 (2021).

context of COVID-19, confirming studies carried out previously according to which low-skilled and poor people tend to be less commonly vaccinated, although they are among the highest “at-risk” groups.<sup>28</sup> Against this background, as the COVID-19 vaccine rollout continues apace and hope slowly returns that we are on our way back to some sort of “normalcy,” the aftermath pandemic measures have started being implemented. These include the preparation of vaccination certificates to enable people to travel and access services upon presentation of a certificate showing that its bearer has been vaccinated. This system of certificates is likely to exclude socioeconomically underprivileged people even more, as I have argued elsewhere.<sup>29</sup> Indeed, even if making a vaccination programme widely available is likely to protect the poor, the system of certificates itself is exclusionary: people who are not vaccinated – overrepresented among the poor – will not be able to benefit from such certificates and therefore be unable to access some essential services.<sup>30</sup>

## 2. THE PROTECTION OF SOCIOECONOMICALLY UNDERPRIVILEGED PEOPLE THROUGH THE FREE-STANDING RIGHTS OF THE ECHR: *TOUR D’HORIZON AND LIMITS*

The situation of precarious people affected by the pandemic for the aforementioned reasons raises important questions with regard to respect of their fundamental rights protected by the ECHR. Many of their rights have been weakened by the pandemic, whether this concerns the fines likely to be imposed on them or their non-take of their social benefits (right to property – Art. 1 of the Protocol 1); the difficulties in attending school at home (right to education – Art. 2 of the Protocol 1); the freedom of movement issues raised by the vaccination “passport” (Art. 2 of the Protocol 4); the exacerbation of the precariousness of their living conditions (right to private and family life – Art. 8); also linked to their poor health condition and their exposure to the virus (prohibition of inhuman and degrading treatment – Art. 3, and the right to live – Art. 2). Consequently the pandemic, which has particularly affected socioeconomically underprivileged people, seems to have dramatically weakened their rights protected by the ECHR.

<sup>28</sup> See E. Paul et al., *Attitudes towards Vaccines and Intention to Vaccinate against COVID-19: Implications for Public Health Communications*, *The Lancet Regional Health – Europe* 1 (2021); M. Schwarzingler et al., *COVID-19 Vaccine Hesitancy in a representative working-age population in France: A survey experiment based on vaccine characteristics*, *Lancet Public Health* 210 (2021); A. Schoenfeld Walker, *Pandemic’s Racial Disparities Persist in Vaccine Rollout*, *New York Times*, 5 March 2021, available at: <https://nyti.ms/36gvCKm> (accessed 30 May 2021).

<sup>29</sup> S. Ganty, *The Veil of the COVID-19 Vaccination Certificates: Ignorance of Poverty, Injustice Towards the Poor*, *12 European Journal of Risk Regulation* 1 (2021).

<sup>30</sup> *Ibidem*.

The question I would like to answer in this section is the extent to which the free-standing rights protected by the ECHR have been operationalized by the ECtHR to protect the rights of socioeconomically underprivileged people, and whether this case law is relevant in the specific case of the pandemic. On the basis of the abundant literature related to the protection of the fundamental rights of socioeconomically underprivileged people through the ECHR,<sup>31</sup> and some examples of ECtHR case law (especially with respect to Arts. 3 and 8), I argue that there is room for their increased protection in the context of the pandemic (2.1.), albeit to a limited extent (2.2.).

### 2.1. *Tour d'horizon*

Certainly the ECHR mainly protects civil and political rights, but in addition the right to education and the right to property are usually classified as socioeconomic rights.<sup>32</sup> At the same time however, socioeconomic interests such as housing rights, social security, and health and health care have also been protected in the Strasbourg system.<sup>33</sup>

As recalled by Françoise Tulkens, the classification between political, civil and socioeconomic rights is porous, especially in the case law of the ECHR,<sup>34</sup> and as explained by Lavrysen the Court is not always consistent in its approach.<sup>35</sup>

As a consequence, civil and political rights are also capable of being applied to protect the interests of socioeconomically underprivileged people, which are intrinsically linked to socioeconomic rights. As explained below, the Court has already ruled against certain member States under the free-standing Convention rights because of their measures – or their lack of measures – to safeguard either the civil or political interests and/or their socioeconomic interests in the case of people in socioeconomically underprivileged situations. A great deal of literature has been published on this specific question,<sup>36</sup> and summarizing it would go beyond the scope of this article. However, it seems useful to mention some examples in this paper which will help explain the extent to which the

<sup>31</sup> See e.g. L. Lavrysen, *Court Fails to Acknowledge Discrimination and Stigmatization of Persons Living in Poverty*, Strasbourg Observers (2016); L. Lavrysen, *Strengthening the Protection of Human Rights of Persons Living in Poverty under the ECHR*, 33 Netherlands Quarterly of Human Rights 293 (2015); F. Tulkens, *The Contribution of the European Convention on Human Rights to the Poverty Issue in Times of Crisis*, 2(2) Cyprus Human Rights Law Review 127 (2013); A.E.M. Leijten, *Core Rights and the Protection of Socio-economic Interests by the European Court of Human Rights*, Cambridge University Press, Cambridge: 2018; A. O'Reilly, *The European Convention on Human Rights and the Socioeconomic Rights Claims: A Case for the Protection of Basic Socioeconomic Rights through Article 3*, 15 Hibernian Law Journal 1 (2016); V. David, *Caring, Rescuing or Punishing? Rewriting RMS v. Spain (ECtHR) from an Integrated Approach to the Rights of Women and Children in Poverty*, in: E. Brems, E. Desmet (eds.), *Integrated Human Rights in Practice*, Edward Elgar, Cheltenham: 2017, pp. 174-181.

<sup>32</sup> They are respectively enshrined in Protocol 1, Arts. 1 and 2.

<sup>33</sup> See e.g. Leijten, *supra* note 31, pp. 233 et seq.

<sup>34</sup> Tulkens, *supra* note 31, p.127.

<sup>35</sup> Lavrysen, *Strengthening the Protection*, *supra* note 31, p. 304.

<sup>36</sup> See the literature in note 31.

freestanding Convention rights<sup>37</sup> can be operationalized to protect socioeconomically underprivileged people in the pandemic situation described above in section 1, especially considering the case law of the Court related to Arts. 3 and 8.<sup>38</sup>

For instance, the prohibition of inhuman and degrading treatment enshrined in Art. 3 of the Convention implies not only negative but also positive obligations on the part of Member States, which cannot be derogated from.<sup>39</sup> Indeed, according to settled case law, given the absolute nature of Art. 3<sup>40</sup> even considerable difficulties encountered by States cannot exculpate them from their obligations under this provision.<sup>41</sup> This is *a fortiori* true in the context of a pandemic, which in no way constitutes an excuse to derogate from this absolute fundamental right. The Court considers that inhuman treatment encompasses, *inter alia*, actual bodily injury or intense physical or mental suffering,<sup>42</sup> while a treatment is considered as degrading if it humiliates or degrades an individual; if it implies a lack of respect for human dignity or even diminishes it; or if it arouses feelings of fear, anguish or inferiority capable of breaking a person's moral and physical resistance.<sup>43</sup> Moreover, it is sufficient that the victim is humiliated in her own eyes.<sup>44</sup> However, Art. 3 is applied only when a situation reaches a certain level of seriousness, depending on the circumstances of the case and the victim's characteristics.<sup>45</sup> For example, this provision cannot be interpreted as obliging States to guarantee a right to housing to everyone within their jurisdiction.<sup>46</sup> Nonetheless, this case-by-case approach with respect to Art. 3 ECHR does

<sup>37</sup> I speak only of free-standing Convention rights in this section, because Art. 14 – related to the prohibition of discrimination – has been much less operationalized to protect against discrimination on the grounds of socioeconomic status, as will be analyzed in the last section.

<sup>38</sup> We should bear in mind however that other Convention rights, such as the right to property and the right to education, have already been successfully invoked in the protection of the rights of precarious people. See Lavrysen, *Strengthening the Protection*, *supra* note 31, p. 304. See also Leijten, *supra* note 31, p. 233.

<sup>39</sup> ECtHR, *Moldovan and others. v. Romania* (App. Nos. 41138/98 and 64320/01), 12 July 2005, para. 98.

