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Poverty-Related Discrimination in the European Court of Human Rights or the 'Art of Ignoring the Poor'

Analysing the ECtHR's Non-Discrimination Jurisprudence Based on Sen's Capability Approach and Fredman's Four-Dimensional Concept of Substantive Equality

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Abstract

Poverty and non-discrimination law have traditionally evolved on two parallel tracks. The former has primarily been dealt with in socioeconomic terms, while the latter mainly focused on civil and political rights. Despite having the legal avenues to do so, the European Court of Human Rights (ECtHR) remains reluctant to recognise poverty as a discrimination ground. Hence, this thesis explores the contributions of Sen's capability approach and Fredman's substantive equality concept to the interpretation of Article 14 of the European Convention on Human Rights (ECHR). It is argued that both theories have the potential to bring about critical developments in the Court's non-discrimination case law. It is contended that once the Court has acknowledged the links between discrimination and poverty as capability deprivation, it could draw on Fredman's framework to recognise poverty as a discrimination ground of Article 14 ECHR (recognition dimension). Further, States should be under positive duties to cater to the needs of persons living in poverty to facilitate their capability to access and enjoy Convention rights on equal terms (redistributive, participative, and transformative dimensions).

List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ASEAN	Association of Southeast Asian Nations
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CoE	Council of Europe
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEA	European Economic Area
ERRC	European Roma Rights Centre
ESC	European Social Charter
EU	European Union
I-ACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
IHRL	International Human Rights Law
OHCHR	Office of the United Nations High Commissioner for Human Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme

'The poor […] are like the shadows in a painting: they provide the necessary contrast'.
Philippe Hecquet, 1740[1]

'May we not outgrow the belief that poverty is necessary?'
Alfred Marshall, 1890[2]

'The present global institutional order is foreseeably associated with such massive incidence of avoidable severe poverty, its (uncompensated) imposition manifests an on-going human rights violation — arguably the largest such violation ever committed in human history'.
Thomas Pogge, 2007[3]

'Human rights are not just about prisoners of conscience, they are also about prisoners of poverty'.
Paul Hunt, former Special Rapporteur for Health, 2008[4]

1. CHAPTER 1: INTRODUCTION

1.1. GENERAL BACKGROUND AND CONTEXT

Understanding poverty in 'twenty-first-century Europe' entails acknowledging that it revolves around an 'increasingly unequal distribution of resources, rather than a lack of resources'.[5] Despite the deep link between the two, for a long time, '[p]overty [would] not traditionally b[e] regarded as a human rights issue'.[6] On the one hand, human rights were 'viewed as restraining the State from interfering in individual freedom'.[7] On the other, poverty was presented as requiring positive State action. And so, even following the recognition by the international community that poverty is, in fact, a human rights issue, '[p]poverty remain[ed] largely unfamiliar to discrimination law'.[8]

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[1] Martin Ravallion, *The Economics of Poverty: History, Measurement, and Policy* (Oxford University Press 2016) 9. Note that the title of the thesis quotes John Kenneth Galbraith, 'L'art d'ignorer les pauvres' [2005] *Le Monde diplomatique* <www.monde-diplomatique.fr/2005/10/GALBRAITH/12812> accessed 14 May 2022.

[2] Ravallion (n 1) 9.

[3] Thomas Pogge, 'Severe Poverty as a Human Rights Violation' in Thomas Pogge (ed), *Freedom From Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford University Press 2007) 52.

[4] Paul Hunt, 'Statement to the Panel on Maternal Mortality and the Human Rights of Women' (UN Human Rights Council 2008) 1 <http://repository.essex.ac.uk/9789/1/human-rights-council-statement-maternal-mortality-panel-june-2008.pdf> accessed 14 May 2022.

[5] 'Living in Dignity in the 21st Century: Poverty and Inequality in Societies of Human Rights: The Paradox of Democracies' (Council of Europe 2013) 13–14.

[6] Sandra Fredman, 'Poverty and Human Rights: A Peril and a Promise' in Dapo Akande and others (eds), *Human Rights and 21st Century Challenges* (Oxford University Press 2020) 222.

[7] ibid.

[8] Shreya Atrey, 'The Intersectional Case of Poverty in Discrimination Law' (2018) 18 Human Rights Law Review 411, 411 <https://academic.oup.com/hrlr/article-abstract/18/3/411/5086067?redirectedFrom=fulltext> accessed 15 February 2022.

Already at the 1993 World Conference on Human Rights, the international community had acknowledged the dangers of 'widespread extreme poverty' on the 'full and effective enjoyment of human rights' and called for its 'immediate alleviation and eventual elimination'.[9] Yet, two decades later the 'eradicat[ion] of extreme poverty for all people everywhere' is still listed as the first Goal of the UN 2030 Agenda for Sustainable Development,[10] and is unlikely to materialise by that date[11].

As a result of the 'most recent economic crisis, people living in European countries have seen an increase not just in the proportion of the population in and at risk of poverty, but also in income inequality [and] insecure living conditions'.[12] Consequently, in 2020, 21.9% of the European Union (EU) population, that is approximately 96.5 million people, were considered 'at risk of poverty or social exclusion'.[13] The United Nations Development Programme's (UNDP) Human Development Report 2020 indicated that 1.3 billion people across 107 developing countries live in multidimensional poverty.[14]

Additionally, the COVID-19 pandemic has exacerbated existing 'poverty, […] inequalities, and structural and entrenched discrimination'[15] between and within societies. As a result of the pandemic, it is estimated that, worldwide, an added 97 million people have fallen into poverty in 2020 and 2021.[16] Given their socioeconomic precarity, impoverished persons have been the most affected 'both in terms of vulnerability to the virus and its economic consequences'.[17] In

[9] Vienna Declaration and Programme of Action*,* 25 June 1993, World Conference on Human Rights, A/CONF.157/23, para. 14.
[10] Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, UN General Assembly Resolution 70/1.
[11] Philip Alston, 'The Parlous State of Poverty Eradication Report of the Special Rapporteur on Extreme Poverty and Human Rights' (OHCHR 2020) A/HRC/44/40 paras 27–32 <https://undocs.org/A/HRC/44/40> accessed 26 February 2022.
[12] Valeska David, *Cultural Difference and Economic Disadvantage in Regional Human Rights Courts: An Integrated View* (1st edn, Intersentia 2020) 223 citing 'Living in Dignity in the 21st Century: Poverty and Inequality in Societies of Human Rights: The Paradox of Democracies' (n 5) 7–27.
[13] Eurostat, 'Living Conditions in Europe - Poverty and Social Exclusion' <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Living_conditions_in_Europe_-_poverty_and_social_exclusion> accessed 9 April 2022. Note that this number 'corresponds to the sum of persons who are […] at least in one of the following three situations: persons who are at risk of poverty; persons who suffer from severe material and social deprivation; and persons (aged less than 65 years) living in a household with very low work intensity.'
[14] 'Global Multidimensional Poverty Index 2020 – Charting Pathways out of Multidimensional Poverty: Achieving the SDGs' (United Nations Development Programme (UNDP) and Oxford Poverty and Human Development Initiative (OPHI) 2020) 3–4 <www.hdr.undp.org/sites/default/files/2020_mpi_report_en.pdf> accessed 9 April 2022. Note that the Multidimensional Poverty Index (MPI) 'examines each person's deprivations across 10 indicators in three equally weighted dimensions–health, education and standard of living (...)'.
[15] 'OHCHR and COVID-19' (*OHCHR*) <www.ohchr.org/en/covid-19> accessed 10 April 2022.
[16] Daniel Gerzon Mahler and others, 'Updated Estimates of the Impact of COVID-19 on Global Poverty: Turning the Corner on the Pandemic in 2021?' (*World Bank Blogs*, 24 June 2021) <https://blogs.worldbank.org/opendata/updated-estimates-impact-covid-19-global-poverty-turning-corner-pandemic-2021> accessed 11 April 2022.
[17] Alston (n 11) paras 2, 34–36.

that context, poverty, as 'both a cause and a consequence of human rights violations',[18] still plays an outsize role in many societies. As a 'multidimensional phenomenon', poverty represents an 'urgent human rights concern' as it pushes many human rights, both socioeconomic and civil and political, 'out of [the] reach' of those experiencing it.[19]

Against this backdrop, it is fitting to explore the role of the European Court of Human Rights ('the Court' or 'ECtHR') – both the one it currently accepts to take on and the one it could, potentially take on in the future. In societies characterised by staggering economic inequality[20] and 'that remain deeply segregated by wealth', persons living in poverty often fall prey to 'systemic discrimination' affecting virtually all aspects of their lives.[21] Hence, as will be seen throughout this thesis, socioeconomic precarity raises important issues of non-discrimination and equality.

The prohibition of discrimination enshrined in Article 14 of the European Convention on Human Rights[22] ('the Convention' or 'ECHR') 'is framed as a prohibition of distinctions or impact that perpetuates disadvantages based on recognised grounds such as [sex, race, colour, language, religion] and so on'.[23] At present, however, poverty is not '[admitted] in the inner circle of protected characteristics' of Article 14 ECHR.[24] Among the peculiarities of that provision is 'the elasticity of the grounds of discrimination',[25] whereby the ECtHR can identify and include new status groups.[26] When faced with claims alleging poverty-related discrimination, the ECtHR, therefore, has to decide whether impoverished persons constitute a group entitled to protection under the prohibition of discrimination of Article 14 ECHR. It has to consider whether poverty-related discrimination is a human rights issue that it should busy itself with and, if so, what this involvement should entail.

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[18] 'About Extreme Poverty and Human Rights' (*OHCHR*) <www.ohchr.org/en/special-procedures/sr-poverty/about-extreme-poverty-and-human-rights> accessed 11 April 2022.
[19] ibid.
[20] 'Even It Up: Time to End Extreme Inequality' (Oxfam International 2014) 28,32 <https://oxfamilibrary.openrepository.com/bitstream/handle/10546/333012/cr-even-it-up-extreme-inequality-291014-en.pdf?sequence=43> accessed 15 February 2022 The report noted that 'the gap between the rich and poor is wider now than ever before and is still growing, with property increasingly in the hands of an elite few. […] Since the financial crisis, the ranks of the world's billionaires have more than doubled, swelling to 1,645 people. […] Oxfam's research in early 2014 found that the 85 richest individuals in the world have as much wealth as the poorest half of the global population'.
[21] Olivier De Schutter, 'Report on Ending the Vicious Cycles of Poverty' (OHCHR 2021) A/76/177 <https://undocs.org/A/76/177> accessed 26 February 2022.
[22] Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS No. 5) (adopted 4 November 1950, entered into force 3 September 1953) (European Convention on Human Rights).
[23] Atrey (n 8) 411.
[24] ibid.
[25] Sandra Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights' (2016) 16 Human Rights Law Review 273, 274 <https://doi.org/10.1093/hrlr/ngw001> accessed 15 February 2022.
[26] Note that the term "status group" refers to the grounds of discrimination protected under Article 14 ECHR (sex, race, colour, language, religion, etc.) but could also cover additional grounds under "other status".

1.2. PURPOSE OF THE THESIS

This thesis examines the ECtHR's current non-discrimination case law, its lacking assessment of *prima facie* poverty-related discrimination cases, and the resulting weak protection afforded to impoverished applicants under Article 14 ECHR. In doing so, it argues that the ECtHR does not effectively exploit all the legal avenues at its disposal under that provision. The thesis also contends that a comprehensive and protective approach consistent with Sen's capability approach and Fredman's substantive concept of equality would lead the ECtHR to recognise poverty as a discrimination ground and impose positive duties on States.

In this sense, the thesis aims to demonstrate that persons living in poverty routinely face stigma, stereotyping, prejudice, and discrimination based on their precarity. This, in turn, affects their capability to access and enjoy ECHR rights on equal terms. In light of this *status quo*, the ECtHR's approach – which addresses *prima facie* poverty-related discrimination as an isolated occurrence confined to the case at hand, instead of the broader phenomenon that it is – is out of touch with the experiences of the persons affected.

On the whole, the thesis suggests that Sen's capability approach and Fredman's substantive equality concept highlight the necessity of applying the non-discrimination principles, developed by the ECtHR under Article 14 ECHR, to *prima facie* socioeconomic discrimination cases.

1.3. RESEARCH QUESTIONS

With these considerations in mind, the thesis aims to answer the following research questions. Given the unwillingness of the ECtHR to recognise poverty as a discrimination ground, would an interpretation of Article 14 ECHR consistent with the capability approach and the four-dimensional concept of substantive equality result in better protection from poverty-related discrimination? If so, could these two concepts lead the ECtHR to recognise poverty as a discrimination ground under Article 14 ECHR? Finally, could they also lead the ECtHR to impose positive duties on States in poverty-related discrimination cases?

1.4. THEORIES AND METHODOLOGY

1.4.1. Sen's capability approach

When it comes to poverty and discrimination, the capability approach makes for a compelling concept. Theorised by Nobel Laureate Amartya Sen,[27] the capability approach provides an

[27] Amartya Sen is a Professor of Economics and Philosophy and has been awarded, *inter alia*, the Nobel Prize in Economics in 1998 as well as India's Bharat Ratna for his work in welfare economics in 1999. 'His research has ranged over social choice theory, economic theory, ethics and political philosophy, welfare economics, theory of

alternative space in which to consider poverty. This concept is further explored in what follows, therefore, suffice it to say that the capability approach focuses on the 'capability to achieve valuable functionings that make up our lives, and more generally, our freedom to promote objectives we have reasons to value'.[28] As a two-tiered concept, Sen's capability approach entails functionings and freedoms. Functionings are made up of doings and beings that one may value, such as 'being in good health [or] being happy'.[29] Whether or not an individual can achieve her valued functionings will depend on her capability to do so. Hence, Sen contends that appraising a person's well-being requires examining her functionings, that is, what she 'succeeds in *doing* with the commodities' at her disposal.[30]

1.4.2. Fredman's four-dimensional concept of substantive equality

The concept of equality can be broken down into two distinct categories comprising formal equality – which is concerned with direct discrimination – and substantive equality – which aims at tackling indirect discrimination. In formal terms, equality 'is predicated on the principle that justice inheres in consistency'[31] and, therefore, means 'treat[ing] like cases alike'.[32] It entails affording the same treatment to similarly situated persons, regardless of the outcome. This 'essentially static and passive' approach to equality overlooks the context and, thus, 'disregards the collective dimensions of individual inequality such as group membership, structural inequality or societal realities'.[33] Fredman's[34] four-dimensional concept of equality departs from this formal understanding and adopts a substantive approach in its stead.

Substantive equality is a broad concept subject to varying definitions and degrees. On the whole, substantive equality aims to overcome the '[unequal results of] treating unequals equally'.[35] It can be subcategorised as comprising equality of results[36] and equality of

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measurement, decision theory, development economics, public health, and gender studies'. See 'Amartya Sen – Biographical Note' <https://scholar.harvard.edu/sen/biocv> accessed 8 May 2022.

[28] Amartya Sen, *Inequality Reexamined* (Oxford University Press 1992) xi.

[29] ibid 39.

[30] Amartya Sen, *Commodities and Capabilities* (Oxford Univ Press 1999) 5 (emphasis in original).

[31] Sandra Fredman, *Discrimination Law* (2nd edn, Oxford University Press 2011) 2.