<sup>40</sup> Although the Court “does not live up to the promise of such an absolute right” – see S. Smet, *The ‘Absolute’ Prohibition of Torture and Inhuman or Degrading Treatment in Article 3 ECHR: Truly a Question of Scope Only?*, in: E. Brems and J. Gerards (eds.), *Shaping rights in the ECHR: the role of the European Court of Human Rights in determining the scope of Human Rights*, Cambridge University Press, Cambridge: 2013, p. 275.

<sup>41</sup> ECtHR, *M.S.S. v. Belgium and Greece* (App. No. 30696/09), Grand Chamber, 20 January 2011, para. 223.

<sup>42</sup> ECtHR, *Budina v. Russia* (App. No. 45603/05), 18 June 2009; *V. v. United Kingdom* (App. No. 24888/94), Grand Chamber, 16 December 1999, para. 71.

<sup>43</sup> *M.S.S. v. Belgium and Greece*, para. 220; ECtHR, *Pretty v. the United Kingdom* (App. No. 2346/02), 29 April 2002, para. 52. See also *Budina v. Russia*.

<sup>44</sup> *Budina v. Russia*; ECtHR, *Tyrer v. the United Kingdom* (App. No. 5856/72), 25 April 1978, para. 32; *Smith and Grady v. the United Kingdom* (App. Nos. 33985/96 and 33986/96) 27 September 1999, para. 120.

<sup>45</sup> ECtHR, *Ireland v. the United Kingdom* (App. No. 5310/71), 18 January 1978, para. 162.

<sup>46</sup> ECtHR, *Chapman v. Belgium* (App. No. 39619/06), 5 March 2013, para. 99. Thus, as Leijten explains, “there is no single, clear criterion that is decisive for judging whether something counts as ‘ill-treat-

not exclude the Court from finding a violation of Art. 3 of the Convention on account of socioeconomic circumstances, and in particular when the applicant is in such a situation of deprivation that it would be incompatible with human dignity.<sup>47</sup> This is the finding reached by the Strasbourg Court in the famous *M.S.S. v. Belgium and Greece* case, which concerned the return of an asylum seeker from Belgium to Greece under the Dublin Regulation. The Court considered that the applicant had been exposed to inhuman and degrading treatment because of the living conditions he had experienced in Greece for months, conditions which included almost total material deprivation, without being able to meet his most basic needs to eat, wash, and find shelter.<sup>48</sup> More generally, the Court considers that the responsibility of a State can be activated for ill-treatment within the meaning of Art. 3 when an applicant, in a situation of total dependence on the support of the State, is confronted with indifference on the part of the authorities vis-à-vis her situation of serious deprivation, or her inability to meet her needs is incompatible with human dignity.<sup>49</sup>

The protection of private and family life enshrined in Art. 8 of the Convention has also been successfully invoked on several occasions before the Strasbourg Court in cases of harmful measures taken by the authorities against socioeconomically disadvantaged people. For instance, in the *Wallova and Walla v. the Czech Republic* case, the Court condemned the Czech Republic for depriving the applicants, parents of five children, of their parental authority because they were unable to provide their children with adequate and stable housing due to their poverty. The Court ruled in favour of the applicants under Art. 8,<sup>50</sup> finding that the placement measure was too radical in light of the reasons given by the authorities. In other words, unsatisfactory living conditions or material deprivation cannot be the only reason for depriving parents of their parental authority and placing their

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ment', and the question whether particular circumstances demand individual protection has to be decided on a case-by-case basis." See Leijten, *supra* note 31, p. 50.

<sup>47</sup> *M.S.S. v. Belgium and Greece*, para. 253; *Budina v. Russia*; ECtHR, *Price v. the United Kingdom* (App. No. 33394/96), 10 October 2001, paras. 24-30; *Valašinas v. Lithuania* (App. No. 44558/98), 24 July 2001, para. 117.

<sup>48</sup> *M.S.S. v. Belgium and Greece*, paras. 249-264.

<sup>49</sup> *Budina v. Russia*; ECtHR, *Hudorovič and others v. Slovenia* (App. No. 24816/14 and 25140/14), 10 March 2020, para. 165. See also *Khan v. France* (App. No. 12267/16), 28 February 2019, paras. 93-94. The Court has controversially ruled that an applicant should not be regarded as responsible for her situation, however. In *O'Rourke v. the United Kingdom*, which concerned a person evicted from his home who was left homeless for fourteen months to the detriment of his health, the Court ruled that the applicant's suffering did not reach the required level of severity to engage the responsibility of the British State. According to the Court, he was largely responsible for his own deterioration following his expulsion, since he had refused any of the help which had been offered to him by the authorities, i.e. overnight shelters and temporary accommodation. ECtHR, *O'Rourke v. the United Kingdom* (App. No. 39022/97), 26 June 2001. See also *Nitecki v. Poland* (App. No. 65653/01), 21 March 2002.

<sup>50</sup> ECtHR, *Wallova and Walla v. the Czech Republic* (App. No. 23848/04), 26 October 2006, para. 47. Two similar cases were decided by the Court in which it reached similar conclusions: ECtHR, *R.M.S. v. Spain* (App. No. 28775/12), 18 June 2013 and *Soares de Melo v. Portugal* (App. No. 72850/14), 16 February 2016.

children into institutional care.<sup>51</sup> The Court made it clear that the Czech authorities should have considered less radical measures and that it was the responsibility of the welfare authorities to take positive steps “to help people in difficulty who do not have the necessary knowledge of the system, to guide them in their efforts and to advise them, among other things, on the different types of social benefits, the possibilities of obtaining social housing or other means of overcoming their difficulties.”<sup>52</sup>

More recently, in the unprecedented *Lăcătuș v. Switzerland* judgment, the Court condemned Switzerland for its legislation providing for a general ban on begging in public spaces, punishable by a fine and by imprisonment in the event of non-payment of the fine. The Court conceded that the right to beg is not absolute, but a general prohibition like the one challenged in the case is not permitted. The Court noted that for some, being in a situation of manifest vulnerability, begging was the applicant’s only means of survival. According to the Court, the applicant “had the right, inherent to human dignity, to express her distress and to try to remedy to her needs through begging.”<sup>53</sup> Therefore, by imposing such sanctions on the applicant – a fine followed by five days imprisonment for not being able to pay it – Switzerland violated the applicant’s human dignity and the very essence of her rights protected by Art. 8.<sup>54</sup> As a consequence, Member States are liable, under the Convention, including under Arts. 3 and 8, for their actions and omissions vis-à-vis particularly precarious groups. This is no different in the context of the pandemic. Indeed, in situations similar to the above-ones states are likely to be held responsible for violations of Convention rights towards socioeconomically underprivileged people, namely:

- homeless people who have been threatened with being fined for not respecting the lockdown measures without having the possibility of benefiting from the usual support structures – a situation similar to that of Mrs Lăcătuș;
- asylum seekers unable to submit an asylum application and therefore barred from benefiting from reception – as in Belgium<sup>55</sup> – or without material support – as in France – where the authorities have failed to provide asylum seekers and migrants with the possibility of meeting their basic needs by preventing organisations from providing support to these people;<sup>56</sup>

<sup>51</sup> *Wallová and Walla v. Czech Republic*, paras. 72, 74 and 78. See V. David, *ECtHR Condemns the Punishment of Women Living in Poverty and the “Rescuing” of Their Children*, available at: <https://bit.ly/3xmUAUn> (accessed 30 May 2021).

<sup>52</sup> *Wallová and Walla v. Czech Republic*, para. 74 and *R.M.S. v. Spain*, para. 86. See David, *supra* note 51 and David, *supra* note 31.

<sup>53</sup> ECtHR, *Lăcătuș v. Switzerland* (App. No. 14065/15), 19 January 2021, para. 107. Own translation from: “elle avait le droit, inhérent à la dignité humaine, de pouvoir exprimer sa détresse et à essayer de remédier à ses besoins par la mendicité.”

<sup>54</sup> *Ibidem*, para. 115.

<sup>55</sup> E.g. M. Doutrepoint, *La situation des migrant-es en période de confinement: analyse à la lumière des droits fondamentaux* in: I. Andoulsi, S. Huart (eds.), *Continuité de la justice et respect des droits humains en temps de pandémie*, Anthemis, Limal: 2021, pp. 111-130.