[32] Aristotle, The Nicomachean Ethics of Aristotle (JM Dent, 1911) Book V3, paras 1131a–b.

[33] Marc De Vos, 'The European Court of Justice and the March towards Substantive Equality in European Union Anti-Discrimination Law' (2020) 20 International Journal of Discrimination and the Law 62, 63 <https://journals.sagepub.com/doi/full/10.1177/1358229120927947> accessed 8 May 2022.

[34] Sandra Fredman is a 'Professor of the Laws of the British Commonwealth and the USA at Oxford University. […] She has written and published widely on anti-discrimination law, human rights law and labour law, including numerous peer-reviewed articles. […] She has acted as an expert adviser on equality law and labour legislation in the EU, Northern Ireland, the UK, India, South Africa, Canada, Malaysia and the UN. […] She founded the Oxford Human Rights Hub in 2012, of which she is the Director'. See 'Sandra Fredman FBA, QC (Hon)' (*Oxford Law Faculty*, 16 July 2015) <www.law.ox.ac.uk/people/sandra-fredman-fba-qc-hon> accessed 19 May 2022.

[35] Daniel Moeckli, 'Equality and Non-Discrimination', *International Human Rights Law* (3rd edn, OUP Oxford 2018) 156.

[36] The terms equality of results and equality of outcomes will be used interchangeably.

opportunity.[37] The former demands an equal distribution of social goods (such as education, employment, healthcare, political representation, etc.) and can, in some cases, require affirmative action[38] schemes to correct past and entrenched inequalities. The latter stresses individual merits and seeks to guarantee equal opportunities regardless of the outcome.

Against this background, Fredman's concept is premised on the belief that 'the right to substantive equality should not be collapsed into a single formula'[39] and, therefore, 'pursu[es] four overlapping aims'.[40] These include redressing socioeconomic disadvantage (redistributive dimension); addressing stigma, stereotyping, humiliation, and violence (recognition dimension); enhancing social and political participation (participative dimension); and accommodating difference by achieving structural change (transformative dimension).[41] As discussed in more detail in chapter 4, this theory is of fundamental importance to poverty-related discrimination, as it underlines the fact that poverty is not only concerned with issues of redistribution. Impoverished persons also 'experience many of the elements of discrimination experienced by status groups, including lack of recognition, social exclusion, and reduced political participation'.[42]

1.4.3. Methodology

To attain the research objectives and respond to the questions raised above, the thesis adopts a twin approach. First, it implements a doctrinal analysis. It focuses on the ECtHR's non-discrimination law as it stands in the ECHR and as it was developed by the Court in its case law. Doing so allows for a discussion of the legal meaning of the non-discrimination principle. It further helps to appraise the adequacy and consistency of the treatment by the Court of *prima facie* poverty-related non-discrimination cases. Second, the approach chosen in this thesis brings in other concepts from outside the realm of the ECHR. Specifically, the methodology used here entails applying Sen's capability approach and Fredman's substantive equality concept to relevant ECtHR case law. That aims to illustrate the added protective value of these two theories in *prima facie* poverty-related non-discrimination cases.

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[37] Note that substantive equality also generally comprises a subcategory based on human dignity, which will not be addressed in the present inquiry.

[38] In European contexts, the term "positive discrimination" is sometimes preferred to "affirmative action". Here, both terms will be used interchangeably. DiSalvo and Ceaser define the concept as 'refer[ing] to policies that legitimate the use of measures that explicitly take into account an individual's group status in the allocation of jobs, contracts, and university admissions to assist groups that are disadvantaged and that have suffered historically from discrimination. According to its proponents, the larger objectives of these policies include eliminating patterns of negative discrimination, producing greater equality, integrating members of these groups into society by giving them a larger stake in it, and achieving greater representativeness or diversity'. See Daniel DiSalvo and James W Ceaser, 'Affirmative Action and Positive Discrimination Observation Reciproque' (2004) 25 Tocqueville Review 77 <https://heinonline.org/HOL/P?h=hein.journals/tocqvr25&i=77> accessed 8 May 2022.

[39] Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 International Journal of Constitutional Law 712, 712 <https://doi.org/10.1093/icon/mow043> accessed 15 February 2022.

[40] Fredman, *Discrimination Law* (n 31) 25.

[41] Fredman, 'Emerging from the Shadows' (n 25) 274.

[42] Fredman, 'Poverty and Human Rights: A Peril and a Promise' (n 6) 238.

Applying Sen's capability approach aims to place poverty within the sphere of human rights, generally, and within the competence *ratione materiae*[43] of the ECtHR, specifically. By emphasising that poverty should not be defined exclusively in economic terms, but rather in the broader space of capabilities, the capability approach underlines the relevance of poverty-related discrimination for the enjoyment of ECHR rights.

Applying Fredman's four-dimensional concept of substantive equality to the ECtHR's case law demonstrates the strong link between poverty, equality, and discrimination. It further shows how a non-discrimination case law, consistent with this framework, could potentially have far-reaching consequences, both in terms of the response to, and the prevention of, poverty-related discrimination.

The arguments put forward to critique the ECtHR's current approach rely mostly on the Court's rationale as laid out in its judgments and decisions. When relevant, the scrutiny additionally focuses on the arguments of the parties and the submissions of third-party interveners. Some of the cases were chosen to illustrate the ECtHR's established general principles and its current approach to non-discrimination under Article 14, generally. Cases concerning poverty-related discrimination, specifically, were identified, in part, via the ECtHR's online database[44] by doing a word search with terms such as "poverty", "social origin", "social benefits", "social exclusion", or "socioeconomic precarity".

Additionally, some cases were pinpointed by reading the Court's official guide on Article 14, online academic publications discussing the ECtHR's recent developments[45], as well as journal articles by researchers and commentators on the Court's jurisprudence. The selected cases include both cases where Article 14 ECHR was raised by the parties and/or considered by the ECtHR, but also cases where – it is argued – the Court failed to address issues under that provision when it was appropriate to do so.

1.5. Definitions and limitations

1.5.1. Defining the key terms

Despite the global consensus on the urgency to combat poverty, there exists a divergence in the literature on how poverty should be measured and defined.[46] Three main approaches to

[43] Latin expression for 'subject matter'.
[44] 'HUDOC - European Court of Human Rights' <https://hudoc.echr.coe.int/eng#%20> accessed 27 May 2022.
[45] 'Strasbourg Observers' <https://strasbourgobservers.com/> accessed 27 May 2022.
[46] Peter Saunders notes that '[t]here is no shortage of approaches to the conceptualisation and definition of poverty. Some of the most eminent social scientists have been trying to define poverty for more than 200 years'. See Peter Saunders, 'Towards a Credible Poverty Framework: From Income Poverty to Deprivation' (Social Policy Research Centre (SPRC) Discussion Paper No 131 2004) 4

poverty assessment, relevant in the present context, include income poverty, capability deprivation, and social exclusion.

1.5.1.1. *Income poverty*

As the most commonly used technique to measure poverty, the monetary approach relies on 'a shortfall in […] income' or purchasing power against a poverty line.[47] Absolute (or extreme) poverty will generally be distinguished from relative poverty, both of which are measured with persons falling below a pre-established 'poverty threshold, or poverty line' being categorised as poor.[48] On the one hand, relative poverty is 'generally construed as a household income level below a given proportion of average national income'.[49] On the other, absolute poverty is said to affect only countries from the Global South and 'means that households cannot meet their basic needs for survival' (such as food, healthcare, safe drinking water, sanitation, education, shelter, etc.).[50] This typical income-based poverty measurement scheme of the World Bank – which established the current international poverty line at $1.90 per day[51] – has been increasingly challenged[52] in recent years and deemed 'neither meaningful nor reliable'.[53]

1.5.1.2. *Capability deprivation*

An alternative view based largely on Amartya Sen's capability approach has gained momentum. Sen defines 'poverty as the failure of basic capabilities to reach certain minimally accepted levels'.[54] By rejecting the monetary approach and instead considering poverty as capability deprivation, this approach has the added value to 'provid[e] a fuller recognition of the variety of ways in which lives can be enriched or impoverished'.[55] Indeed, an analysis in

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<www.researchgate.net/publication/265357824_Towards_a_Credible_Poverty_Framework_From_Income_Poverty_to_Deprivation> accessed 4 May 2022.

[47] Caterina Ruggeri Laderchi, Ruhi Saith and Frances Stewart, 'Does It Matter That We Do Not Agree on the Definition of Poverty? A Comparison of Four Approaches' (2003) 31 Oxford Development Studies 243, 247.

[48] 'Poverty' (*Council of Europe*) <www.coe.int/en/web/compass/poverty> accessed 8 April 2022.

[49] Jeffrey Sachs, *The End of Poverty: Economic Possibilities of Our Time* (The Pinguin Press 2005) 20.

[50] ibid.

[51] Note that the World Bank has additionally adopted the $3.20 and $5.50 per person and per day poverty lines in complement to the $1.90 international poverty line. See 'Measuring Poverty' (*World Bank*) <www.worldbank.org/en/topic/measuringpoverty#2> accessed 10 April 2022.

[52] The former UN Special Rapporteur on extreme poverty and human rights Philip Alston has authored a report where he rightly condemns the World Bank's international poverty line to measure extreme poverty. According to him, relying on the $1.90 per day benchmark leads to the erroneous belief that poverty levels are declining. He relevantly shows that the international poverty line is 'well below the national poverty lines of most countries, and accordingly generates dramatically lower numbers in poverty'. Two striking examples include Thailand and the United States with a 0.0% and 1.2% poverty rate under the World Bank's measurement, respectively, but 9.9% and 12.7% under national poverty lines, respectively. See Alston (n 11) paras 5–11.

[53] Thomas Pogge and Sanjay G Reddy, 'How Not to Count the Poor' 1, 1 <https://papers.ssrn.com/abstract=893159> accessed 10 April 2022.

[54] Sen, *Inequality Reexamined* (n 28) 109.

[55] ibid 43–44.

the space of capabilities does not focus on the lack or lowness of income, which does not indicate a person's capability to exploit that income to achieve valued functionings.

For instance, if a person possesses and has access to food which would satisfy her nutritional needs, that may not necessarily be the case for someone else. A second person suffering from a condition affecting her nutrient intake may well find herself undernourished although she follows the same diet as the first individual.[56] Hence, under the capability approach, 'the conversion of commodity-characteristics into personal achievements of functionings depends on a variety of factors – personal and social'.[57] This approach to poverty, based on a loss of capabilities has been progressively endorsed and incorporated by various international institutions, including the Committee on Economic, Social and Cultural Rights (CESCR)[58], the Office of the United Nations High Commissioner for Human Rights (OHCHR)[59], and the UNDP[60].

1.5.1.3. *Social exclusion*

The concept of social exclusion emerged in industrialised countries to consider the 'condition of those who are not necessarily income-poor – though many are too – but who are kept out of the mainstream society'.[61] It 'describes the processes of marginalization and deprivation'[62] whereby individuals are 'systematically excluded from participation in society'.[63] In this sense, 'participation refers to the capacity to purchase goods and services; participation in economically or socially valuable activities, political engagement, and social interaction'.[64] Some scholars have taken the view that the concept of social exclusion 'highlights the interaction between status and distributive equalities'.[65] Hence, its main contribution lies in its 'focus on the relationship between the included and the excluded, and in particular on the role of the former in causing or perpetuating exclusion'.[66]

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[56] Sen, *Commodities and Capabilities* (n 30) 5.
[57] ibid 17.
[58] 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights' (UN Committee on Economic, Social and Cultural Rights 2001) E/C.12/2001/10 para 7 <www2.ohchr.org/english/bodies/cescr/docs/statements/E.C.12.2001.10Poverty-2001.pdf> accessed 17 April 2022.
[59] 'The Guiding Principles on Extreme Poverty and Human Rights' (OHCHR 2012) A/HRC/21/39 para 2 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/154/60/PDF/G1215460.pdf?OpenElement> accessed 17 April 2022.
[60] 'Human Development Report 2019 Beyond Income, beyond Averages, beyond Today: Inequalities in Human Development in the 21st Century' (UNDP 2019) <https://hdr.undp.org/en/content/human-development-report-2019> accessed 17 April 2022.
[61] Fernanda Doz Costa, 'Poverty and Human Rights: From Rhetoric to Legal Obligations a Critical Account of Conceptual Frameworks' (2008) 5 International Journal on Human Rights 84 <https://sur.conectas.org/wp-content/uploads/2017/11/sur9-eng-fernanda-doz-costa.pdf> accessed 17 February 2022.
[62] Ruggeri Laderchi, Saith and Stewart (n 47) 257.
[63] Fredman, 'Poverty and Human Rights: A Peril and a Promise' (n 6) 245.
[64] ibid.
[65] ibid.
[66] Ruth Lister, *Poverty* (Cambridge: Blackwell/Polity Press 2004) 98.

Regardless of the space chosen to consider poverty – income, capabilities, or exclusion – in the case of extreme poverty, it 'is best defined as a condition in which the vast majority of human rights cannot possibly be realized'.[67] In that context, according to Philip Alston, the former Special Rapporteur on extreme poverty and human rights, 'inequality is not just an economic issue, but also one of human rights'.[68]

1.5.1.4. *Human rights and non-discrimination*

The international human rights paradigm was constructed around the rhetoric of freedom and equality which was already prominent at the time of the Enlightenment.[69] The principles of equality and non-discrimination have since then been streamlined throughout the human rights project to become 'a fundamental rule of international human rights law'.[70] By adhering to international human rights law, States take on 'legally binding obligations' regarding a 'broad class of human rights', including pledges of equality and the prohibition of discrimination.[71] These have been codified in various international instruments, including, *inter alia*, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Social, Economic and Cultural Rights (ICESCR).[72] Various regional human rights instruments[73] have also been adopted, including the ECHR, which will be the focus of the present inquiry. On the whole, these instruments recognise the 'human rights of all individuals (as 'rights holders') and corresponding obligations on States to uphold these human rights (as 'duty bearers')'.[74] As such, the 'international human rights system is founded on the idea that all human beings have the same set of fundamental rights' which ought to be guaranteed based on the principles of equality and non-discrimination.[75]

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[67] Philip Alston, 'Extreme Inequality as the Antithesis of Human Rights' (*OpenGlobalRights*) <www.openglobalrights.org/extreme-inequality-as-the-antithesis-of-human-rights/> accessed 6 May 2022.

[68] ibid. On that point, Alston relevantly notes that '[i]nternational economic actors like the World Bank, the International Monetary Fund (IMF), the World Trade Organization (WTO), and the Organization for Economic Cooperation and Development (OECD) have begun to speak about the negative economic consequences of such inequalities. Yet it is no coincidence that these are the very same organizations that steadfastly resist policies that will factor human rights into their policies and programs. Of course, it is not so much the organizations themselves that are to blame, but the governments that control them. It is telling that, when economic and financial issues are raised in the Human Rights Council, someone invariably makes the argument that it is not the appropriate forum and these matters should be dealt with elsewhere. And when efforts are made to raise human rights in the economic forums, the same governments insist that these issues be addressed in the Human Rights Council. They seek, in other words, to silo off issues that are deeply intertwined'.

[69] Moeckli (n 35) 148.