<sup>56</sup> E.g. Amnesty International, *supra* note 17, p. 5.

- people working in the informal sectors, such as sex workers, who have been cut off from all material resources without any state support;
- poor single-parent families supported mainly by the mother;
- the elderly or seriously ill, isolated and with limited or no outside help;
- vaccination programmes not available to irregular migrants;
- etc.

## 2.2. Limits

Three pitfalls must however be mentioned in the Strasbourg Court's case law with respect to the protection of fundamental rights of socioeconomically disadvantaged persons under the ECHR, especially in the context of the pandemic: the limitation of protection in cases of extreme vulnerability under Art. 3 ECHR; the "negativist" approach of the Court under Art. 8 ECHR; and the Court's avoidance of tackling and taking into account the socioeconomically underprivileged situation of the applicant(s) in some cases.

Firstly, when it comes to socioeconomic interests the prohibition of inhuman and degrading treatment remains reserved for the most extreme cases, as aforementioned. The living conditions experienced by many people living in deprived parts of Madrid will not necessarily be considered as falling below the threshold of human dignity to the point of violating Art. 3 of the Convention. It is no different for the inhabitants of Seine Saint Denis, who have been controlled and sanctioned for lockdown violations three times more often than in the rest of France.<sup>57</sup> The same is true for the children in these neighbourhoods, who are locked in cramped spaces and lack the tools, the support, the space, and the peace and quiet necessary to be able to attend to their lessons or do their homework online, and for people who are or will be deprived of certain services because they do not have the vaccination certificates. They are clearly victims of their precarious situations and are treated differently on this basis, reflecting the socioeconomic inequalities both nationally and internationally, as has been brilliantly documented.<sup>58</sup> Nevertheless they are not necessarily considered to be in an extremely precarious situation of vulnerability incompatible with human dignity, i.e. one likely to be considered as inhuman or degrading treatment within the meaning of Art. 3 of the Convention. More generally, as Leijten explains concerning the very question of protection of socioeconomic interests under the Convention, the ECtHR has so far only recognised the minimum cores "according to which states are required to guarantee minimum levels of these rights."<sup>59</sup> In other words, if "such minimum levels are absent, socioeconomic rights are not taken seriously."<sup>60</sup>

<sup>57</sup> *Ibidem*, p. 5.

<sup>58</sup> B. Milanovic, *Global Inequality: A New Approach for the Age of Globalization*, Harvard University Press, Cambridge-London: 2018; T. Piketty, *Capital in the Twenty-First Century*, Harvard University Press, Cambridge-London: 2014; T. Piketty, *Capital and Ideology*, Harvard University Press, Cambridge-London: 2020.

<sup>59</sup> Leijten, *supra* note 31, p. 220.

<sup>60</sup> *Ibidem*, 221.

Secondly, the issue of the positive obligations of States towards vulnerable populations under Art. 8 of the Convention in particular remains uncertain: How would the Court assess, under Art. 8, a Member State's failure to meet its positive obligations during a pandemic, especially with regard to social, economic, health, psychological and educational aid, etc., when the situation is not likely to be considered as a degrading or inhuman treatment in the sense of Art. 3 ECHR? Lavrysen rightly explains that the "Court's case law remains predominantly "negativist," such as for example the field of the right to home (Art. 8) and the right to property (Art. 1 of the Protocol 1), meaning that Court restricts itself to protecting 'existing' homes and possessions."<sup>61</sup> The door is not completely closed, however. Indeed, in the recent *Hudorovič and others v. Slovenia* case, which concerned the supply of drinking water to illegal Roma settlements, the Court issued an unprecedented ruling that Art. 8 can impose on States a positive obligation to provide access to drinking water. In other words, access to drinking water is not a right protected by Art. 8 as such, but it can be inferred from this article given that without water a human being cannot survive.<sup>62</sup> However, despite this strong statement the Strasbourg Court concluded in that case that Slovenia had a wide margin of appreciation in matters of housing, considering that the applicants had not shown that they had suffered harmful consequences to their health and human dignity due to the lack of drinking water. This is based on the settled case law of the Court, according to which national authorities are in principle better placed than international judges to assess what is in the public interest for social or economic reasons, by virtue of their direct knowledge of their society and its needs.<sup>63</sup> In this respect, the ECtHR usually respects the political choices of national legislators unless they are manifestly unfounded, a condition which is all the more likely to occur during a crisis such as during the COVID-19 pandemic, although to my knowledge there is no case law on this specific question as yet.

Thirdly and more generally, when the fundamental rights of people living in poverty are affected it is usually by measures neutral on their face, which are not challenged by practitioners or examined by judges from the perspective of their socioeconomic situation vis-à-vis the dimensions of recognition or redistribution.<sup>64</sup> Indeed, when scrutinising the violation of human rights, courts often simply avoid tackling the situation of applicants who are disadvantaged or excluded because of their socioeconomic background; thus it is easy for courts to ignore or undermine this issue in their scrutiny of the violation of rights when discrimination is not invoked. This is regrettable, since it can be a very important feature of the case. In this regard, the ECtHR judgment in

<sup>61</sup> Lavrysen, *Strengthening the Protection*, *supra* note 31, p. 306.

<sup>62</sup> *Hudorovič and others v. Slovenia*, para. 116.; V. David, *The Court's First Ruling on Roma's Access to Safe Water and Sanitation in Hudorovic et al. v. Slovenia: Reasons for Hope and Worry*, Strasbourg Observers, 9 April 2020, available at: <https://bit.ly/3xlPttn> (accessed 30 May 2021).

<sup>63</sup> ECtHR, *Stec and others v. the United-Kingdom* (App. Nos. 65731/01 and 65900/01), 12 April 2006, para. 52; *Carson and others v. the United-Kingdom* (App. No. 42184/05), 16 March 2010; *Bah v. the United Kingdom* (App. No. 56328/07), 27 September 2011, para. 47.

<sup>64</sup> For a definition of these concepts, see *infra* section 2.

*Garib v. The Netherlands* case is a striking example. The case concerned the policy of the city of Rotterdam according to which only people with a certain minimum income were eligible for a housing permit to take up new residence in moderate-cost rental housing in the Rotterdam Metropolitan Region.<sup>65</sup> Only people residing in the Region for at least six years were exempt from such a requirement. The aim of this policy was to reverse the “concentrations of the ‘socioeconomically disadvantaged’ in distressed inner-city areas.”<sup>66</sup> Because of this measure the applicant, a single mother of two living on social benefits, was refused a housing permit to move to the Tarwewijk neighbourhood, a “hotspot” area in Rotterdam, even though she had found housing there which met her family’s needs.<sup>67</sup> She claimed that her freedom to choose her residence (Art. 2 of Protocol No. 4) had been violated. Her claim was dismissed by the Chamber of first instance and the Grand Chamber. As summarised by Lavrysen regarding this case, “[p]oor individuals are pushed out of their boroughs and they are thereby rendered invisible, without addressing the roots of their socioeconomic problems, allowing wealthier individuals to replace them.”<sup>68</sup> The COVID-19 pandemic has sadly confirmed that many supposedly “neutral” measures affect disadvantaged people more severely and that measures taken directly against those people are commonplace. For example, the situation of people who find themselves confined in disadvantaged neighborhoods is close to that of Ms Garib and is likely to raise issues under Art. 2 of Protocol No. 4. However, as in the situation of Madame Garib, the Court might consider that lockdown measures in poor neighbourhoods are proportionate with regard to Art. 2 Protocol No. 4 or other articles of the Conventions, without tackling the “socioeconomic disadvantaged” aspects of their situation. In other words, it would be easy for the Court to ignore the impact of certain measures (or the lack of measures) towards socioeconomically underprivileged people under the free-standing Convention rights. As aforementioned, the situation with respect to the vaccination certificate system is particularly likely to hinder people in a precarious situation and constitutes such an example, among others. A recent judgment by the ECtHR dealt with the question of proportionality – in light of the right to private and family life (Art. 8 ECHR) – in the context of the compulsory administration of nine different vaccines for children in the Czech Republic. Parents who did not comply were respectively fined and prohibited from benefiting from nursery services for their children.<sup>69</sup> In other words, the case concerned the “indirect obligation” to be vaccinated, i.e. an obligation which did not directly impose an involuntary medical treatment<sup>70</sup>

<sup>65</sup> ECtHR, *Garib v. the Netherlands* (App. No. 43494/09), 23 February 2016; ECtHR, *Garib v. the Netherlands* (App. No. 43494/09), Grand Chamber, 6 November 2017.

<sup>66</sup> *Ibidem*, para. 23.

<sup>67</sup> *Ibidem*, paras. 127-128.

<sup>68</sup> Lavrysen, *Court Fails to Acknowledge Discrimination*, *supra* note 31.

<sup>69</sup> ECtHR, *Vavříčka and Others v. the Czech Republic* (App. Nos. 47621/13 and 5 others), Grand Chamber, 8 April 2021.

<sup>70</sup> The margin of appreciation of the state is also wide when it comes to a direct compulsory vaccination: ECtHR, *Solomakhin v. Ukraine* (App. No. 24429/03), 15 March 2012; ECtHR, *Boffa and others v. San-Marino* (App. No. 2653/95 and 13 others), 15 January 1998.

but which, in the case of a vaccination certificate, was likely to exclude people from services. The Court judged that such measures did not violate the right to private and family life, without engaging with the questions raised under the right to education and the freedom of thought, conscience and religion.<sup>71</sup> The ECtHR appears to have left a very wide margin of appreciation to the states. This has given rise to some criticism, especially as to the necessity of the sanctions imposed on parents in light of the aim of public health protection.<sup>72</sup> In this case, the Court did not tackle the flip-side of the social solidarity aspect: i.e. that the parents, owing to their poverty, are likely to be significantly affected by fines; or the fact that nursery care was rendered unavailable to them. Indeed, this issue was unfortunately only marginally raised in the arguments brought by the applicants.<sup>73</sup> As a consequence, the question of conditioning the fundamental rights of the poor through an indirect vaccination obligation remains open before the ECtHR. Nonetheless, in the context of the pandemic if such a question appears before the Court regarding the implementation of the vaccination certificates, there is no guarantee that the Court will take into account the impact of these otherwise neutral measures on socioeconomically underprivileged people. In the next section I will argue that Art. 14 on prohibition of discrimination, invoked in combination with another Convention article, would be a better candidate for protecting socioeconomically underprivileged persons against the indirect differences in treatment to which they are victims of.

### 3. THE POTENTIAL OF PROHIBITION OF DISCRIMINATION ON GROUNDS OF SOCIOECONOMIC SITUATION IN THE PROTECTION OF PRECARIOUS PEOPLE DURING A PANDEMIC

The prohibition of discrimination under Art. 14 of the Convention constitutes an important tool in the protection of disadvantaged people. This article states that “[t]he 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.” Some socioeconomically underprivileged applicants have already successfully argued that they have been discriminated against on the basis of “traditional” protected characteristics such as gender, race, or ethnic origin.<sup>74</sup> However, these grounds are not likely to encompass the situation of people who have been

<sup>71</sup> *Vavříčka and Others v. the Czech Republic*.

<sup>72</sup> Dissenting opinion of Judge Wojtyczek in ECtHR, *Vavříčka and Others v. the Czech Republic*, para. 18; Z. Vikarská, *Is Compulsory Vaccination Compulsory?*, Verfassungsblog, 12 April 2021, available at: <https://verfassungsblog.de/is-compulsory-vaccination-compulsory> (accessed 30 May 2021).

<sup>73</sup> *Vavříčka and Others v. the Czech Republic*, para. 162.

<sup>74</sup> See J. Gerards, *The discrimination Grounds of Article 14 of the European Convention on Human Rights*, 13(1) Human Rights Law Review 99 (2013); O.M. Arnardóttir, *The Differences that Make a Difference*:

discriminated against on grounds of their disadvantaged socioeconomic status. In this vein, while there is little in the literature and case law on the question of discrimination based on the grounds of socioeconomic status as a protected characteristic,<sup>75</sup> I argue that it is essential to protect people in a socioeconomic underprivileged situation from both direct and indirect differences in treatment, especially in the context of the pandemic. Indeed, such an approach is likely to overcome some of the troublesome issues explained in the previous section vis-à-vis the free-standing Convention rights, especially the one regarding the silence of the Court on the socioeconomic situation of the applicants in some cases. Below I first explain how antidiscrimination law relates to issues of socioeconomic inequality on the basis of the concepts of recognition and redistribution (3.1.). Secondly, I argue that the protected characteristic of socioeconomic status in antidiscrimination law has a potential utility in the protection of socioeconomically underprivileged people in the context of the pandemic, in particular in light of Art. 14 ECHR (3.2.).

### 3.1. Articulating the prohibition of discrimination on grounds of socioeconomic situation and the issues of “recognition” and “redistribution”

As some authors have already argued, an approach toward equality which is substantive in nature is all the more important in the protection of socioeconomically underprivileged people.<sup>76</sup> Substantive equality considers the context in which people find themselves,<sup>77</sup> in contrast to formal equality, which is limited to treating likes alike.<sup>78</sup> Taking this concept further, Fredman argues for a multidimensional concept of substantive equality rather than choosing between the various principles of equality of results, of opportunity, and of dignity. She identifies four dimensions to making equality substantive. First, the *redistributive* dimension aims “to correct the cycle of disadvantage associated with status of out-groups” and “to redress disadvantage by removing obstacles to genuine choice.”<sup>79</sup> Second, the *recognition* dimension is related to the respect for dignity and combats stereotypes, stigmas, and humiliation on grounds of gender, race, disability, sexual orientation or other statuses.<sup>80</sup> Third, the *transformative* dimension of

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*Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights*, 14 Human Rights Law Review 647 (2014).

<sup>75</sup> See J.-C. Benito Sánchez, *Towering Grenfell: Reflections around Socioeconomic Disadvantage in Anti-discrimination Law*, 5(2) Queen Mary Human Rights Law Review 1 (2019); S. Ganty, *Poverty as Misrecognition: What Role for Antidiscrimination Law in Europe?*, Human Rights Law Review (2021).

<sup>76</sup> N. Fraser, A. Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange*, Verso, New York: 2004; S. Fredman, *Redistribution and Recognition: Reconciling Inequalities*, 23 South African Journal on Human Rights 214 (2007), p. 216; S. Fredman, *The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty*, 3 Stellenbosch Law Review 567 (2011); S. Atrey, *The Intersectional Case of Poverty in Discrimination Law*, 18 Human Rights Law Review 411 (2018).

<sup>77</sup> Lavrysen, *Strengthening the Protection*, *supra* note 31, p. 314.

<sup>78</sup> S. Fredman, *Discrimination Law*, Oxford University Press, Oxford: 2011, pp. 8 and 25.

<sup>79</sup> *Ibidem*, pp. 25-27.

<sup>80</sup> *Ibidem*, pp. 28-29.

equality accommodates differences and structural change by “removing the detriment but not the difference itself,”<sup>81</sup> and concerns the structural harm, autonomy, and the promotion of substantive freedoms.<sup>82</sup> Finally, the *participative* dimension mainly focuses on social inclusion and political voice.<sup>83</sup> This last dimension not only refers to political participation but also to “the importance of community in the life of individuals” and concerns more specifically social exclusion.<sup>84</sup> In other words, this approach shows that equality and non-discrimination cannot be limited to formal equality (that likes should be treated alike), but must encompass redistribution, recognition, transformation and participation.<sup>85</sup>

This section aims to demonstrate the added value of the prohibition of discrimination on the grounds of socioeconomic situation regarding the *recognition* dimension of equality, especially in the context of the pandemic described in section 1.