[70] Vienna Declaration and Programme of Action, 25 June 1993, World Conference on Human Rights, para. 15.

[71] Doz Costa (n 61) 85.

[72] ibid 6–7.

[73] Articles 2, 3, 18(3)-(4), and 28 African Charter on Human and Peoples' Rights (ACHPR); Article 1 and 24 American Convention on Human Rights (ACHR); Articles 2, 9, 35 Arab Charter on Human Rights; Articles 1, 2, 3, and 9 ASEAN Human Rights Declaration; Article 14 ECHR and Article 1 Protocol No 12 ECHR.

[74] Doz Costa (n 61) 7.

[75] Moeckli (n 35) 148.

1.5.1.5. *Intersectional discrimination*

On the whole, intersectional discrimination refers to cases where the discrimination at play results from 'the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone'.[76] The concept of intersectionality was theorised by Kimberlé Crenshaw in her article *Demarginalizing the Intersection of Race and Sex* on the discrimination experienced by Black women.[77] In her piece, Crenshaw demonstrated how the 'single-axis framework [of] antidiscrimination law', that tends to 'treat race and gender as mutually exclusive categories of experience and analysis', in fact, distorts the experiences of Black women.[78] Accordingly, she observes that '[b]ecause the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated'.[79]

Transposing the concept to poverty, Shreya Atrey posits that '[i]t is the appreciation of th[e] intersectional nature of poverty that lies at the core of constructing a successful response to addressing poverty in discrimination law'.[80] In this sense, any meaningful attempt to grasp the intersectional nature of poverty entails 'reading in poverty as a ground, […] adopting a contextual approach to establishing discrimination, or attaching a substantive equality interpretation to equality and non-discrimination guarantees'.[81]

1.5.1.6. *Poverty-related discrimination*

Based on the above, in the present inquiry, the term poverty-related discrimination refers to disadvantageous treatment or outcome based on one's socioeconomic precarity. It relates to situations in which rights holders within the jurisdiction of the ECtHR sustain a disadvantage in the access to, or enjoyment of, their ECHR rights due to their socioeconomic precarity.

1.5.2. Delineating the scope of the topic

Before turning to the structure and outline of the thesis, it is fitting to discuss some caveats. This study and its findings are subject to some limitations. The first set of limitations concerns the ECHR provision that will be relied on throughout this paper. The thesis focuses exclusively

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[76] Mary Eaton, 'Patently Confused: Complex Inequality and Canada v. Mossop' (1993) 1 Review of Constitutional Studies 203, 229 <https://heinonline.org/HOL/Page?handle=hein.journals/revicos1&id=207&div=&collection=>.
[77] Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1989 University of Chicago Legal Forum <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1052&context=uclf> accessed 10 February 2022.
[78] ibid 139.
[79] ibid 140.
[80] Atrey (n 8) 413.
[81] ibid.

on the prohibition of discrimination as it is guaranteed by Article 14 ECHR and not on the more general non-discrimination provision of Article 1 of Protocol No 12 to the ECHR[82]. As regards the 'parasitic'[83] or 'accessory'[84] nature of Article 14 ECHR, this feature will not be critiqued here. Instead, this characteristic of the non-discrimination provision will be taken as a given on which the analysis is constructed.

As far as socioeconomic rights are concerned, the thesis does not delve into whether or not the ECtHR should adjudicate them. This is a topic that lies outside the scope of this paper.[85] The focus, here, is rather on poverty-related discrimination and its effect on the equal access and enjoyment of ECHR rights.

It is conceded that some scholars have criticised the positive and negative obligations dichotomy as well as the vulnerability approach – two notions relied on in this analysis. Regarding the former, the alternative concept of the 'responsibility approach' is sometimes preferred. Nevertheless, the present thesis relies on the positive and negative dichotomy, as it is a familiar concept in the ECtHR's jurisprudence. What is more, by focusing on the extent to which a State is 'culpable [for] the destitution in issue', the responsibility approach 'risks bringing [burdensome] causality elements into the examination'.[86] Equally contested is the vulnerability approach. Regarding that latter notion, some reject it as 'stigmatising vulnerable groups [and being] paternalistic'.[87] The thesis does not engage in a discussion on the adequacy of the concept of vulnerability as such. Instead, it considers the value-added of the concept in

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[82] Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177) (adopted 4 November 2000, entered into force 1 April 2005) (Protocol No. 12 to the ECHR). Note that at the time of writing, Protocol No. 12 has been ratified by twenty out of the forty-six Council of Europe member States. See <www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=177> accessed 22 February 2022. Leijten points out that the reluctance by member States to ratify Protocol No. 12 'can be explained by the concern that the Protocol increases to a large extent the power of the ECtHR to intervene with member state policies in different areas.' See Ingrid Leijten, 'Social Security as a Human Rights Issue in Europe – Ramaer and Van Willigen and the Development of Property Protection and Non Discrimination under the ECHR' 73 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 177, 198–199 <www.zaoerv.de/73_2013/73_2013_2_a_177_208.pdf> accessed 3 March 2022.

[83] Fredman, 'Emerging from the Shadows' (n 25) 273.

[84] Oddný Mjöll Arnardóttir, 'Non-Discrimination Under Article 14 ECHR: The Burden of Proof' [2007] Scandinavian Studies In Law 27, 14 <https://scandinavianlaw.se/pdf/51-1.pdf> accessed 10 May 2022.

[85] For further discussion of the topic see Francesco Seatzu, 'Enhancing a Principled Justificatory Model of Adjudication for the Protection of Human Rights in the Socio-Economic Sphere: The Impact of the European Social Charter on the Case Law of the European Court of Human Rights', *The Global Community Yearbook of International Law and Jurisprudence 2015* (Oxford University Press 2016); Ingrid Leijten (ed), 'The ECHR and Socio-Economic Rights Protection', *Core Socio-Economic Rights and the European Court of Human Rights* (Cambridge University Press 2018).

[86] Laurens Lavrysen, 'Strengthening the Protection of Human Rights of Persons Living in Poverty under the ECHR' (2015) 33 Netherlands Quarterly of Human Rights 293, 310–311 <https://journals.sagepub.com/doi/abs/10.1177/016934411503300303> accessed 26 January 2022.

[87] So Yeon Kim, 'Les Vulnérables : Evaluating the Vulnerability Criterion in Article 14 Cases by the European Court of Human Rights' [2021] Legal Studies 1 <www.researchgate.net/publication/351821760_Les_vulnerables_evaluating_the_vulnerability_criterion_in_Article_14_cases_by_the_European_Court_of_Human_Rights> accessed 15 May 2022.

the case law of the ECtHR for the protection of persons living in poverty. The argument put forward here is that the protection afforded by the ECtHR to impoverished persons would gain in recognising that poverty gives rise to vulnerability, thus warranting enhanced protection against discrimination.[88]

Also of note is the fact that the concepts of social exclusion, human dignity, and intersectionality will not be the subject of in-depth discussions in the present inquiry. The notion of social exclusion will only be discussed insofar as it is relevant under Fredman's four-dimensional concept of substantive equality.[89] Likewise, considerations of human dignity will not be taken on board in the analysis of poverty and substantive equality.[90] Substantive equality is an umbrella concept that is generally presented as including three main subcategories, namely equality opportunity, equality of results, and human dignity. In the present context, however, substantive equality will be discussed as a two-tiered concept comprising the first two sub notions only. As regards intersectionality, the concept will only be tangentially discussed to point out its contribution to protection from poverty-related discrimination, insofar as it is consistent with the capability approach and the four-dimensional concept of substantive equality. In that sense, it will not be applied as an analytical framework as such. The choice to rely on Fredman's concept instead of intersectionality by no means diminishes the relevance of the concept for a rights-based approach to poverty and equality.

It is also worthy to explain the choice to confine the discussion to Amartya Sen's conception of the capability approach, instead of that of Martha Nussbaum. The reasons for this choice are twofold. First, Nussbaum's conception of the capability approach is somewhat disconnected from the concept of equality. As a core tenet of this thesis, it seemed important to favour Sen's capability approach which includes strong ties with equality. Nussbaum's approach appears to regard issues of 'inequality [as] a separate and distinct problem compared to poverty'.[91] Hence, under her conception, '[p]overty can be measured and dealt with entirely separately from inequality: […] regardless of the extent of inequalities in

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[88] Lavrysen (n 86) 321.

[89] For further discussion see Amartya Sen, 'Social Exclusion: Concept, Application, and Scrutiny' (Office of Environment and Social Development, Asian Development Bank 2000) Social Development Papers No. 1 <www.adb.org/sites/default/files/publication/29778/social-exclusion.pdf> accessed 22 February 2022; 'Reducing Poverty by Tackling Social Exclusion' (Department for International Development (DFID) 2005) <www2.ohchr.org/english/issues/development/docs/socialexclusion.pdf> accessed 13 April 2022; Mallika Ramachandran, 'Poverty, Social Exclusion, and the Role of a Comprehensive Human Rights Framework' [2016] Indian Law Institute 12 <https://ili.ac.in/pdf/paper2.pdf> accessed 15 May 2022; 'The Right to Be Protected against Poverty and Social Exclusion under the European Social Charter' (Council of Europe 2016) <https://rm.coe.int/16806f597e> accessed 8 April 2022.

[90] See the following where Fredman discusses substantive equality based on human dignity Fredman, *Discrimination Law* (n 31) 19–25; Fredman, 'Substantive Equality Revisited' (n 39) 720–723.

[91] Sandra Fredman, 'The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty' (2011) 22 Stellenbosch Law Review 566, 569 <https://journals.co.za/doi/abs/10.10520/EJC54803> accessed 15 February 2022.

society'.[92] Second, and directly linked to the foregoing, a major 'difference between Sen's writings' and Nussbaum's is that she 'endorsed a specific list of the Central Human Capabilities'.[93] This is a step that Sen has never taken. According to him, the space of capabilities 'can also have a good deal of discriminating power, both because of what it includes as potentially valuable and because of what it excludes from the list of objects to be weighted as intrinsically important'.[94] Hence, for present purposes, this thesis will focus exclusively on Sen's conception of the capability approach since it can be construed as an analytical framework striving for inclusiveness and equality rather than a rigid, pre-established list of relevant capabilities and functionings.

It should also be emphasised that it is not argued that Sen's capability approach and Fredman's substantive equality concept are the *only* adequate and relevant theories capable of achieving enhanced protection from poverty-related discrimination in the ECtHR. These two concepts are relied on simply to illustrate one of many possible ways forward for the ECtHR's non-discrimination law.

Finally, it should be noted that for present purposes the terms 'persons in socially precarious situations'; 'persons living in poverty'; 'destitute persons'; 'underprivileged persons'; 'persons in socioeconomic precariousness'; 'impoverished persons', etc. will be used interchangeably. These preliminary considerations aside, the following section describes the structure and outline of the thesis.

1.6. STRUCTURE AND OUTLINE

Chapter 3 explores the contributions of Sen's capability approach to the ECtHR's poverty-related non-discrimination law. It provides an alternative conception of poverty away from a purely monetary assessment and closer to a contextualised analysis of the applicant's deprivation. By going beyond the mere examination of resources, it demonstrates the importance of considering a person's actual means and concrete capability to use that resource.

Chapter 4 then discusses the contribution of Fredman's four-dimensional concept of substantive equality. It argues in favour of the recognition of poverty as a discrimination ground under Article 14 ECHR (recognition dimension), which would create a right not to be discriminated against based on socioeconomic precarity. In turn, such a recognition would lead to the imposition of positive duties on States to, *inter alia*, assist those at the margins and

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[92] ibid.

[93] Martha Nussbaum, 'Capabilities as Fundamental Entitlements: Sen and Social Justice' (2003) 9 Feminist Economics 33, 40 <www.tandfonline.com/doi/abs/10.1080/1354570022000077926> accessed 17 February 2022.

[94] Sen, *Inequality Reexamined* (n 28) 43.

pay special consideration to their needs (distributive, participative, and transformative dimensions).

The fifth and concluding chapter outlines what the ECtHR's *lex ferenda*[95] might resemble in terms of poverty-related non-discrimination law. It suggests that building on both Sen's and Fredman's theories, the ECtHR could acknowledge the links between poverty and discrimination. By viewing poverty as a capability deprivation, it could meaningfully address issues of substantive inequality in the capability to enjoy Convention rights. In turn, this could lead the ECtHR to incorporate disadvantages based on socioeconomic precarity into its non-discrimination case law under Article 14 ECHR. Doing so, it is argued, would not contravene the Court's current jurisprudence. Instead, it would arguably result in enhanced protection of the most impoverished and vulnerable and facilitate their access and enjoyment of ECHR rights on equal terms.

But first, chapter 2 considers the underlying reasons for the Court's unwillingness to recognise poverty as a discrimination ground. It then discusses some possible counter-arguments to the ECtHR's current stance on poverty-related discrimination. Before turning to these considerations, the first issue this piece addresses is the ECtHR's *lex lata*[96] by providing a bird's-eye view of its non-discrimination and *prima facie* socioeconomic discrimination case law. That is the subject of the following lines.

[95] Latin expression for 'the law as it should be'.
[96] Latin expression for 'the law as it is'.

2. CHAPTER 2: *LEX LATA* – POVERTY AND NON-DISCRIMINATION IN THE CURRENT CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS (ECtHR)

2.1. INTRODUCTORY REMARKS

At the outset, it is necessary to give a rapid overview of the ECtHR's current approach to non-discrimination in general and in relation to poverty specifically. Then, the underlying reasons for the Court's unwillingness to recognise poverty as a ground for discrimination will be discussed. It will be seen that, despite having the legal avenues to do so, the ECtHR still declines to include poverty as a discrimination ground of Article 14 ECHR. The Court's reluctance on that point is not unchallenged.

2.2. NON-DISCRIMINATION UNDER ARTICLE 14 ECHR

2.2.1. Nature and scope of application

It results from the Court's case law that alongside the rule of law and the values of tolerance and social peace, the principle of non-discrimination is of a fundamental nature and underlies the Convention as a whole.[97] Under the ECHR, protection against discrimination is guaranteed by Article 14 ECHR and Article 1 of Protocol No. 12 to the Convention. The former secures 'the enjoyment of the rights and freedoms set forth in [the] Convention […] without discrimination'.[98] The latter, as a self-standing norm,[99] enshrines a general prohibition of discrimination 'by any public authority […] in the enjoyment of any right set forth by law'.[100] Both articles are articulated around an open-ended list of prohibited grounds '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'.[101] This list being non-exhaustive, the Court has the authority to identify new statuses to be added to the ranks of the prohibited

[97] S.A.S. v France [GC] App no 43835/11, ECHR 2014 (extracts), para. 149.

[98] European Convention on Human Rights, Article 14 reads: '[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'.

[99] Among others, Daniel Moeckli relevantly noted that the guarantee enshrined in Article 1 of Protocol No. 12 'is still narrower than the general right to equality before the law and equal protection of the law under Article 26 ICCPR in that it only applies to the enjoyment of rights set forth by (national) law.' Daniel Moeckli, 'Equality and Non-Discrimination', *International Human Rights Law* (3rd edn, OUP Oxford 2018) 154.

[100] Protocol No. 12 to the ECHR, Article 1(1) and 1(2).