In philosophy, discrimination is generally linked to the problems of “recognition” which arise “when cultural value patterns constitute some as inferior, excluded or invisible.”<sup>86</sup> In other words, recognition refers from “an ideal reciprocal relation between subjects in which each sees the other as its equal and also as separate from it.”<sup>87</sup> It usually involves overcoming stigmas, prejudices and stereotypes. As Fredman explains, insofar as regards discrimination the recognition dimension of equality implies that individuals are “defined not by relations of production, but of esteem, respect and prestige enjoyed relative to other groups in society.”<sup>88</sup> In this regard, discrimination is not only a cause but also a consequence of socioeconomic disadvantages.<sup>89</sup> As a matter of fact it is widely agreed that “[g]roups which suffer from discrimination on status grounds [gender, race ...] are disproportionately represented among people living in poverty,”<sup>90</sup> and it has become clear that “status-based discrimination is frequently closely correlated with socioeconomic disadvantage.”<sup>91</sup>

In this sense, poverty is a consequence of the discrimination that vulnerable groups and minorities such as Roma, migrants, black people, single women and persons with disabilities have historically had to endure. Because of the long-standing discrimination against them, these groups have experienced structural socioeconomic disadvantages which are extremely difficult to overcome. In this context, misrecognition is the cause

<sup>81</sup> *Ibidem*, p. 30.

<sup>82</sup> Atrey, *supra* note 76.

<sup>83</sup> Fredman, *supra* note 78, p. 31.

<sup>84</sup> *Ibidem*, p. 32.

<sup>85</sup> Atrey, *supra* note 76, p. 429.

<sup>86</sup> Fredman, *Redistribution and Recognition*, *supra* note 76, p. 216.

<sup>87</sup> Fraser, Honneth, *supra* note 76.

<sup>88</sup> Fredman, *Redistribution and Recognition*, *supra* note 76, p. 216.

<sup>89</sup> Human Rights Council 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, Magdalena Sepúlveda Carmona, A/HRC/21/39, 2012, para. 18.

<sup>90</sup> Fredman, *The Potential and Limits*, *supra* note 76.

<sup>91</sup> Fredman, *Redistribution and Recognition*, *supra* note 76, pp. 214-215.

of misdistribution. There is another side to this coin, however. Poor people themselves are subjected to stereotyping, prejudice, stigma and discrimination because of their precarious situations. Their precariousness is thus not only a consequence but also a cause of discrimination, creating a vicious cycle. In other words, misdistribution raises important issues of recognition resulting from a person's socioeconomic status. This question is less well-developed and analysed in the literature, especially from a legal perspective.<sup>92</sup> As Ignatieff puts it, “while inequalities of gender, race, and sexual orientation have been made visible the last forty years, older inequalities of class and income have dropped out of the registers of indignation.”<sup>93</sup> Indeed, both antidiscrimination law and human rights law more generally have mainly focused on the status equality of individuals based on traditional discrimination status grounds, rather than issues of misrecognition linked to the “distributive equality of classes.”<sup>94</sup>

Although discrimination on the grounds of socioeconomic situation is obviously linked to the issue of misdistribution – which is the root of such discrimination – it is mainly related to the rationale of recognition.<sup>95</sup> Fredman insists on the primary role of recognition on the grounds of socioeconomic situation in antidiscrimination law, which adds to the primary emphasis on redressing economic disadvantage within the welfare state<sup>96</sup> – i.e. the redistributive function.<sup>97</sup> Against this background, I argue that this equality of status constitutes a privileged tool to fight discrimination against socioeconomically disadvantaged people, that is to say, situations in which socioeconomically disadvantaged people are treated differently – either directly or indirectly – because of their precarious situation, and is thus likely to add value to the protection of socioeconomically underprivileged people via the free-standing Convention rights. As will be explained below, this approach is essential in the context of the COVID-19 pandemic, in particular in light of direct differences in treatment – such as measures targeting lower-income neighbourhoods – and indirect neutral measures such as general lockdown measures or the vaccination certificates, which hit socioeconomically disadvantaged people much harder.

From a legal point of view, antidiscrimination clauses are generally open-ended and likely to include grounds such as socioeconomic status, poverty, or social

<sup>92</sup> Ganty, *Poverty as Misrecognition*, supra note 75.

<sup>93</sup> M. Ignatieff, *The Rights Revolution*, House of Anansi Press, 2000, p. 92.

<sup>94</sup> S. Moyn, *Not Enough. Human Rights in an Unequal World*, Harvard University Press, New Haven: 2018, p. 205.

<sup>95</sup> D. Roman, *La discrimination fondée sur la condition sociale, une catégorie manquante du droit français*, 28 Recueil Dalloz 1911 (2013).

<sup>96</sup> Fredman, *Redistribution and Recognition*, supra note 76, p. 229.

<sup>97</sup> Of course it has been rightly argued that antidiscrimination law will not solve the problems of redistribution. Although antidiscrimination law can help, redistribution calls for a much more structural and holistic approach than that developed individually within this body of law. See Atrey, supra note 76, pp. 411–440; M.A. Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 Yale Journal of Law and Feminism 1 (2008), p. 1; Fredman, *Redistribution and Recognition*, supra note 76.

condition.<sup>98</sup> Moreover, most of them at the international, European, and national levels explicitly provide for the prohibition of discrimination on grounds of wealth, property, or social origin, which to some extent relate to discrimination on the basis of socioeconomic status.<sup>99</sup> This is the case for Art. 14 of the Convention, which provides that the enjoyment of rights and freedoms recognised in the Convention must be secured without discrimination on some status grounds, the list of which is open<sup>100</sup> and explicitly sets out property, social origin, and birth as status grounds. In the following sections, I will use the expressions “socioeconomic situation” and “social condition,”<sup>101</sup> which terms are more encompassing than “property” or “social origin.” Their use does not pose a problem *a priori* since, as previously indicated, antidiscrimination clauses are open-ended. It should be noted that other suitable grounds are also likely to describe the socioeconomic situation of individuals when discriminated against on this ground, including class.<sup>102</sup>

### 3.2. Application of the prohibition of discrimination on grounds of socioeconomic situation in the context of the pandemic

Despite being indisputably available, the protected characteristic of “socioeconomic status” in antidiscrimination law remains largely underused when people in socioeconomically disadvantaged situations need protection from stereotyping, prejudice, and more generally from the direct or indirect differences in treatment they experience on account of their precarious situation. Even when the situation of socioeconomic inequality is recognised, people in precarious situations are often treated as if they were responsible for their own situation.<sup>103</sup> This could explain the reluctance to apply anti-discrimination law to such those situations, which Atrey rightly points out as follows: “Viewed through this individualistic lens, poverty obviously fell beyond the purview of discrimination as concerned with structural disadvantage between groups rather than individual circumstances.”<sup>104</sup> This also echoes what Bridges has coined “the moral construction of poverty,” referring to the discourse according to which people are poor because there is something wrong with them, refusing to accept the possibility that people are poor because of structural reasons outside their control.<sup>105</sup>

<sup>98</sup> Ganty, *supra* note 75. On the exception of Art. 19 TFEU and antidiscrimination directives adopted on that basis.

<sup>99</sup> *Ibidem*.

<sup>100</sup> See Gerards, *supra* note 74, pp. 6 et seq. See also O.M. Arnardóttir, *The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights*, 14 Human Rights Law Review 647 (2016).

<sup>101</sup> See W. MacKay, N. Kim, *Adding Social Condition to the Canadian Human Rights Act: Canadian Human Rights Conditions*, Canadian Human Rights Commission 2009, p. 37.

<sup>102</sup> See e.g. A. Benn, *The Big Gap in Discrimination Law: Class and the Equality Act 2010*, 3(1) Oxford Human Rights Hub Journal 30 (2020).

<sup>103</sup> See K. Bridges, *The Poverty of Privacy Rights*, Stanford University Press, Redwood City: 2017, pp. 38-64; Atrey, *supra* note 76, p. 421; Ganty, *Poverty as Misrecognition*, *supra* note 75.

<sup>104</sup> Atrey, *supra* note 76, p. 421.

<sup>105</sup> Bridges, *supra* note 103, pp. 38-64.

In the context of the COVID-19 pandemic, by taking freedom-restricting measures which target only the poorest, or by adopting policies targeting the general population which hit socioeconomically disadvantaged people much more severely, public authorities endorse a particular vision of individual responsibility, to wit: Precarious people bear the consequences of their situations, for which they are regarded as responsible. However, as we have just explained, poverty and precariousness have structural causes and any direct or indirect differentiations based on the situation of poverty, especially when they are marked by stigmas and stereotypes, have to be questioned in light of antidiscrimination law.