[101] Article 14 ECHR and Article 1 of Protocol No. 12 to the ECHR. Note that, at times, the ECtHR does not find it necessary to indicate the prohibited ground at stake. For instance, in Rasmussen v Denmark, 28 November 1984, Series A no 87, para. 34 it held that 'for the purposes of Article 14 (…) [t]here is no call to determine on what ground this difference was based, the list of grounds appearing in Article 14 not being exhaustive'.

grounds of these two non-discrimination provisions. As regards Article 14 ECHR, the Court has, for instance, done so with age,[102] sexual orientation,[103] disability,[104] and HIV/AIDS status.[105]

The present paper focuses exclusively on Article 14 ECHR, which requires that, when acting within the scope of any Convention right, the State ought not to discriminate on suspect grounds or 'other status' without a reasonable justification.[106] As a subordinate or 'parasitic'[107] norm, Article 14 ECHR is devoid of 'independent existence'.[108] It can only be invoked where the facts of the case fall 'within the ambit' of another substantive ECHR provision.[109] It is, however, unnecessary to demonstrate a violation of said Convention right but merely necessary to read Article 14 ECHR 'in conjunction' with a substantive provision.[110] Hence, according to the Court, the principle of non-discrimination of Article 14 ECHR stretches 'to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide'.[111]

For instance, the absence of a parental leave scheme, which is a matter falling within the general scope of Article 8 ECHR (right to private and family life),[112] does not in itself violate that provision. In *Konstantin Martin v Russia*, the Court found that Article 14 ECHR, taken together with Article 8 ECHR, is violated however, if, without a legitimate justification, the State voluntarily creates such a scheme to the benefit of women and the exclusion of men.[113] Likewise, in *E.B. v France*,[114] it was found that guaranteeing single persons the right to adopt a child is not required under Article 8 ECHR. It is, however, a matter falling within the ambit of that provision so that, if a State voluntarily goes 'beyond its obligations under Article 8 in creating such a right' it cannot apply that right in a discriminatory manner by denying it to gay and lesbian individuals.[115]

Article 14 ECHR is silent on what constitutes discrimination. One must, therefore, turn to the ECtHR's jurisprudence. In the Court's words, direct discrimination refers to a different treatment 'of persons in analogous, or relevantly similar, situations based on an identifiable

[102] Schwizgebel v Switzerland App no 25762/07, ECHR 2010 (extracts), para. 85.
[103] Salgueiro da Silva Mouta v Portugal App no 33290/96, ECHR 1999-IX, paras. 28, 36. See also E.B. v France App no 43546/02 (ECtHR Grand Chamber, 22 January 2008), para. 94.
[104] Glor v Switzerland App no 12444/04, ECHR 2009, para. 80.
[105] Kiyutin v Russia App no 2700/10, ECHR 2011, para. 57.
[106] Rory O'Connell, 'Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECHR' (2009) 29 Legal Studies 211 <https://papers.ssrn.com/abstract=1328531> accessed 3 March 2022.
[107] Fredman, 'Emerging from the Shadows' (n 25) 273.
[108] Carson and Others v the United Kingdom [GC] App no 42184/05, ECHR 2010, para. 63.
[109] Konstantin Markin v Russia [GC] App no 30078/06, ECHR 2012 (extracts), para. 124.
[110] E.B. v France [GC], paras. 45, 47.
[111] Biao v Denmark App no 38590/10 (ECtHR Grand Chamber, 24 May 2016), para. 88.
[112] Article 8(1) ECHR reads: 'Everyone has the right to respect for his private and family life, his home and his correspondence'.
[113] Konstantin Markin v Russia [GC], paras. 130, 152.
[114] E.B. v France App no 43546/02 (ECtHR Grand Chamber, 22 January 2008).
[115] E.B. v France [GC], para. 49.

characteristic or "status"'[116] protected under Article 14 ECHR. In its early jurisprudence, the Court focused solely on the prohibition of direct discrimination. Namely, an arbitrary differential treatment based on a suspect ground that fails to satisfy the objective and reasonable justification test. The two-limb test, first established in the *Belgian Linguistics Case*, requires differential treatment by national authorities to pursue a legitimate aim and to be proportionate to the aim sought.[117] Confined to formal equality and sameness of treatment, the Court originally construed Article 14 ECHR as requiring 'likes to be treated alike'.[118] In *Abdulaziz, Cabales and Balkandali v the United Kingdom*, for instance, the Court refused to endorse an indirect approach to discrimination, and instead confined it to 'cases where a person or group is treated, without proper justification, less favourably than another'.[119]

As Fineman rightly pointed out, such an 'impoverished' idea of formal equality 'reduced to sameness of treatment […] leaves undisturbed' and even perpetuates existing 'forms of subordination and domination'.[120] Hence, indirect discrimination proves more suited to address the unequal outcomes of the equal application of policies due to structural inequalities.[121] In the watershed case of *D.H. and Others v the Czech Republic,*[122] the ECtHR departed from its formal equal treatment approach and expressly recognised for the first time the prohibition of indirect discrimination under Article 14 ECHR. It held that seemingly neutral practices or rules not based on prohibited grounds can carry *de facto* disproportionately prejudicial repercussions on particular groups, even in the absence of discriminatory intent.[123] Consequently, the ECtHR found that the disproportionately high placement of Roma students in 'special schools for children with intellectual deficiencies', based on tests to determine their intellectual capacities that were insensitive to their cultural differences, violated Article 14 ECHR read together with Article 2 of Protocol No. 1 to the ECHR (right to education)[124].

2.2.2. States' positive obligations

Article 14 does not prohibit – and sometimes even requires – differential treatments that pursue a legitimate aim and are proportionate to the aim sought.[125] In *Thlimmenos v Greece*,

[116] Biao v. Denmark [GC], para. 89.
[117] Case "relating to certain aspects of the laws on the use of languages in education in Belgium" (merits), 23 July 1968, Series A no 6, (Belgian Linguistics Case) (No 2), para. 10 of 'the law' part.
[118] Aristotle, The Nicomachean Ethics of Aristotle (JM Dent, 1911) Book V3, paras 1131a–b.
[119] Abdulaziz, Cabales and Balkandali v the United Kingdom, 28 May 1985, Series A no 94, para. 82.
[120] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law & Feminism 2–3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1131407> accessed 1 May 2022.
[121] Moeckli (n 35) 156.
[122] D.H. and Others v the Czech Republic [GC] App no 57325/00, ECHR 2007-IV.
[123] D.H. and Others v the Czech Republic [GC], para. 184.
[124] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 009) (adopted 20 March 1952, entered into force 18 May 1954) (Protocol No. 1 to the ECHR), Article 2.
[125] Belgian Linguistics case (No 2), para. 10 of 'the law' part.

the Grand Chamber held that Article 14 ECHR 'is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different'.[126] The case concerned a Jehovah's witness who was refused appointment as an accountant on the ground that he had been convicted of a felony – conscientious objection. The applicant had been convicted for refusing, on religious grounds, to wear a military uniform. The ECtHR ruled that the applicant's right not to be discriminated against based on his religion was violated. The *Thlimmenos doctrine*, thus, expanded States' obligations whereby the prohibition of discrimination is not confined to 'treating likes alike'.[127] It is insufficient that States have non-discrimination legislation in place to comply with their Article 14 obligations. As a 'living instrument' that ought to be 'interpreted in the light of present-day conditions', the ECHR imposes both negative and positive obligations under its Article 14 ECHR.[128] It resulted from *Sejdić and Finci v Bosnia and Herzegovina* that States must take positive measures to attempt to correct factual inequalities and actively assist those at the margins of society.[129]

In *Andrle v the Czech Republic* the Court has, for instance, found legitimate a difference in the pensionable age for men and women to compensate for past and present gender inequalities, including the gender pay gap.[130] *Horváth and Kiss v Hungary* concerned 'past discriminations in education' leading to 'the systemic placement of Roma children in special schools'.[131] In this case, the ECtHR held that 'structural deficiencies' warranted 'positive measures […] to assist [Roma children] […] in following the school curriculum'.[132] In light of the foregoing, Contracting States are under a positive duty to take positive measures to support persons historically discriminated against.

In this context, the ECtHR adopts a 'vulnerable groups approach under Article 14 ECHR', whereby it identifies specific groups as vulnerable, which in turn 'facilitat[es] stricter review and a more substantive approach'.[133] In the ECtHR's jurisprudence, the concept of vulnerability means that, 'as vulnerable subjects', certain individuals or groups are considered

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[126] Thlimmenos v Greece [GC] App no 34369/97, ECHR 2000-IV, para. 44. See also Stec and Others v the United Kingdom [GC] App nos 65731/01 and 65900/01, ECHR 2006-VI, para. 51; Eweida and Others v the United Kingdom App nos 48420/10 and 3 others, ECHR 2013 (extracts), para. 87.
[127] Aristotle, The Nicomachean Ethics of Aristotle (1911) Book V3, paras 1131a–b.
[128] Pla and Puncernau v Andorra App no 69498/01, ECHR 2004-VIII, para. 62.
[129] Sejdić and Finci v Bosnia and Herzegovina [GC] App nos 27996/06 and 34836/06, ECHR 2009, para. 44. See also Belgian Linguistics case (No 2), para. 10 of 'the law' part; Thlimmenos v Greece [GC], para. 44; D.H. and Others v the Czech Republic [GC], para. 175.
[130] Andrle v the Czech Republic App no 6268/08 (ECtHR, 17 February 2011), para. 60.
[131] Horváth and Kiss v Hungary App no 11146/11 (ECtHR, 29 January 2013), para. 104.
[132] Horváth and Kiss v Hungary, para. 104.
[133] Oddný Mjöll Arnardóttir, 'Vulnerability under Article 14 of the European Convention on Human Rights' (2017) 4 Oslo Law Review 150, 150 <https://pdfs.semanticscholar.org/ab23/2766a9b84e58b941aa9745b3bd07a5bb9526.pdf?_ga=2.91969626.1793391664.1652623236-1475238097.1650705255> accessed 2 May 2022.

more 'susceptible to harm'.[134] The concept of vulnerable groups[135] enables the ECtHR to take the 'vulnerability of the applicants or of the group to which they belong into account [to] increase the weight attributed to their harm in the scope and proportionality analysis, as well as to recognise enhanced positive obligations'.[136] On the whole, the concept 'thereby operates as a prioritisation criterion to enhance human rights protection for those considered vulnerable or as a member of a vulnerable group'.[137] Thus understood, the concept of vulnerability can prove to be a powerful tool regarding poverty and could potentially lead to 'the prioritisation of the rights of persons living in poverty'.[138]

2.2.3. Protection from discrimination of persons living in poverty

At the outset, it should be borne in mind that the ECtHR did not recognise poverty as a discrimination ground of Article 14 ECHR. From a non-discrimination angle, the protection afforded by the Court to destitute persons under that provision is only indirect.[139] The Court often refuses to engage in a discussion on the discriminatory nature of the policy at issue. *Garib v the Netherlands*[140] and *Emabet Yeshtla v the Netherlands* (dec.)[141] are apt examples of how the Court is, at times, oblivious to the discrimination aspect altogether. In both cases, the ECtHR discarded all claims. In *Garib*, it found no violation of the substantive rights taken alone or in conjunction with Article 14 ECHR. In *Yeshtla*, it declared the application inadmissible.

In *Garib v the Netherlands*, the Grand Chamber held that a law imposing minimum income or length-of-residence requirements to obtain housing permits in inner-city areas, thus barring the applicant – a single mother of two living on social benefits – from obtaining such a housing permit, disclosed no violation of her freedom to choose her residence[142] (Article 2 Protocol 4 ECHR[143]). The applicant had not invoked Article 14 ECHR in her submission before the Chamber, which led the Grand Chamber to refuse to consider the question of non-discrimination. In doing so, it failed to address pivotal poverty and recognition issues, including their intersectional aspects. Many raced to condemn the judgment in *Garib* as a missed

[134] Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 International Journal of Constitutional Law 1056, 1058 <https://academic.oup.com/icon/article/11/4/1056/698712> accessed 30 March 2022.

[135] The ECtHR first introduced the concept of vulnerable groups in *Chapman v the United Kingdom* concerning the Roma community. See Chapman v the United Kingdom [GC] App no 27238/95, ECHR 2001-I.

[136] Lavrysen (n 86) 319; citing Peroni and Timmer (n 134) 1076–1079.

[137] Lavrysen (n 86) 319; citing Peroni and Timmer (n 134) 1084.

[138] Lavrysen (n 86) 318.

[139] Sarah Ganty, 'Poverty as Misrecognition: What Role for Antidiscrimination Law in Europe?' (2021) 21 Human Rights Law Review 962, 988 <https://academic.oup.com/hrlr/article/21/4/962/6312655> accessed 5 February 2022.

[140] Garib v the Netherlands App no 43494/09 (ECtHR Grand Chamber, 6 November 2017).

[141] Emabet Yeshtla v the Netherlands (dec.), App no 37115/11, (ECtHR, 15 January 2019).

[142] Garib v the Netherlands, paras. 10, 12, 167.

[143] Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto (ETS No. 046) (adopted 16 September 1963, entered into force 2 May 1968) (Protocol No. 4 to the ECHR).

opportunity ‘to develop important standards in terms of discrimination on the grounds of poverty or “social origin” and its intersection with other grounds such as race and gender; a question particularly compelling in the present case […]’.[144] The discriminatory character of the Dutch policy was hard to miss. It had the purported aim to tackle ‘concentrations of “socioeconomically underprivileged” in distressed inner-city areas’ which had ‘serious effects on the quality of life owing to unemployment, poverty and social exclusion.’[145] As already noted by dissenting judges in the Chamber judgment, and reemphasised by dissenting Judge Pinto de Albuquerque,

> the income-based restriction […] ‘not only leads to stigmatization of the poor, but it indirectly creates discrimination based on race and gender, since the people most gravely affected by unemployment are immigrants and single mothers’.[146]

Similarly to *Garib*, the Court in *Emabet Yeshtla v the Netherlands* (dec.) also failed to acknowledge the intersecting criteria of disadvantage that faced the applicant. *Yeshtla* concerned an Article 8 and 14 ECHR claim based on the withdrawal of social housing benefits from the applicant – a naturalised Dutch citizen who is an Ethiopian HIV-positive woman – because Dutch policy denies such benefits to persons cohabiting with unlawful residents. The applicant was living with her son – an unlawful resident – who was caring for her given her medical condition.[147] The Court dismissed both claims. Regarding the Article 14 justification test, it found the differential treatment between aliens with and without a residence permit legitimate and proportionate to the aim sought. Namely, that of ensuring proper immigration control and preventing unlawful residents from indirectly benefiting from housing benefits.[148]

The Court overlooked the intersectional disadvantage at play. It failed to acknowledge the policy’s exacerbated disparate effects on the applicant and only focused on its legitimacy and proportionality, which suggests that immigration control prevails over assistance to marginalised groups.[149] The applicant found herself at the intersection of various forms of disadvantage. As a poor HIV-positive migrant woman dependent on social benefits, she was at risk of experiencing stigma and prejudice attached to such characteristics. The Court refused to acknowledge how the applicant’s socioeconomic precariousness combined with

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[144] Valeska David and Sarah 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) <https://strasbourg.weichie.dev/2017/11/16/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/> accessed 27 March 2022.