The ECtHR thus far appears to have refrained from ruling on discrimination against people in socioeconomic precarious situations on the grounds of Art. 14 of the Convention, avoiding the question through procedural tricks (as will be explained below), or by using other articles of the Convention, with the consequence that there is allegedly no need to rule separately on the discrimination complaint.<sup>106</sup> In most cases, however, this is, a “denial of justice.”<sup>107</sup>

In this section I will demonstrate that the operationalisation of the protected characteristic of socioeconomic status in antidiscrimination law is a unique instrument in the protection of socioeconomically disadvantaged people, one that no other fundamental right is able to provide. There are three main reasons for this. It enables taking into consideration the socioeconomic situation when examining compliance with civil and political rights (3.2.1); combating stigmatisation and stereotypes (3.2.2); and considering the situation as a whole through intersectionality (3.2.3).

### 3.2.1. Considering the socioeconomic situation when examining potential violations of fundamental rights

First, antidiscrimination law provides an opportunity to examine the socioeconomic issues which underlie disputes over civil and political fundamental rights, especially those that have no *direct* link with issues of redistribution. Indeed, the socioeconomic situation of victims of violations of fundamental rights protected by the Convention is sometimes ignored by the Strasbourg Court, even though it lies at the heart of the case.<sup>108</sup> In this regard the above-mentioned ECtHR judgment in *Garib v. The Netherlands* is a striking example and shows that scrutiny via social condition status grounds in antidiscrimination law can be essential to protect people living in poverty. As a reminder, this case concerned a gentrification policy of the city of Rotterdam which conditioned access to housing permits on a minimum income threshold. The applicant claimed that her freedom to choose her residence (Art. 2 of Protocol No. 4) had been violated, but did not invoke Art. 14 ECHR. Her claim was dismissed by the Chamber of first instance. As regards the recognition issue discussed in this section, the chal-

<sup>106</sup> *Lăcătuș v. Switzerland*, para. 123.

<sup>107</sup> *Ibidem*, partly concurring and partly dissenting opinion of Judge Ravarani, para. 23.

<sup>108</sup> See e.g. ECtHR, *Emabet Yeshtla v. The Netherlands* (App. No. 37115/11), 15 January 2019; *Van Volsem v. Belgium* (App. No. 14641/89), 9 May 1990; *Bah v. the United Kingdom*; *Garib v. the Netherlands*.

lenged gentrification policy includes an important socioeconomic dimension regarding stigma and stereotypes. The authority justified measures taken to “gentrify” a distressed neighbourhood on the basis that conditions in the area had “serious effects on quality of life owing to unemployment, poverty and social exclusion (...) together with antisocial behaviour, the influx of illegal immigrants and crime.”<sup>109</sup> Thus such measures, by their very nature, strongly stereotype poor people. In their joint dissenting opinion before the Chamber, Judges Lopez Huerra and Keller criticized these stereotypes, stating that the “poor do not *per se* pose a threat to public security, nor are they systematically the cause of crime.” Such a stereotype is likely to lead to discrimination, especially since “the need to reverse the decline of impoverished inner-city areas (...) can be achieved through other policy measures not tied to personal characteristics.”<sup>110</sup> They also underlined that the necessity test under Art. 14 of the Convention should have been applied in this case “since the measure [was] linked to source of income and [was] thus implicitly connected to the social origin and gender of the persons concerned.” Although they did not refer to the application of Art. 14 as such, they seem to imply that the ground of poverty should call for strict scrutiny: the poor are a vulnerable group in and of themselves and restrictions applied to this group must be based on a “reasonable relationship of proportionality between the means employed and the aim sought to be realised.”<sup>111</sup> Accordingly, the State’s margin of appreciation must also be narrower in this context.<sup>112</sup> The argument of discrimination was raised by the applicant and the third party interveners before the Grand Chamber, which dismissed the application without examining the case under Art. 14, based on the procedural “trick” that it was not “open to an applicant, in particular one who has been represented throughout, to change before the Grand Chamber the characterisation he or she gave to the facts complained of before the Chamber,” a position which *nota bene* seems to be in contradiction with its own case law.<sup>113</sup> *Garib* constitutes a missed opportunity for the Court to progress on the question of discrimination based on socioeconomic situations, especially in its recognition dimensions and its intersection with other grounds, such as race and gender: “a question particularly compelling in the present case, since the applicant was a single mother living on social welfare.”<sup>114</sup> In this context scrutiny under Art. 14 could have changed the outcome of the case, since it would have directly tackled the disadvantages the applicant experienced because of her socioeconomic background.<sup>115</sup> Dissenting Judges Pinto de Albuquerque and Vehabović also stressed the opportunity

<sup>109</sup> *Garib v. the Netherlands*, para. 23.

<sup>110</sup> Joint dissenting opinion of judges Lopez Guerra and Keller in *Garib v. the Netherlands*, para. 1

<sup>111</sup> *Ibidem*, para. 14.

<sup>112</sup> *Ibidem*.

<sup>113</sup> *Garib v. The Netherlands*, para. 101; V. David, S. Ganty, *Strasbourg fails to protect the rights of people living in or at risk of poverty: the disappointing Grand Chamber judgment in Garib v. the Netherlands*, Strasbourg Observers, 16 November 2017, available at: <https://bit.ly/2Uufdz7> (accessed 30 May 2021).

<sup>114</sup> *Ibidem*.

<sup>115</sup> Dissenting opinion of Pinto de Albuquerque and Vehabović in *Garib v. the Netherlands*, para 63.

missed by the Grand Chamber to expressly include poverty among the discrimination criteria prohibited under Art. 14.<sup>116</sup>

The Court was probably not ready to take this step. The doors nevertheless remain open, and practitioners should be encouraged to invoke Art. 14 of the Convention, as it is likely to make a difference in disputes involving strong misrecognition elements with respect to people living in precarious circumstances, especially in the context of the pandemic. Indeed, the conclusion of such a case is likely to be different if the Court adopts the perspective of Art. 14 read in conjunction with other Convention articles. Firstly, these “other” free-standing Convention articles do not themselves need to be violated when invoked in conjunction with Art. 14 ECHR, meaning that applicants do not face the above-mentioned pitfalls linked to their protection. Secondly, the proportionality of measures – including those taken during the pandemic – are likely to be evaluated differently under Art. 14 ECHR than under the free-standing Convention rights, since they concern direct or indirect differences in treatment between socioeconomically underprivileged people and the rest of the population. In this respect, in the context of the pandemic it is precisely the proportionality of these measures and the differences in treatment they generate which raise doubts: imposing lockdown measures on poor neighborhoods amounts to ignoring that precarious people are already much more severely affected by the pandemic, for structural reasons beyond their own control or responsibility, and that such lockdown measures – whether neutral or targeted directly at poor people – are likely to have a much greater negative impact on them than on middle or upper classes, as explained in the first part of this paper; a fact with far-reaching consequences in the long term with respect to health, education, psychological and physical wellbeing etc. Finally, as explained in the following sections, Art. 14 ECHR is likely to capture the misrecognition and intersectional issues which are challenging to tackle with other Convention provisions.

Consequently, Art. 14 of the Convention constitutes an additional count to a complaint filed before national courts and the Strasbourg Court in the context of public actions and omissions linked to the pandemic and their effect on precarious people. Socioeconomically disadvantaged people are often victims of both direct and indirect differences in treatment, which potentially raise different questions than under such free-standing Convention rights as Arts. 8 and 3.

### 3.2.2. Fighting against stigma and stereotyping: a problem of recognition

There are many examples to demonstrate that beyond the material disadvantages that the poor and undereducated face, they are also victims of stereotyping and stigma, which can be defined as “beliefs about the characteristics of groups of people” which are predominantly negative.<sup>117</sup> Stereotypes “serve to maintain existing power relationships; they are control mechanisms. Stereotypes uphold a symbolic and real hierarchy

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<sup>116</sup> *Ibidem*.