[145] Garib v the Netherlands, para. 26.

[146] Garib v the Netherlands, Dissenting Opinion of Judge Pinto de Albuquerque joined by Judge Vehabović, para. 33.

[147] Emabet Yeshtla v the Netherlands (dec.), paras. 14-18.

[148] Emabet Yeshtla v the Netherlands (dec.), para. 34.

[149] Emabet Yeshtla v the Netherlands (dec.), para. 40.

her gender, race, and national origin further jeopardised her socioeconomic inclusion and put her at greater risk of experiencing *prima facie* discrimination.

The Court's case law also reveals that, if considered at all, the 'socioeconomic disadvantage' of the applicants is often examined only tangentially, as part 'of a broader claim under a different right'.[150] For instance, the Court adopted such an approach in *Lăcătuş v Switzerland*,[151] *Wallová and Walla v the Czech Republic*,[152] and *Hudorovič and Others v Slovenia*[153]. Even in cases where the ECtHR does find a separate violation of the substantive Convention right (in contrast to *Garib* and *Yeshtla*), it is common practice for the ECtHR to consider it unnecessary to rule on Article 14 ECHR separately (*Lăcătuş* and *Wallová and Walla*). This led various scholars to regard the ECtHR's approach to equality as being 'less than satisfactory'[154] and to attach it a 'second class status'.[155] O'Connell contends that 'the ECtHR often chooses to decide cases on the basis of Articles other than Article 14 even where non-discrimination is central to the case'.[156] *Lăcătuş v Switzerland* seems to be such an instance.[157]

For the first time in *Lăcătuş*, the ECtHR had to determine whether a general ban on begging fell within the scope of Article 8 ECHR (right to respect for private and family life).[158] The applicant – a young isolated, illiterate, unemployed woman of Romanian origin and member of the Roma community who did not receive social assistance – was fined on nine separate occasions for begging in the streets of Geneva in violation of a general prohibition of begging in public.[159] Unable to pay the fines after unsuccessfully contesting them, the applicant was remanded in custody for five days.[160] To find a violation of Article 8 ECHR, the ECtHR relied explicitly on the extreme economic and social vulnerability of the applicant which arguably left her with no other means of subsistence but to panhandle.[161]

In the Court's opinion, the applicant's human dignity is seriously compromised if she does not have sufficient means of subsistence.[162] By begging, the applicant, therefore, adopts a particular lifestyle to overcome an inhuman and precarious situation.[163] The accuracy of these elements makes the Court's discarding of the Article 14 claim all the more disappointing.

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[150] Ganty (n 139) 988.
[151] Lăcătuş v Switzerland App no 14065/15 (ECtHR, 19 January 2021).
[152] Wallová and Walla v the Czech Republic App no 23848/04 (ECtHR, 26 October 2006).
[153] Hudorovič and Others v Slovenia App nos 24816/14 and 25140/14 (ECtHR, 10 March 2020).
[154] O'Connell (n 106) 212, citing A. McColgan, 'Women and the Human Rights Act' (2000) 51 (3) Northern Ireland Legal Quarterly 417, 433.
[155] ibid.
[156] ibid.
[157] Lăcătuş v Switzerland, para. 123.
[158] Lăcătuş v Switzerland, para. 53.
[159] Lăcătuş v Switzerland, paras. 1, 5, 58.
[160] Lăcătuş v Switzerland, paras. 11, 14.
[161] Lăcătuş v Switzerland, paras. 57, 115-117.
[162] Lăcătuş v Switzerland, paras. 56, 57.
[163] Lăcătuş v Switzerland, paras. 56, 57.

Although in contrast with previous cases (*Garib* and *Yeshtla*), the Court aptly identifies the disadvantage at play, it fails to see how it relates to *prima facie* discrimination, specifically. The third-party intervention by the European Roma Rights Center (ERRC) disclosed that the Geneva anti-begging legislation was adopted in an 'antigypsyism' context and targeted the Roma community.[164] Yet the Court neglected the discrimination issue altogether, both with respect to her Roma origin and socioeconomic deprivation. Heri aptly captures 'the uneasiness' some readers of the *Lăcătuş* judgment might be left feeling.[165]

> The Court here seemed to follow the applicant's point that 'it is necessary to fight against poverty and not against the poor'. But at the same time, the approach taken is one of individual freedom, and not of redistributive justice or of a full social rights analysis. This is of course in line with the Court's approach to the rights in the ECHR.[166]

In *Wallová and Walla v the Czech Republic*, the Court was called upon to decide whether the removal of the applicants' children from their custody due to their material deprivation violated, *inter alia*, their right to private and family life (Article 8 ECHR) and not to be discriminated against on their 'social origin and poverty' (Article 14 ECHR).[167] The applicants were 'unable to provide their children with adequate and stable accommodation',[168] but the 'children were not exposed to situations of violence or abuse'.[169] On the Article 8 claim, the Court found that the 'breaking up of [a] family constitutes a very serious interference' and as such, 'unsatisfactory living conditions or material deprivations' cannot constitute the sole ground for the placement of the children.[170] The ECtHR found a breach of Article 8 ECHR, ruling that the authorities should have considered alternative measures, 'less radical than the placement of the children'.[171] It further held that national authorities have a positive duty to ensure that people in situations of poverty have adequate assistance and support to 'overcom[e] their difficulties'.[172]

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[164] 'Third-Party Intervention in Lăcătuş v Switzerland, Written Submissions by the European Roma Rights Centre (ERRC)' (2016) para 25 <www.errc.org/uploads/upload_en/file/third-party-intervention-lacatus-v-switzerland-22-august-2016.pdf> accessed 27 March 2022.

[165] Corina Heri, 'Beg Your Pardon!: Criminalisation of Poverty and the Human Right to Beg in Lăcătuş v. Switzerland' (*Strasbourg Observers*, 10 February 2021) <https://strasbourg.weichie.dev/2021/02/10/beg-your-pardon-criminalisation-of-poverty-and-the-human-right-to-beg-in-lacatus-v-switzerland/> accessed 23 January 2022.

[166] ibid.

[167] Wallová and Walla v the Czech Republic, paras. 47, 86. See also Soares de Melo v Portugal App no 72850/14 (ECtHR, 16 February 2016) with similar facts, where the Court found that the forceful removal of the applicant's children in view of their adoption because of the poor material living conditions violated Article 8 ECHR (paras. 104, 120). The Court also noted the positive obligations incumbent upon national authorities to support and assist persons living in poverty to facilitate their family life (paras. 106, 119).

[168] Wallová and Walla v the Czech Republic, para. 67.

[169] Wallová and Walla v the Czech Republic, para. 72.

[170] Wallová and Walla v the Czech Republic, paras. 70-73.

[171] Wallová and Walla v the Czech Republic, paras. 71, 79.

[172] Wallová and Walla v the Czech Republic, paras. 74-76.

Regarding the non-discrimination aspect, the Court declared the Article 14 complaint admissible but ruled that it was unnecessary to examine it any further.[173] Hence, the Court did rule the removal measure to be disproportionate and took the socioeconomic vulnerability of the applicants into account to some degree. But by declining to engage in a substantive discussion on Article 14 ECHR, the Court didn't seize the opportunity to address important issues of stereotyping and stigma due to poverty under the right not to be discriminated against. David notes that such 'poverty-related child removal cases' examined by the Court illustrate the 'discriminatory character' of the removal measures that are often based on intersecting harmful stereotypes 'on gender roles, economic situation […] and other social traits'.[174] She is of the view that '[b]esides violating human rights, such stereotypes sustain existing inequalities'.[175]

Finally, in *Hudorovič and Others v Slovenia*,[176] the ECtHR had to rule on the novel question of whether the continued lack of adequate access to safe drinking water and sanitation by Roma families living in informal settlements violated, *inter alia*, the right to private and family life (Article 8 ECHR) taken alone and together with the right to non-discrimination (Article 14 ECHR). In both applications, the applicants had no, or inadequate, access to water, sewage and sanitation. In one case, the applicant collected 'water from the cemetery and the nearby polluted stream'[177] and in the other, they supplied 'themselves with water from the village fountain'.[178] The Court found no violation of Article 8 ECHR, neither alone nor together with Article 14 ECHR. In its reasoning, the Court acknowledged that although there exists no right to access safe drinking water under Article 8, '[a] persistent and long-standing lack of access to safe drinking water […] may trigger the State's positive obligation under that provision'.[179]

The Court further recognises that, as a vulnerable and disadvantaged group, the Roma population requires special consideration to be given to their needs.[180] Additionally, it also recognises the possible 'disproportionate effects […] [of the legislation] on the members of the Roma community'.[181] By requiring consumers to pay some of the costs associated with water and sanitation utilities, the legislation imposes a greater burden on persons living on social benefits, thus raising questions of *prima facie* discrimination. The Court also rightly notes that 'social groups such as the Roma may need assistance in order to be able effectively

[173] Wallová and Walla v the Czech Republic, para. 88.
[174] Valeska David, 'ECtHR Condemns the Punishment of Women Living in Poverty and the "rescuing" of Their Children' (*Strasbourg Observers*, 17 March 2016) <https://strasbourgobservers.com/2016/03/17/ecthr-condemns-the-punishment-of-women-living-in-poverty-and-the-rescuing-of-their-children/#_ftn2> accessed 29 March 2022.
[175] ibid.
[176] Hudorovič and Others v Slovenia App nos 24816/14 and 25140/14 (ECtHR, 10 March 2020).
[177] Hudorovič and Others v Slovenia, para. 12.
[178] Hudorovič and Others v Slovenia, paras. 28, 33.
[179] Hudorovič and Others v Slovenia, para. 116.
[180] Hudorovič and Others v Slovenia, para. 142.
[181] Hudorovič and Others v Slovenia, paras. 143, 147.

to enjoy the same rights as the majority population'.[182] In the next breath, however, the Court notes that the State has taken steps 'with the view to improving the living conditions of the Roma community'.[183] It is, therefore, satisfied that the State has discharged its positive obligation under Article 8 ECHR to provide access to basic utilities to the socially disadvantaged group.[184] Further, the Court opines that the applicants could have used their social benefits, *inter alia*, for improving their living conditions,[185] without enquiring whether the amount received was sufficient to cover both the necessary arrangements and their daily expenses.[186] Arguably, urging the applicants to deduct this expense from their social benefits puts them at greater risk of experiencing poverty. On that point, Mishra takes the view that

> [t]he Court decontextualized the position of the applicants in determining socioeconomic issues. They ignored the history of social exclusion and inequality faced by the Roma people and the role of the State in addressing this, contrary to the concepts of substantive equality and positive obligations.[187]

Hence, the Court should not lose sight of the fact that '[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and *effective'.*[188]

This humble overview of ECtHR's jurisprudence on poverty and discrimination has two main findings. First, it is a testament to the Court's reluctance to examine cases from the angle of non-discrimination based on socioeconomic precariousness. Second, it exhibits the strong ties that exist between stereotyping, stigma and discrimination, as well as the pernicious impacts such attitudes have on persons living in poverty, specifically. May it be the imposition of means-tested housing permits (*Garib*), the withdrawal of social housing benefits (*Yeshtla*), the criminalisation of begging in public (*Lăcătuş*), the removal of children from destitute families (*Wallová and Walla*), or the lack of adequate access to safe drinking water for marginalised groups (*Hudorovič and Others*), all these measures have in common their differential adverse impacts on impoverished persons.

There are widespread stereotypes that poor, irregular, and undereducated migrants unduly profit from social benefits[189] or that 'poor or otherwise "deviant" families' are abusive and

[182] Hudorovič and Others v Slovenia, para. 142.
[183] Hudorovič and Others v Slovenia, paras. 144, 146, 147.
[184] Hudorovič and Others v Slovenia, para. 161.
[185] Hudorovič and Others v Slovenia, para. 149.
[186] Mythili Mishra, 'A Tale of Two Communities: Inequality and the Right to Water in Hudorovič and Others v Slovenia' (2021) 6 LSE Law Review 170, 174 <https://lawreview.lse.ac.uk/articles/abstract/201/#> accessed 29 March 2022.
[187] Mishra (n 186).
[188] Airey v Ireland, para. 24 (emphasis added).
[189] Ganty (n 139) 992.

unable to care for their children.[190] Persons from the Roma community are often viewed through an 'us versus them' approach.[191] Poverty has traditionally been ascribed to 'individual misfortune, incompetence, indolence' or individual responsibility.[192] Arguably, the policies at issue in these cases are themselves constructed on such biased ideas. Conceivably, they hide their unreasonableness under pretences of immigration control (*Yeshtla*) and economic redress of impoverished areas (*Garib*). In other cases, such policies may be deemed acceptable considering the wide margin of appreciation doctrine (*Hudorovič and Others*) and the socioeconomic versus civil and political rights dichotomy. It seems, therefore, fitting to understand why the Court will only indirectly and partially address issues of stereotyping, recognition, and non-discrimination based on poverty. What, if anything, prevents the ECtHR from recognising poverty as a discrimination ground *per se*? That is the line of inquiry to which the thesis now turns.

2.3. UNWILLINGNESS OF THE ECTHR TO RECOGNISE POVERTY AS A DISCRIMINATION GROUND

2.3.1. Outlining the Court's reluctance to endorse the socioeconomic discrimination ground

Despite previously recognising other new discrimination grounds, the ECtHR has steadfastly discarded the chance to enshrine a right not to be discriminated against based on socioeconomic precarity under Article 14 ECHR. As was shown above, there were ample opportunities for the Court to do so. Various authors[193] have noted that typical arguments put forward for not engaging in a more dynamic interpretation of the Convention include the wide margin of appreciation afforded in socioeconomic matters and on issues lacking a European consensus; the socioeconomic and civil and political rights dichotomy; and the negative and positive obligations dichotomy.

As a civil and political rights instrument,[194] the ECHR 'does not enshrine any "right not to be poor"',[195] nor does it 'guarantee, as such, socio-economic rights'.[196] The relevant question here is whether protection from poverty-related discrimination belongs to the scrutiny of the

[190] David (n 174).
[191] 'Third-Party Intervention in Lăcătuş v Switzerland, Written Submissions by the European Roma Rights Centre (ERRC)' (n 163) para 25.
[192] Fredman, 'Poverty and Human Rights: A Peril and a Promise' (n 6) 222.
[193] Lavrysen (n 86); Ganty (n 139).
[194] To the exclusion of Articles 1 and 2 of the First Additional Protocol on the right to property and the right to education.
[195] Seminar Organising Committee, 'Seminar Background Paper: Implementing the European Convention on Human Rights in Times of Economic Crisis' (ECtHR 2013) 1 <www.echr.coe.int/documents/seminar_background_paper_2013_eng.pdf> accessed 27 February 2022.
[196] Pančenko v Latvia App no 40772/98 (ECtHR adm., 28 October 1999), para. 2 of 'the law' part. Note that the adjudication by the ECtHR of socioeconomic rights lies outside the scope of this paper. See *infra* Chapter 1, Section 1.5.2.