<sup>117</sup> A. Timmer, *Toward an Anti-Stereotyping Approach for the European Court of Human Rights*, 11(4) Human Rights Law Review 714 (2011).

between ‘us’ and ‘them.’”<sup>118</sup> In the 2012 United Nation Guiding Principles on Extreme Poverty and Human Rights, the Special Rapporteur on extreme poverty and human rights underlined that “[p]ersons experiencing extreme poverty live in a vicious cycle of powerlessness, stigmatization, discrimination, exclusion and material deprivation, which all mutually reinforce one another.”<sup>119</sup> However, this vicious cycle exists not only for people living in extreme poverty, but more broadly for all socioeconomically underprivileged people. There are many examples in Europe: a family asked to leave a museum because of its “unpleasant” smell;<sup>120</sup> homeless people who are regularly victims of violence;<sup>121</sup> deprivation of parental rights because of poor material living conditions;<sup>122</sup> or refusal of affordable housing to potential tenants who receive social benefits.<sup>123</sup> And these stigma are multiple, as powerfully put by Hershkoof and Cohen regarding the situation of the poor in the US.<sup>124</sup> Against this background, the 2012 UN Guiding Principles expressly state that there is a right to be protected from the negative stigma attached to conditions of poverty, not only by individuals but in particular by public authorities. Therefore, public authorities “must take all appropriate measures to modify sociocultural patterns with a view to eliminating prejudices and stereotypes.”<sup>125</sup>

As regards the COVID-19 situation more specifically, several reports have shown that these stereotypes against poor people and minorities are exacerbated in times of pandemic. Indeed, as Earnshaw explains we tend to believe that bad things fall on people who are regarded as “bad,” a phenomenon called the “just-world fallacy.”<sup>126</sup> In other words, people who suffer more severely from the pandemic than others are considered to have done something wrong and to deserve their suffering. It is also established that many forms of stigma and discrimination have arisen since the identification of COVID-19. The first was xenophobia, directed against people seen as having “brought” the virus to the world.<sup>127</sup> Then populations facing stigma and discrimination previous to the pandemic (e.g. persons with HIV, sexual minorities, sex workers, migrants etc.)

<sup>118</sup> *Ibidem*, p. 715.

<sup>119</sup> Human Rights Council United-Nations General Assembly, *supra* note 89, pp. 4-8.

<sup>120</sup> C. Rollot, *Une famille pauvre exclue du musée d'Orsay*, *Le temps*, 31 January 2013, available at: <https://www.letemps.ch/culture/une-famille-pauvre-exclue-musee-dorsay> (accessed 30 May 2021).

<sup>121</sup> L. Jamet, Ch. Thouilleux, *Davantage de victimes de vol ou d'agression parmi les sans-domicile*, Institut national de la statistique et des études économiques (2012); L. Faragó et al., *Criminalization as a justification for violence against the homeless in Hungary*, *The Journal of Social Psychology* 14 (2021).

<sup>122</sup> *Soares de Melo v. Portugal; Wallová and Walla v. Czech Republic*.

<sup>123</sup> E.g. Centre interfédéral pour l'égalité des chances, *Baromètre de la diversité logement* (2014).

<sup>124</sup> H. Hershkooff, A.S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104(4) *Harvard Law Review* 896 (1991), p. 912.

<sup>125</sup> Human Rights Council United Nations General Assembly, *supra* note 89, p. 21.

<sup>126</sup> V. Earnshaw, *Don't Let Fear of Covid-19 Turn into Stigma*, *Harvard Business Review*, 6 April 2020, <https://bit.ly/3jPDD0O> (accessed 30 May 2021); L. Manderson, S. Levine, *COVID-19, Risk, Fear, and Fall-out*, 39(5) *Medical Anthropology* 367 (2020), pp. 367-370.

<sup>127</sup> E.g. Amnesty International, *Mesures prises face à la COVID-19 et obligations des états en matière de droits humains: observations préliminaires* (2020), available at: <https://bit.ly/3qNIEs6> (accessed 30 May 2021).

were subjected to further stigma and verbal and physical abuse.<sup>128</sup> Moreover, some lockdown measures were motivated by the belief that these people have a “bad way of life” because they are overrepresented among the infected – as in Madrid – while as previously explained the fact that they are more affected by the pandemic is explained mainly by structural reasons. These stigmatized people are over-represented among socioeconomically disadvantaged populations and their socioeconomic situation contributes to the stereotypes and prejudices to which they fall victim. In fact however, stigma and stereotyping during a pandemic pose a threat to everyone. Research about HIV, Ebola, Hansen’s disease and other infectious disease shows that stigma undermines efforts to find and treat diseases. People who fear being socially excluded if they are sick are less likely to get tested or seek treatment if they have symptoms.<sup>129</sup> Prejudice and stereotyping are therefore harmful, in particular for the people who are subjected to them, raising important problems of recognition, as discussed above.

In addition, it has been shown that stigma plays a role in the non-take-up phenomenon, which is particularly relevant with regard to the COVID-19 aftermath measures, and more specifically the vaccination certificates.<sup>130</sup> Indeed, such stigma is likely to be intensified for people who do not have a vaccination certificate – i.e. for people who are not vaccinated (overrepresented among the poor) and likely to find themselves in the situation of “non-take-up.”

Stereotypes and stigma against poor and undereducated people are mainly an issue of misrecognition. As such, they can hardly be tackled and grasped through free-standing Convention rights, even when the violation of other rights have been found, such as in the above-mentioned *Wallova and Walla* case.<sup>131</sup> In this context, the social condition status grounds in antidiscrimination law (especially under Art. 14) appear to be the most suitable tool to redress this misrecognition based on someone’s socioeconomically underprivileged situation; by acknowledging that in some cases such stigma and prejudice against socioeconomically disadvantaged people is illegal and unacceptable.

Timmer describes this anti-stereotyping analysis in two steps: first, naming stereotypes; and then challenging them.<sup>132</sup> As she rightly puts it, “[t]he goal of a stereotype-

<sup>128</sup> E.g. UNAIDS, *Addressing stigma and discrimination in the COVID-19 response* (2020).

<sup>129</sup> Earnshaw, *supra* note 126.

<sup>130</sup> While stigma plays a role, the literature seems divided on the magnitude of its impact. See Fuchs et al., *supra* note 11. See also H. Kayser, J. Frick, *Take it or Leave it: (Non-)Take-Up Behavior of Social Assistance in Germany*, 121 *Journal of Applied Social Sciences* 1 (2002), pp. 27–58; J. Stube, K. Kronebusch, *Stigma and Other Determinants of Participation in TANF and Medicaid*, 23(3) *Journal of Policy Analysis and Management* 509 (2004); Baumberg, *supra* note 12; O. Hümbelin, *Non-Take-Up of Social Assistance: Regional Differences and the Role of Social Norms*, 45 *Swiss Journal of Sociology* 7 (2019) (claiming that stigma plays an important role) and K. Bruckmeier, J. Wiemers, *A New Targeting: A New Take-Up?*, 43 *Empirical Economics* 565 (2012); J. Currie, *The Take-Up of Social Benefits*, IZA Discussion Papers No. 1103 (2004) (claiming that stigma plays a role, but a more limited one).

<sup>131</sup> *Wallova and Walla v. Czech Republic*. On this question see David, *supra* note 31, and Ganty (*Poverty as Misrecognition*), *supra* note 75.

<sup>132</sup> Timmer, *supra* note 117, pp. 718-719. Naming stereotypes implies taking into account the historical context and current impact as well as revealing the stereotypes, *ibidem*, pp. 720-722.

analysis is exposing and contesting the patterns that lead to structural discrimination. Such an analysis aims to render explicit and problematic what society experiences as ‘natural’.<sup>133</sup> Such an acknowledgement is essential even when the courts end up ruling in the applicant’s favour on the basis of other aspects of the case. Indeed, while recognition is in some instances very symbolic, it is essential to combating structural discrimination and the applicant’s sense of humiliation, shame, and unworthiness. It also creates a link with the other dimensions (distribution, participation, and transformation) of the socioeconomic inequalities people experience and which are often the consequences of prejudice and stigma. In other words, denouncing such stigma and stereotypes constitutes a crucial step in tackling issues of misrecognition at a structural level, especially in pandemic times.