ECtHR?[197] While it does not adjudicate on socioeconomic rights *per se*, the Court recognises 'the "porous" nature of the Convention *vis-à-vis* social rights'.[198] It acknowledges that, in view of the principle of 'indivisibility, interdependence and interrelatedness'[199] of fundamental rights, 'the effectiveness of civil and political rights it sought to protect was possible in certain cases only if the social implications of those rights were taken onboard'.[200] Since the direct recognition and protection of socioeconomic rights exceeds the scope of the ECHR, the Court addresses such issues only 'indirectly'.[201] It affords a 'targeted protection from extreme poverty' only to those aspects that lie at the intersection between socioeconomic and civil and political rights and are 'indispensable for the implementation' of the latter.[202] In *Airey v Ireland*, the ECtHR held that

> the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.[203]

In practice, however, its case law denotes that the Court remains more prone to reject a claim the more it relates to socioeconomic matters.[204] This state of affairs is directly linked to the margin of appreciation doctrine, a core component of the ECtHR's jurisprudence. In *Yeshtla* for instance, the Court dismissed the application, notably its Article 14 complaint, considering that States are generally afforded a wide margin of appreciation concerning 'economic or social policy choices'.[205] Underpinned by the subsidiary character of the ECtHR,[206] the margin of appreciation refers to the extent of judicial deference the regional Court grants States in implementing Convention rights. The scope of the margin of appreciation afforded depends on the subject matter and the existence and extent of a consensus among the Contracting States on the legal issue before the Court.[207]

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[197] Elena Pribytkova, 'Protection from Poverty in the European Court of Human Rights', *Absolute Poverty in Europe* (Policy Press 2019) 335. Note that Pribytkova asks this question concerning poverty, not poverty-related discrimination.

[198] Françoise Tulkens, 'The European Convention on Human Rights and the Economic Crisis: The Issue of Poverty' (European University Institute (EUI) Working Paper 2013) 4 <https://cadmus.eui.eu//handle/1814/28099> accessed 5 February 2022 citing Sudre,'La perméabilité de la Convention européenne des droits de l'homme aux droits sociaux', in Mélanges J. Mourgeon (1998) 467.

[199] Vienna Declaration and Programme of Action*,* 25 June 1993, World Conference on Human Rights, para. 5.

[200] Tulkens (n 198) 4.

[201] Lavrysen (n 86) 304.

[202] Pribytkova (n 197) 336.

[203] Airey v Ireland, 9 October 1979, Series A no 32, para. 26.

[204] Lavrysen (n 86) 304.

[205] Emabet Yeshtla v the Netherlands (dec.), para. 39.

[206] Garib v the Netherlands [GC], para. 137. See also Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 213) (adopted 24 June 2013, entered into force 1 August 2021) (Protocol No. 15 to the ECHR), Article 1 which expressly incorporates the principles of subsidiarity and margin of appreciation in the preamble to the ECHR.

[207] Stec and Others v the United Kingdom [GC], paras. 63-64.

When it comes to the socioeconomic sphere, States enjoy a wide margin of appreciation. National authorities are said to have a 'direct knowledge of their society and its needs' and are, therefore, in principle 'better placed […] to appreciate what is in the public interest on social or economic grounds'.[208] The Court will generally respect domestic socioeconomic policy-making and exercise its 'supervisory jurisdiction' only where measures are deemed 'manifestly without reasonable foundation.'[209]

Finally, the positive versus negative obligations dichotomy also, to a lesser extent, influences the Court's approach to poverty-related discrimination. The artificial partition of socioeconomic and civil and political rights of the cold-war period permanently crystallised with the adoption of segregated Covenants. In principle, the tripartite typology of State obligations (respect, protect, fulfil) has been gradually recognised and socioeconomic and civil and political rights are said to be 'interdependent and indivisible'.[210] But in practice, both sets of rights are deemed 'sufficiently distinct […] to warrant separate treatment' and to be 'implemented through different legal techniques'.[211] On the one hand, socioeconomic rights are to be implemented through *progressive realisation*. They are thought to impose positive obligations, 'requiring both the adoption of legal measures and budgetary commitments'.[212] On the other hand, civil and political rights are seen as requiring State abstention, that is, negative obligations not to infringe on the rights of individuals. As Lavrysen noted, in principle, the ECtHR stated that both 'negative and positive obligations deserve equal respect and should be placed on the same footing at the methodological level'.[213] In practice, however, with the view not to 'impose an unbearable or excessive burden on national authorities',[214] the Court generally affords a wide margin of appreciation 'in cases concerning positive obligations'.[215]

Hence, the fact that poverty discrimination often concerns socioeconomic policy-making and requires positive obligations – two areas where the Court generally grants a wide margin of appreciation – works against its recognition as a discrimination ground. It remains to be seen whether these obstacles are insurmountable.

[208] Andrejeva v Latvia [GC] App no 55707/00, ECHR 2009, para. 83.
[209] Garib v the Netherlands [GC], para. 137.
[210] Vienna Declaration and Programme of Action*,* 25 June 1993, World Conference on Human Rights, para. 5.
[211] Olivier De Schutter, 'Economic, Social and Cultural Rights as Human Rights: An Introduction' (Cellule de Recherche Interdisciplinaire en Droits de l'Homme (CRIDHO) 2013) 4 <https://sites.uclouvain.be/cridho/documents/Working.Papers/CRIDHO-WP2013-2-ODeSchutterESCRights.pdf> accessed 5 April 2022.
[212] ibid.
[213] Lavrysen (n 86) 305 citing Von Hannover v Germany (No. 2) [GC] App nos 40660/08 and 60641/08, ECHR 2012, para. 106; Aksu v Turkey [GC] App nos 4149/04 and 41029/04, ECHR 2012, para. 62.
[214] Women on Waves and Others v Portugal App no 31276/05 (ECtHR, 3 February 2009), para. 40.
[215] Lavrysen (n 86) 306.

2.3.2. Challenging the Court's position

Some recent developments in the ECtHR non-discrimination law should be praised, for they are steps in the direction of a more comprehensive and protective approach by the Court. In the sphere of poverty-related discrimination, however, the Court has not yet committed to an essential expansion of its case law. It is argued that the ECtHR has the necessary legal leeway to adopt a stronger and more protective stance on the topic but declines to do so, out of legal and non-legal motivations.

The granting of a wide margin of appreciation all too often constitutes a major barrier to effective protection of the most underprivileged from discrimination. It is uncontested that the margin of appreciation doctrine forms an integral part of the ECtHR's framework. Nevertheless, even on issues lacking a European consensus, the margin afforded to States is not 'all-embracing'.[216] In *Alajos Kiss v Hungary*, the Court found the margin of appreciation to be substantially narrower for restrictions on the fundamental rights of particularly vulnerable groups historically subject to discrimination and prejudice and resulting in social exclusion.[217] These groups require special protection from the State, which must satisfy a stricter justification test. It is now well-established that no differential treatment 'based exclusively or to a decisive extent' on ethnicity or race can be 'objectively justified in a contemporary democratic society'.[218] In the same vein, only 'very weighty reasons' can justify discrimination based on inherently suspect grounds, such as sex/gender.[219]

In *Hudorovič and Others*, however, relying on the wide margin of appreciation in socioeconomic matters and the progressive realisation principle, the Court simply took the State's arguments at face value and found no violation.[220] Because it affords such a wide margin, the Court fails to consider whether the measures taken by the State were at all 'effective steps to mitigate […] the differential impact that [the] policy may have [on the marginalised group]'.[221] It seems dubious that the Court declined to consider the complaint under Article 14.[222] Had it examined the case through the non-discrimination angle, as it was

[216] Alajos Kiss v Hungary App no 38832/06 (ECtHR, 20 May 2010), para. 42.
[217] Alajos Kiss v Hungary, para. 42.
[218] Sejdić and Finci v Bosnia and Herzegovina [GC], paras. 43-44. See also D.H. and Others v the Czech Republic [GC], para. 176.
[219] Konstantin Markin v Russia [GC], para. 127.
[220] Hudorovič and Others v Slovenia, paras. 144, 146, 159, 162, 167.
[221] Mishra (n 186) 173–174.
[222] Hudorovič and Others v Slovenia, para. 162.

invited to by third-party interventions,[223] the Court would have noted that 'it was not merely a *lack* of access to water, but a *differential* access'[224] that was the crux of the case.

Owing to concerns of procedural economy, the Court often declares the complaints under Article 14 admissible, but finds it unnecessary to examine them any further. It has done so, notably in *Lăcătuş*, *Hudorovič*, and *Wallová and Walla*. In his partly concurring and partly dissenting opinion in *Lăcătuş*, Judge Ravarani cautioned the Court on its excessive use of such procedural economy on issues neither peripheral nor secondary, possibly resulting in partial denials of justice.[225] Under the principle developed in *Ilias and Ahmed v Hungary*, however, the non-discrimination complaints would fall within the scope of review should a Grand Chamber examine these cases in the future.[226]

Now going beyond the mere legal reasoning, it is noteworthy that as the judicial organ of a *political* organisation, the ECtHR – and by extension, the judges that compose it – are influenced by non-legal factors in their decision-making. The Court exercises a discretionary choice when it chooses the breadth of the margin of appreciation in a particular case (*Hurodovič; Yeshtla; Garib*), when it decides whether a procedural technicality should bar the claim altogether (*Garib*), or when it favours procedural economy over the substantive examination of non-discrimination claims (*Lăcătuş* and *Wallová and Walla*). As Bianchi[227] brilliantly captures, 'the traditional view of the judge finding "the correct legal view" […] is hardly tenable nowadays'.[228]

The ECtHR's case law is an apt example of how 'judges make choices […] not […] between legally founded and legally ill-founded claims, but rather among legally plausible claims,

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[223] Hudorovič and Others v Slovenia, para. 131. See also 'Third-Party Intervention in Hudorovič and Others v Slovenia, Written Submissions by the European Roma Rights Centre (ERRC)' (European Roma Rights Centre 2015) <www.errc.org/uploads/upload_en/file/third-party-intervention-slovenia-hudorovic-v-slovenia-&-novak-and-others-v-slovenia-9-october-2015.pdf> accessed 29 March 2022; 'Third-Party Intervention in Hudorovič and Others v Slovenia, Written Submissions by the Human Rights Centre of Ghent University' (2015) <https://hrc.ugent.be/wp-content/uploads/2019/10/Hudorovic-and-Novak-v.-Slovenia.pdf> accessed 29 March 2022.

[224] Mishra (n 186) 175.

[225] Lăcătuş v Switzerland, Opinion of Judge Ravarani, para. 16.

[226] Ilias and Ahmed v Hungary App no 47287/15 (ECtHR Grand Chamber, 21 November 2019), paras. 169, 177 where the Court fine-tuned the standard for review by the Grand Chamber. Alongside the aspects of the case which have been declared admissible by the Chamber, in situations where the Chamber did not rule on the admissibility of the complaint at issue – a complaint which has neither been rejected as inadmissible nor declared admissible by the Chamber – this complaint falls within the scope of the case before the Grand Chamber in proceedings under Article 43 of the Convention. See also Heri (n 165).

[227] Bianchi wrote about the judgment on preliminary objections in *Marshall Islands v. United Kingdom* where the International Court of Justice (ICJ) 'dismissed the case for lack of jurisdiction, on the ground that there is no dispute among the parties'.

[228] Andrea Bianchi, 'Choice and (the Awareness of) Its Consequences: The ICJ's "Structural Bias" Strikes Again in the Marshall Islands Case' (2017) 111 American Journal of International Law 81, 82–83 <www.cambridge.org/core/journals/american-journal-of-international-law/article/choice-and-the-awareness-of-its-consequences-the-icjs-structural-bias-strikes-again-in-the-marshall-islands-case/551C44750486C0701A825A8707FCD688> accessed 3 April 2022.

among which the judge has to choose'.[229] It would have been 'equally or similarly plausible in terms of persuasive force'[230] to consider that, given the vulnerability of the applicants, the margin of appreciation should be narrowed or that the protection of the underprivileged trumps procedural economy concerns. The Court could have easily done so without calling into question the validity of the underlying principles, more generally. Perhaps, the Court's misgivings about addressing socioeconomic discrimination result from a desire to retain the confidence of Contracting States and avoid a legitimacy crisis.[231]

Along the same lines, Koskenniemi discusses the 'patterns of fixed preference' at play within international institutions, which mean that 'although all the official justifications of decision-making are such that they may support contrary positions or outcomes, in practice nothing is ever that random'.[232] Bianchi emphasises what he calls 'the moment of choice', whereby when 'faced with a particular choice in a particular context' a Court will opt 'for one specific outcome, thus manifesting its "structural bias" towards certain issues'.[233] According to him, the system in international practice is steered into the direction that a particular institution views as desirable based on these 'structural bias'.[234]

At times, instead of choosing between 'legally plausible' options, the Court goes as far as to contravene its own established principles to avoid adjudicating on a thorny issue. In *Garib* for instance, under the *jura novit curia* principle (the Court knows the law),[235] the Grand Chamber had the leeway to examine the question of discrimination, but it declined to do so, holding that the Article 14 complaint was 'a new one' which it could not consider.[236] The dismissal of Article 14 on such a technicality is deplorable since it could have changed the outcome of the case for the applicant who arguably 'sustained indirect discrimination, further aggravated by

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[229] ibid 83.
[230] ibid 84.
[231] Sánchez takes the view, for instance, that there is a general reluctance to address socioeconomic issues and class in recent decades. She contends that combating 'forms of domination' requires non-hegemonic groups to 'generat[e] agency [for political action] and […] creat[e] critical spaces from which to resist and contest hegemonic' structures. 'This search for commonalities' she continues, 'can serve to unite individuals […] around common interests […] to produce political alliances and solidarity for social struggle'. Hence, the trend in recent decades to omit discussing class 'often fail[s] to link particular differences with social location'. See Rosaura Sánchez, 'On a Critical Realist Theory of Identity', *Identity Politics Reconsidered* (Palgrave Macmillan 2006) 31–32, 35.
[232] Martti Koskenniemi, 'The Politics of International Law - 20 Years Later' (2009) 20 The European Journal of International Law (EJIL) 7, 9 <www.ejil.org/article.php?article=1785&issue=90> accessed 3 April 2022.
[233] Bianchi (n 228) 84.
[234] ibid.
[235] Shelton notes that 'in modern practice, […] [the principle jura novit curia] signifies in general the judicial power to address a case based on a law or legal theory not presented by the parties'. She further points out that '[t]o some, its application represents the legal aspect of justice because it ensures that a party will not lose a case simply because of a failure to invoke the correct legal ground'. Other commentators 'link the concept to notions of equity whereby the court can recognize rights that an applicant or petitioner may not have invoked and may not even be aware pertain to the issues before the court'. See Dinah Shelton, 'Jura Novit Curia in International Human Rights Tribunals' in Nerina Boschiero and others (eds), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (TMC Asser Press 2013) 189–190.
[236] Garib v the Netherlands [GC], para. 102.

its intersectional nature'.[237] But also because it is a way for the ECtHR to circumvent addressing 'the insidious discrimination based on social precariousness affecting part of the population'.[238] If anything, this demonstrates that the legal outcomes of the Court might be driven by non-legal considerations.

On the point that a consensus has not yet emerged among the Contracting States on the ties between poverty and discrimination, closer scrutiny of Judge Pinto de Albuquerque's opinion in *Garib* suggests otherwise. He stresses that many international instruments and Courts, both within the European and international contexts, prohibit socioeconomic discrimination.[239] Many Council of Europe Member States are party to these instruments, which suggests a *prima facie* acceptance of that discrimination ground. Additionally, there is said to be a 'normative partnership'[240] between the ECHR and the Revised European Social Charter (ESC)[241]. That includes a 'cross-fertilization' and 'enhanced coordination between the ECtHR's and the ECSR's approaches to non-discrimination'.[242]

The ECtHR has itself stated that the Revised European Social Charter 'may provide [the Court] with a source of inspiration'.[243] This approach is consistent with a systemic interpretation of the ECHR to which the Court has adhered in its case law, pursuant to Article 31(3)(c) of the

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[237] Garib v the Netherlands [GC], Dissenting Opinion of Judge Pinto de Albuquerque joined by Judge Vehabović, para. 31.

[238] Garib v the Netherlands [GC], Dissenting Opinion of Judge Pinto de Albuquerque joined by Judge Vehabović, para. 1.

[239] Garib v the Netherlands [GC], Dissenting Opinion of Judge Pinto de Albuquerque joined by Judge Vehabović, para. 26. In particular, Judge Pinto de Albuquerque cites the case of *Gonzales Lluy v Ecuador* where the Inter-American Court of Human Rights included poverty as a discrimination grounds. See Inter-American Court of Human Rights (IACtHR), Gonzales Lluy et al. v Ecuador, judgment of 1 September 2015 (Preliminary Objections, Merits, Reparations, and Costs), Series C no. 298, para. 291. At the UN level, see General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) (E/C.12/GC/20, 2 July 2009), para. 35 where the Committee on Economic, Social and Cultural Rights declares that persons living in poverty 'must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society'. See also the Concluding observations on the sixth periodic report of Canada (E/C.12/CAN/CO/6, 23 March 2016), paras. 17-18 where the Committee refers to 'social condition' as a prohibited discrimination ground and recommends that the State include that status among its prohibited grounds.

[240] Samantha Besson, 'Evolutions on Non-Discrimination Law within the ECHR and ESC Systems: It Takes Two to Tango in the Council of Europe Evolutions in Antidiscrimination Law in Europe and North America' (2012) 60 American Journal of Comparative Law 147, 148 <https://heinonline.org/HOL/P?h=hein.journals/amcomp60&i=149> accessed 17 February 2022.

[241] European Social Charter (revised) (ETS No. 163) (adopted 3 May 1996, entered into force 1 July 1999) (Revised European Social Charter). Note that at the time of writing, eleven out of the forty-six Council of Europe member States did not ratify the Revised European Social Charter. The following States signed but did not ratify: Croatia, the Czech Republic, Denmark, Iceland, Luxembourg, Monaco, Poland, San Marino, and the United Kingdom. The following States neither signed nor ratified: Liechtenstein and Switzerland. See <www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=163> accessed 14 April 2022.

[242] Besson (n 240) 147.

[243] Zehnalova and Zehnal v the Czech Republic (dec.) App no 38621/97, ECHR 2002-V.

Vienna Convention on the Law of Treaties (VCLT).[244] Under that provision, treaty interpretation requires both the context and other relevant rules of international law to be taken into account. In *Tănase v Moldava*, the Grand Chamber concluded that it 'must take into account relevant international instruments and reports, and in particular, those of other Council of Europe organs'.[245] In that regard, Article 30 of the Revised European Social Charter explicitly provides for a 'right to protection against poverty and social exclusion'.[246] Hence, the ECtHR could certainly rely on the wider relevant Council of Europe and international legal frameworks to address socioeconomic discrimination within its own case law.

Perhaps, another possible explanation for the Court's refusal to recognise poverty as a discrimination ground, although it has the legal avenues to do so, is the floodgates argument. Ganty points to the potential 'concern that using the social condition ground in antidiscrimination law would open the doors to challenging any inequality based on socioeconomic status'.[247] That would be a major concern for the Court which, despite its new case-processing strategy, still has to manage a considerable backlog of cases.[248] Partly dissenting Judge Sajó addressed the floodgates argument in *M.S.S. v Belgium and Greece*, considering that 'there seems to be only a small step between the Court's present position and that of a general and unconditional positive obligation of the State to provide shelter and other material services to satisfy the basic needs of the "vulnerable"'.[249] According to Ganty, however, such floodgates claims have little to no chance of materialising. The proportionality test applied in discrimination cases would prevent that any and all 'differences in treatment or inequality [would] automatically ground' a discrimination claim.[250]

It has been stressed that the adjudication of socioeconomic rights (issues of redistribution) and non-discrimination litigation on the socioeconomic ground (issues of recognition) have distinct purposes and outcomes. Accordingly, Ganty takes the view that the socioeconomic discrimination ground would be triggered for misrecognition claims, that is, 'where an individual is stigmatized, stereotyped or considered as inferior or worthless because of her socioeconomic situation'.[251] Rather than for 'mal-redistribution' claims, which have so far only been successful in the non-discrimination context 'when the human dignity of a person in

[244] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).
[245] Tănase v Moldava [GC] App no 7/08, ECHR 2010, para. 176.
[246] Revised European Social Charter, Article 30. See also 'The Right to Be Protected against Poverty and Social Exclusion under the European Social Charter' (n 89).
[247] Ganty (n 139) 983.
[248] '"A Court That Matters/Une Cour Qui Compte" A Strategy for More Targeted and Effective Case-Processing' (Registrar of the ECtHR 2021) <www.echr.coe.int/Documents/Court_that_matters_ENG.pdf> accessed 8 April 2022.
[249] M.S.S. v Belgium and Greece [GC] App no 30696/09, ECHR 2011, Partly Concurring and Partly Dissenting Opinion of Judge Sajó. Note that the case will be further explained and discussed in Chapter 3.
[250] Ganty (n 139) 983.
[251] ibid 984.

extreme vulnerability is at stake'.[252] As such, recognition of poverty as a discrimination ground 'should by no means replace positive steps and measures to raise people' out of poverty.[253] Instead, socioeconomic rights adjudication and poverty-related non-discrimination litigation 'should be regarded as complementary rather than competing'.[254]

Finally, it should not be overlooked that persons living in poverty have historically been relegated to the margins of society – a criterion used by the Court to identify and categorise a group as vulnerable and whose needs require special protection. The case law outlined above only underscores that underprivileged persons are still at heightened risk to experience social exclusion. By all accounts, that argument, together with the living instrument doctrine and the open-ended list of grounds of Article 14 ECHR, are all the necessary elements for the Court to recognise poverty as a prohibited discrimination ground.

2.4. Concluding remarks

It is conceded that the ECtHR has accomplished 'impressive breakthroughs'[255] in recent years in its non-discrimination jurisprudence. The shift from a formal to an increasingly substantive concept of equality, the development of positive obligations to correct factual inequalities, and the growing number of discrimination grounds are among the recent welcomed achievements of the Court. Nevertheless, the ECtHR seems to use legal doctrines (margin of appreciation, European consensus, socioeconomic versus civil and political rights dichotomy, and positive versus negative obligations dichotomy) to avoid addressing politically sensitive socioeconomic issues. This conscious and deliberate choice by the Court does not seem to be dictated by legal doctrines but arguably by non-legal considerations, including the floodgates argument. This stance is regrettable since a wide margin of appreciation in cases of *prima facie* discrimination carries the attendant risk that an alleged lack of consensus provides wide discretion to States in determining the scope of permissible interference with rights. That is often to the detriment of those at the margins, including persons living in poverty.

Hence, recognising poverty as a discrimination ground under Article 14 ECHR would have four main implications. First, it would presuppose categorising persons living in poverty as a vulnerable and socially excluded group historically discriminated against. Second, it would entail narrowing the margin afforded to States on certain socioeconomic policy-making when it has a discriminatory impact on the underprivileged. Third, it would involve the imposition of specific and effective positive obligations to address socioeconomic discrimination. Fourth, it would allow the Court to exercise a 'direct scrutiny of socioeconomic disadvantages'[256]

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[252] ibid.
[253] ibid 1007.
[254] ibid.
[255] Tulkens (n 198) 4.
[256] Ganty (n 139) 985.

(which would have been a welcomed approach in *Garib*, for instance) in cases of intersectional discrimination and in cases where the socioeconomic status is 'the sole […] or main ground'.[257] As there seems to exist a *prima facie* international consensus that regards 'poverty as a prohibited ground of discrimination', the Court ought not 'to interpret the [ECHR] […] in a vacuum, but in light of the relevant international law'.[258] Until the Court recognises and actively addresses this *status quo*, impoverished persons will continue to 'fall through the cracks'[259] of the prohibition of discrimination under Article 14 ECHR.

In this context, the following chapter focuses on the capability approach and examines its possible contribution to the practice of the Court. It will be discussed whether taking on board the notion of poverty as capability deprivation in its case law could lead the ECtHR to reassess its stance on poverty-related discrimination. It will also be seen whether such a development would result in better protection of underprivileged persons against discrimination in the enjoyment of their ECHR rights.

[257] ibid 1004.
[258] Garib v the Netherlands [GC], Dissenting Opinion of Judge Pinto de Albuquerque joined by Judge Vehabović, para. 26 citing Loizidou v Turkey (merits), 18 December 1996, *Reports of Judgments and Decisions* 1996-VI.
[259] Atrey (n 8) 422.

3. CHAPTER 3: THE CONTRIBUTION OF THE CAPABILITY APPROACH TO THE PROTECTION FROM POVERTY-RELATED DISCRIMINATION

3.1. INTRODUCTORY REMARKS

This chapter aims to explore how the ECtHR could harness the capability approach to better protect persons living in poverty. It starts by briefly laying out and defining the main terms of the concept as it was developed by Amartya Sen. It then goes on to explain how, under this approach, poverty is construed as a capability deprivation, before discussing the existing links with human rights. Finally, through a review of some relevant ECtHR case law, it examines what guidance could be gleaned from the capability approach in the practice of the Court.

3.2. THE CAPABILITY APPROACH EXPLAINED

Perhaps the main contribution of Sen's capability approach to the understanding of poverty and (in)equality lies in a shift of the 'variable' chosen for measuring inequality.[260] Sen asserts that inequality assessment necessarily entails judging certain attributes of one individual compared to another – 'such as income, or wealth, or happiness, or liberty, or opportunities, or rights, or need-fulfilments'.[261] Depending on the variable put forward, the outcome of the inequality assessment will inevitably change.[262] Poverty has traditionally been measured in terms of income only, with persons falling below a pre-established poverty line being classified as poor.[263] Alternatively, Sen proposes a different 'focal variable' on which to base the analysis.[264] As a framework centred on individual well-being, the capability approach posits that well-being or 'human flourishing',[265] should be measured in the space of capabilities.[266]

The concept is formulated in a two-part definition comprising functionings and freedoms. Functionings are a person's set of possible achievements and 'reflect the various things a person may value doing or being'.[267] For instance, such functionings could include being well-nourished, being educated, being free from discrimination, being an active participant in society, or 'having self-respect'.[268] Substantive freedom refers to a person's real opportunities to accomplish her functionings. It entails 'the *processes'* (process-freedoms) that facilitate free decision-making and uncoerced actions as well as the 'actual *opportunities'* (opportunity-

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[260] Sen, *Inequality Reexamined* (n 28) 2.
[261] ibid.
[262] ibid.
[263] 'Measuring Poverty' (n 51).
[264] Sen, *Inequality Reexamined* (n 28) 2.
[265] ibid 39–40. Sen explains that '[t]he philosophical basis of this approach can be traced to Aristotle's writings' in which he 'examine[d] (...) the political and social implications of concentrating on well-being in this sense, involving "human flourishing"'.
[266] Amartya Sen, *Development as Freedom* (Alfred A Knopf 1999) 74.
[267] ibid 75.
[268] ibid.

freedoms) available to an individual depending on her 'personal and social circumstances'.[269] Accordingly, the capability approach is a framework that considers the entire range of 'potential constraints' to human well-being (lack of resources, disability, discrimination, etc.) and is therefore well-suited for analysis of discrimination and poverty.[270]

3.3. POVERTY UNDERSTOOD AS CAPABILITY DEPRIVATION

The notion of capability encapsulates the array of substantive freedoms ('the real opportunities') an individual possesses to achieve the functionings (doings and beings) she may value and which will enable her to 'lead one type of life or another'.[271] Viewed through the lens of the capability approach, poverty, thus, amounts to a 'capability deprivation'.[272] While he does not deny the crippling effect of low or lack of income and its role in the creation and perpetuation of poverty, Sen takes the view that the space of capabilities carries an added value.[273] Indeed, he argues that an inequality assessment should not be limited to mere income or resource analysis (*'means'*) because it does not reveal the person's concrete capabilities to use that resource and convert it into functionings (*'ends'*).[274]

In addition to income deprivation, some persons may experience 'adversity in converting income into functionings' while others do not. For instance, two persons may earn the same income, which is formally sufficient for them not to be considered poor in the sense of income distribution. Except that one of these individuals is a single mother who has to care for a family of four on her sole wage with one of her children requiring costly treatment or accommodation associated with an ailment or a disability. Conversely, the other individual with similar earnings is a single person only having to care for her personal needs without additional medical costs. Rightly so, Sen takes the view that '"real poverty" (in terms of capability deprivation) may be, in a significant sense, more intense than what appears in the income space'.[275]

There is also a case for discussing the relationship between 'relative income vis-à-vis the general level of prosperity in [a given] community'.[276] A '*relative* deprivation in terms of income' – namely being 'relatively poor in a rich country' – can result in '*absolute* deprivation in terms of capabilities', since 'achiev[ing] the *same social functioning*' generally requires more

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[269] ibid 17 (emphasis in original).
[270] Rod Hick, 'The Capability Approach: Insights for a New Poverty Focus' (2012) 41 Journal of Social Policy 291, 291, 296 <www.cambridge.org/core/journals/journal-of-social-policy/article/abs/capability-approach-insights-for-a-new-poverty-focus/9CE834C02EDA93EE32BE26354A2879F8> accessed 15 February 2022.
[271] Sen, *Inequality Reexamined* (n 28) 40.
[272] Sen, *Development as Freedom* (n 266) 87.
[273] ibid; Amartya Sen, 'Conceptualizing and Measuring Poverty', *Poverty and Inequality* (Studies in Social Inequality, Stanford University Press 2006) 33–34.
[274] Sen, *Development as Freedom* (n 266) 90 (emphasis in original).
[275] ibid 88.
[276] Sen, 'Conceptualizing and Measuring Poverty' (n 273) 36.

income in a rich country.[277] For instance, the social functionings of 'appearing in public without shame, […] taking part in the life of the community'[278] or 'being clothed appropriately' all have a 'social use' potentially decisive 'for the capability to mix with others in [a given] society'.[279] Not achieving these social functionings in a 'generally opulent country' may have severe consequences in terms of 'social exclusion', stigma, and discrimination.[280] It remains to be seen how the capability approach relates to the human rights paradigm, and poverty-related discrimination, specifically.