### 3.2.3. Considering the situation as a whole: multiple discrimination

In order to combat all aspects of socioeconomic hardship related to discrimination, discriminatory situations must also be taken into account as a whole, as status grounds – including the socioeconomic status ground – intersect and/or are additive. This is a way to recognise that “privilege and disadvantage migrate across identity categories”:<sup>134</sup> single mothers, migrants, “second or third generation” citizens etc. are overrepresented among disadvantaged populations, and when considering discrimination against them the entire situation should be taken into account through the lens of “intersectional” or “additive” discrimination – described under the generic term of “multiple discrimination.”<sup>135</sup>

Intersectional discrimination arose from “the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone.”<sup>136</sup> This form of multiple discrimination differs from “additive discrimination,” “where an individual ‘belongs to two different groups, both of which are affected by [discriminatory] practices.’”<sup>137</sup> Over the last few years, the legal literature has paid more attention to intersectional and additive discrimination, even though attention to multiple discrimination is still not widespread in Europe and in European states. Nonetheless, the social condition ground is often neglected in the analysis.<sup>138</sup> This is regrettable, since the “fit” of social condition with other prohibited grounds is not only appropriate, but also vital in recognizing and achieving the ameliorative purposes of human rights.<sup>139</sup> Accordingly, failing to carry out an

<sup>133</sup> *Ibidem*, p. 725.

<sup>134</sup> Fineman, *supra* note 97, p. 21.

<sup>135</sup> See S. Hannett, *Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination*, 23 *Oxford Journal of Legal Studies* 65 (2003).

<sup>136</sup> *Ibidem*, p. 68. Kimberley Crenshaw coined the term of “intersectionality”: K. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1 *University of Chicago Legal Forum* 139 (1989).

<sup>137</sup> Hannett, *supra* note 135.

<sup>138</sup> *Ibidem*.

<sup>139</sup> See MacKay, Kim, *supra* note 101, p. 81.

intersectional analysis could result in disadvantaged individuals falling through the gaps of human rights protection. Indeed, when an applicant alleges multiple counts of discrimination, and one of the grounds is left unprotected or not invoked, this can affect the success of the overall discrimination claim.<sup>140</sup> In an extensive report on poverty, *ATD Quart Monde* explains that before the introduction of the economic precariousness ground in French antidiscrimination law, it was very difficult to obtain a comprehensive understanding of the phenomenon of multiple discrimination and to find adequate responses to it.<sup>141</sup> Atrey also rightly emphasises the fact that the dominant framework in antidiscrimination law is “too fixated on grounds or status groups considered independently and in isolation of the poverty which exists within them.”<sup>142</sup>

In the context of the pandemic, the intersectional approach in antidiscrimination law – including the ground of social condition – is all the more important as people particularly affected by public actions and omissions can fall into situations of intersectional or additive discrimination. This is the case for irregular migrants, who are excluded from financial aid and the social security system. The same is true of poor neighbourhoods where families “with a migration background” mainly live. A study has shown that the death rate among Bangladeshis in British hospitals is twice that of “white” Britons, while that of Pakistanis and “black” Africans is respectively 2.9 and 3.7 times higher.<sup>143</sup> We therefore do not all have equal access to healthcare systems: race or ethnicity, combined with socioeconomic status, is likely to have a significant impact on these inequalities. The situation of women is also worth mentioning. As Hennette Vauchez reminds us, “it is established that lockdown impacts more heavily the popular and impoverished classes; yet single women and mothers are overexposed to poverty and over-represented in low-paid jobs (the very ones that are now considered essential to the functioning of society).”<sup>144</sup>

The Strasbourg Court recognises certain *groups* living in precarious socioeconomic situations as “vulnerable.”<sup>145</sup> It originally used the concept of group-based vulnerability in relation to the Roma minority,<sup>146</sup> but extended it to other groups, such as people

<sup>140</sup> See Hannett, *supra* note 135, p. 72.

<sup>141</sup> J. Ianni et al., *Discrimination et pauvreté. Livre Blanc: analyse, testings et recommandations*, ATD Quart Monde (2013), p. 55.

<sup>142</sup> Atrey, *supra* note 76, p. 424.

<sup>143</sup> L. Platt, R. Warwick, *Are Some Ethnic Groups More Vulnerable to COVID-19 than Others?*, The IFS Deaton Review (2020).

<sup>144</sup> Hennette-Vauchez, *supra* note 14. Own translation from: “il est établi que le confinement pèse plus lourdement sur les classes populaires et paupérisées; or les femmes et mères isolées sont surexposées à la pauvreté et sur-représentées dans les métiers peu rémunérateurs (ceux-là même que l’on juge aujourd’hui essentiels au fonctionnement de la société).”

<sup>145</sup> See L. Peroni, A. Timmer, *Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law*, 11 *International Journal of Constitutional Law* 1056 (2013).

<sup>146</sup> E.g. ECtHR, *D.H. and others v. The Czech Republic* (App. No. 57325/00), 3 November 2007; *Oršuš and others v. Croatia* (App. No. 15766/03), 16 March 2010; *Sampanis and others v. Greece* (App. No. 32526/05), 5 June 2008.

with intellectual disabilities,<sup>147</sup> people living with HIV,<sup>148</sup> and asylum-seekers.<sup>149</sup> Moreover, in some *individual* cases, as in the *B.S.* case,<sup>150</sup> the recognition of discrimination against a vulnerable *person* seems to have been recognised as an instance of intersectional discrimination – regarding a black, female sex worker – although without the Court being explicit on the matter. Despite the many advantages of the concept of “vulnerable groups” and of specific vulnerability where the applicant does not belong to such a group, it might be useful for the Court to explicitly recognise the multiplicity or intersectionality of grounds of discrimination when Art. 14 is invoked, mainly for reasons of “recognition”; especially with respect to stereotyping it is important that courts explicitly name the discrimination ground which constitutes the source and nature of the inequality experienced. Indeed, as Timmer puts it: “[You] cannot change a reality without naming it.”<sup>151</sup>

## CONCLUSIONS

At the time of this writing, a year after the start of the first lockdown, socioeconomically disadvantaged people seemed more than ever before to have fallen behind the veil of invisibility. Beyond the social, philosophical, and political questions raised by this situation, there is an urgent need to challenge and indict – in light of the law on fundamental rights – the situation of these forgotten people, who are struggling even more to make their voices and plight heard and recognised in the context of the pandemic. In this paper, I have shown that the free-standing Convention rights, including Arts. 8 and 3 ECHR can be operationalized to safeguard the political, civil and socioeconomic interests of socioeconomically underprivileged people. Protection under these articles contains some pitfalls however. In this context, I have demonstrated that the prohibition of discrimination on grounds of one’s socioeconomic situation based on Art. 14 ECHR is an important additional tool to protect the rights of people living in precarious situations, especially in times of pandemic. This article supports applicants to challenge disproportionate differences in treatment – both direct and indirect – based on their deprived situation. This is all the more important with regard to issues of recognition grounded in misdistribution. More specifically, I have put forward three main arguments for the importance of invoking the prohibition of discrimination on grounds of socioeconomic situation in times of pandemic. First, such a claim forces courts to deal with this issue directly, making it unavoidable. Second, it is the only efficient way

<sup>147</sup> E.g.: ECtHR, *Alajos Kiss v. Hungary* (App. No. 38832/06), 20 May 2010. Peroni, Timmer, *supra* note 145, p. 1057.

<sup>148</sup> E.g. ECtHR, *Kiyutin v. Russia* (App. No. 2700/10), 10 March 2011.

<sup>149</sup> E.g. *M.S.S. v. Belgium and Greece*.

<sup>150</sup> ECtHR, *B.S. v. Spain* (App. No. 47159/08), 24 July 2012.

<sup>151</sup> A. Timmer, *Judging Stereotypes: What the European Court of Human Rights Can Borrow from American and Canadian Equal Protection Law*, 63 *American Journal of Comparative Law* 239 (2015).

to combat the numerous examples of prejudice, stereotyping, and stigma which affect socioeconomically disadvantaged people. Third, the ground of socioeconomic status in antidiscrimination law is often an element of multiple discrimination, and it is necessary to consider a discriminatory situation as a whole. Otherwise, applicants might fall through the gaps.

In a nutshell, the legal tool of discrimination on grounds of socioeconomic status is essential since many of the discriminatory situations that socioeconomically disadvantaged people experience in “normal” times are exacerbated by the COVID-19 pandemic. There is an urgent need for judges, lawyers, organisations, and researchers to use antidiscrimination law to make the invisible visible: the victims of structural and endemic inequalities that the law is struggling to address.