3.4. The linkage between poverty as capability deprivation and human rights

The relationship between poverty and human rights is an uneasy one characterised by 'deep political and even ideological issues'.[281] It was not self-evident for all schools of thought that poverty was a matter of concern for the human rights project. For some, poverty belonged to the field of development,[282] for others it was a matter of economic growth,[283] and for others still, it should be dealt with through policy-making.[284] This 'traditional mono-disciplinary analysis' often led to 'conceptual fragmentation' and failed to capture the deep ties between poverty and human rights.[285]

In the last decades, poverty has increasingly been recognised as a human rights issue and has attracted enhanced attention from human rights bodies. What is more, various international human rights institutions have incorporated the lack of capabilities within their definitions of poverty.[286] Thus prompting commentators to regard the capability approach as 'the conceptual "bridge" between poverty and human rights'.[287] Despite this growing rhetoric around poverty as a human rights issue, poverty is mostly dealt with under the category of social and economic rights, thus leaving the repercussions it has on the *capability* to enjoy civil and political rights mostly overlooked.[288]

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[277] Sen, *Development as Freedom* (n 266) 89 (emphasis in original).
[278] Sen, *Inequality Reexamined* (n 28) 115.
[279] Sen, 'Conceptualizing and Measuring Poverty' (n 273) 36.
[280] ibid.
[281] Stephen P Marks, 'Poverty', *International Human Rights Law* (3rd edn, OUP Oxford 2018) 597.
[282] Doz Costa (n 61) 81.
[283] Simon Kuznets, 'Economic Growth and Income Inequality' 45 American Economic Review 1 <https://assets.aeaweb.org/asset-server/files/9438.pdf> accessed 19 April 2022.
[284] Thomas Piketty, *Capital in the Twenty-First Century* (Arthur Goldhammer tr, Harvard University Press 2014).
[285] Polly Vizard, *Poverty and Human Rights: Sen's 'capability Perspective' Explored* (Oxford University Press 2006) 11–12.
[286] 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights' (n 58) para 7; 'The Guiding Principles on Extreme Poverty and Human Rights' (n 59) para 2; 'Human Development Report 2019 Beyond Income, beyond Averages, beyond Today: Inequalities in Human Development in the 21st Century' (n 60) 30–47.
[287] Doz Costa (n 61) 85.
[288] Lavrysen (n 86) 294 (emphasis added).

In the context of the ECtHR, freedom from discrimination, including socioeconomic discrimination, plays an important role in 'secur[ing] […] everyone' (Article 1 ECHR) the capability to enjoy the 'rights and freedoms'[289] enshrined in the ECHR. As was shown above, the practice of the Court, however, falls short of an endorsement of the prohibition of poverty-related discrimination. The capability approach was not originally formulated in the language of human rights law, but rather 'from the perspective of ethics, economics and political theory'.[290] Nevertheless, as a 'practical [and analytical] framework', the capability approach 'provides an important entry-point for defending the validity'[291] of a range of human rights, including the right not to be discriminated against based on poverty. It has the potential of better appraising and grasping the 'substantive human rights position of individuals and groups'.[292] As Lavrysen posits, the impacts of poverty are not exclusive to the socioeconomic sphere, but also interfere with the capability of persons living in poverty to enjoy their civil and political rights[293] on an equal footing with others. Hence, according to him an advantage of the capability approach when it comes to poverty is that

> it highlights what one should care about from a human rights perspective when dealing with poverty: the 'multidimensional approach to poverty focusing on "capability failure" rather than income' gives a clear direction to the inquiry whether or not the human right of a person living in poverty has been violated.[294]

3.5. GUARANTEEING PERSONS LIVING IN POVERTY THE CAPABILITY TO ENJOY ECHR RIGHTS ON EQUAL TERMS

This section explores whether the Court's current approach to poverty-related discrimination is consistent with what would be expected under the capability approach. This will be done based on a short selection of cases involving socioeconomic precarity, including, at times, cases where Article 14 ECHR was neither invoked by the applicants nor considered by the Court. This section suggests that the capability approach could perhaps have led to an alternative reading of these cases. The first three subsections identified are based on the work of Valeska David[295] – albeit not concerning the capability approach, specifically – while the last one considers cases that can be regarded as compatible with the capability approach.

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[289] Article 1 ECHR reads as follows: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention'.

[290] Lavrysen (n 86) 296.

[291] Polly Vizard, Sakiko Fukuda-Parr and Diane Elson, 'Introduction: The Capability Approach and Human Rights' (2011) 12 Journal of Human Development and Capabilities 1, 2 <www.researchgate.net/publication/227620229_Introduction_The_Capability_Approach_and_Human_Rights> accessed 15 February 2022.

[292] ibid 4.

[293] Lavrysen (n 86) 297.

[294] ibid 298, citing Vizard (n 285) 19.

[295] Valeska David, *Cultural Difference and Economic Disadvantage in Regional Human Rights Courts: An Integrated View* (1st edn, Intersentia 2020) 224–241. David writes, *inter alia*, about 'the social policy

3.5.1. Recognition of the vulnerability of applicants perceived as lacking agency

By refusing to add poverty as a discrimination ground, the Court prevents the creation of a 'group or identity framework' in cases of *prima facie* socioeconomic discrimination.[296] David argues that one 'normative implication of this position' is to allow the ECtHR to consider that the 'rights deficits involved in an experience of poverty are an individual matter only'.[297] Rights deficits are not studied by reference to the impact of a policy or State action or omission on a particular category of persons. In doing so, the Court's approach 'downplay[s] important relational aspects of the violations complained of', including 'inequalities among groups'.[298] Overlooking the 'social group difference […] between the haves and have-nots' seems to enable the Court to consider 'socioeconomic deprivation' as 'an individual fault'.[299] While the idea of individual agency is central under the capability approach, it should be borne in mind that, for Sen, the agency of an individual closely depends on State policies.[300] In fact, national authorities are often the main actors with the power to increase or decrease both the substantive freedoms and the range of possible functionings a given individual enjoys in a society.[301]

Yet, the Court appears more willing to recognise the vulnerability of certain applicants, such as asylum-seekers, given their perceived lack of agency over their situation.[302] In *M.S.S. v Belgium and Greece*,[303] for instance, the Court found a violation of the rights of an asylum-seeker under Article 3 (prohibition of inhuman or degrading treatment) and Article 13 (right to an effective remedy). This was due to the appalling and violent detention conditions;[304] the state of extreme poverty in which the applicant had lived since his release from the Greek detention centre;[305] as well as the shortcomings in access to the asylum procedure, especially for homeless asylum-seekers like the applicant[306].

Conversely, in cases involving other groups of persons living in poverty, such as single mothers living on social assistance, the Court often fails to identify their vulnerability.[307] The Court's refusal to consider the non-discrimination claim and to find a violation of the substantive

compartment and the invisibility of economic disadvantage, the socio-economically disadvantage as (in)vulnerable, and looking beyond the applicants' poverty'.

[296] ibid 224–225.

[297] ibid 225.

[298] ibid.

[299] ibid.

[300] Sen, *Development as Freedom* (n 266) 18–19.

[301] ibid.

[302] David (n 12) 225.

[303] M.S.S. v Belgium and Greece [GC] App no 30696/09, ECHR 2011.

[304] M.S.S. v Belgium and Greece [GC], paras. 230-234.

[305] M.S.S. v Belgium and Greece [GC], paras. 262-264.

[306] M.S.S. v Belgium and Greece [GC], paras. 294-321.

[307] David (n 12) 225–226.

provision in *Garib*[308] as well as the inadmissibility decision in *Yeshtla*[309] – two cases involving underprivileged single mothers depending on welfare – attest of this state of affairs. In that regard, David notes that, at times, the Court even leaves unchallenged the suggestion made by governments 'that individuals' economic deprivation is simply the result of their own conduct'.[310] The concept of freedom and genuine choice in Sen's approach implies a sense of individual agency but is not synonymous with state non-intervention.[311] On the contrary, opportunity freedom implies that more freedom leads to more opportunity and, thus, to greater ability to achieve valued functionings.[312] Hence, a person would experience 'unfreedom' if she lacks adequate opportunities to achieve what she minimally wishes to be or do.[313] Some relevant functionings in these cases, might include to 'be sheltered, receive social support, […] [and enjoy] personal autonomy and family life'.[314] Consequently, to enhance the opportunity freedom and overall capability, the State must 'remov[e] […] major sources of unfreedom', such as 'poor economic opportunities' and 'systematic social deprivation'.[315]

In *M.S.S.*, the Court did take into account the applicant's real capabilities – or lack thereof – not to find himself in this situation of extreme material deprivation, which in this case amounted to ill-treatment in breach of Article 3 ECHR. By doing so, the judgment is in line with the capability approach since it recognises that the applicant's set of valuable achievements (functionings made up of doings and beings) did not reflect his freedom to lead a dignified life. Indeed, Sen contends that a good life, based on a person's well-being, is one of genuine (as opposed to coerced) choice.[316] Here, the applicant had lived for months in the most abject poverty (living on the street and in public parks with no access to food, shelter, or sanitary facilities) and in 'permanent fear of being attacked or robbed', with no 'prospects of his situation improving'.[317] Consequently, the applicant was deprived of some of his most basic functionings, such as having his human dignity respected and being free from inhuman or degrading treatment.

[308] Garib v the Netherlands App no 43494/09 (ECtHR Grand Chamber, 6 November 2017).
[309] Emabet Yeshtla v the Netherlands (dec.), App no 37115/11, (ECtHR, 15 January 2019).
[310] David (n 12) 226.
[311] Fredman, 'Poverty and Human Rights: A Peril and a Promise' (n 6) 232.
[312] Amartya Sen, *Rationality and Freedom* (Harvard University Press 2004) 585.
[313] Sen, *Development as Freedom* (n 266) 17, 25.
[314] Lavrysen (n 86) 303.
[315] Sen, *Development as Freedom* (n 266) 3–4.
[316] Amartya Sen, 'On the Foundations of Welfare Economics: Utility, Capability and Practical Reason' in Francesco Farina, Frank Hahn and Stefano Vannucci (eds), *Ethics, Rationality and Economic Behavior* (Oxford: Oxford University Press 1996) 59.
[317] M.S.S. v Belgium and Greece [GC], paras. 238, 263.

3.5.2. Invisibility of the socioeconomic deprivation dimension by both the Court and applicants

When turning to the applicant's right to an effective remedy in *M.S.S.*, however, the Court partly departs from the logical outcome expected under the capability approach. Owing to 'major structural deficiencies' in the Greek asylum procedure, the Court found a violation of Article 13 ECHR (right to an effective remedy).[318] Although the Court was not called upon to decide on the issue of discrimination in *M.S.S.*, under the capability approach a case could be made for such a consideration. Indeed, upon his release from the detention centre, the applicant was given a three-day deadline to register an address where he could be reached with information about his asylum application.[319] Not only could the applicant not do so as he was homeless at the time, but he was also not informed of the fact that he could ask the authorities for alternative means of communicating, enabling him to effectively follow the procedure.[320]

That means that the poor communication system between the authorities and asylum-seekers had greater adverse impacts on the capabilities of the destitute and homeless. Arguably, due to his homelessness, the applicant saw his capability to have an effective remedy more compromised than other asylum-seekers not living on the street and able to provide the authorities with an address for the asylum procedure. A similar argument can be made as regards the capability of the applicant to apply to 'the Greek Supreme Administrative Court for judicial review of a potential rejection of his asylum request'.[321] Given the poor notification procedure in respect of persons with no known address, the Court found it 'very uncertain whether the applicant [would have been] able to learn the outcome of his asylum application in time to react within the prescribed time-limit'.[322]

The foregoing demonstrates that even in cases where the Court finds for the applicant, the question of poverty-related discrimination and the resulting capability deprivation often remains secondary and incidental if present at all. This holds true of both the Court and the applicants who tend to frame their claims overlooking the socioeconomic discrimination they experience, even when it is a central aspect of their application.[323] As will be discussed in the next chapter, possible explanations for this self-censorship include the perceived weak persuasive force of this legal argument (given the current stance of the Court on the matter) and the stigma and stereotypes generally associated with poverty.[324] Arguably, the applicant in *M.S.S.* could have additionally claimed that the Greek system in place considerably curtailed

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[318] M.S.S. v Belgium and Greece [GC], paras. 300-301, 321.
[319] M.S.S. v Belgium and Greece [GC], para. 306.
[320] M.S.S. v Belgium and Greece [GC], paras. 308-309
[321] M.S.S. v Belgium and Greece [GC], para. 316.
[322] M.S.S. v Belgium and Greece [GC], para. 318.
[323] David (n 12) 228–229.
[324] See *infra* Chapter 4.

his capability to be free from discrimination in access to an effective remedy based on his socioeconomic precarity in violation of Articles 13 and 14 ECHR.

The *Hudorovič and Others v Slovenia*[325] judgment discussed above is also a fitting example here. Although the impugned failure by the State to provide the applicants with access to basic public utilities (such as safe drinking water and sanitation) entailed a socioeconomic component, the applicants mainly relied on their Roma origin.[326] As regards the Article 14 complaint, they submitted that due to 'discriminatory attitudes, prejudice and stereotypes' their 'special needs as members of a disadvantaged Roma community' were overlooked.[327] Yet, an important aspect of the case involved the applicants' inability, as persons living on social assistance, to pay for the installation of the sanitation utilities.[328] Because the applicants framed their case around their social origin and only marginally relied on their socioeconomic precarity, the Court's reasoning takes a 'rather economically neutral' and 'ethnic-only approach'.[329] Under the capability approach, the complex and intersectional nature of the discrimination at play, resulting in a deprivation of the applicants' capability to enjoy ECHR rights on equal terms, would have been apparent to the Court.

3.5.3. Tendency of the Court to discard or displace the socioeconomic component even when raised by applicants

Even in cases where the applicants crafted their claim around their socioeconomic disadvantage, the Court may still discard it in its reasoning, thus overlooking the capability deprivation at play. *Gnahoré v France*[330] highlights how such an approach, insensitive to the potential impacts of poverty on the capability to enjoy Convention rights, fails to grasp the 'extent and type of harm experienced'.[331] In *Gnahoré*, the applicant – an Ivory Coast national – sought to appeal the placement of his child with the Child Welfare Service and made an application for legal aid to receive free legal representation. The Legal Aid Office recognised that the applicant was 'eligible for legal aid on a means test but refused his application on the ground that "no arguable ground of appeal on points of law [could] be made out against the impugned decision"'.[332] Before the ECtHR, the applicant claimed that this decision contravened with his right to access to court under Article 6(1) ECHR. The Court, however, found no violation, considering that the refusal of legal aid only barred the applicant from free legal counsel and not from pursuing his appeal, as such, since legal representation was not mandatory for the proceedings in question.[333]

[325] Hudorovič and Others v Slovenia App nos 24816/14 and 25140/14 (ECtHR, 10 March 2020).
[326] Hudorovič and Others v Slovenia, paras. 107, 120-122.
[327] Hudorovič and Others v Slovenia, para. 160.
[328] Hudorovič and Others v Slovenia, paras. 146-147.
[329] David (n 12) 229.
[330] Gnahoré v France App no 40031/98, ECHR 2000-IX.
[331] David (n 12) 230.
[332] Gnahoré v France, para. 47.
[333] Gnahoré v France, paras. 39-42.

Although Article 14 ECHR was not relied on, this case discloses an underlying issue of *prima facie* discrimination based on poverty. The partly dissenting judges rightly pointed out that the 'system may be perceived as being inherently unfair by the least well-off appellants, as they are the only ones who have to show that they have a prima facie case on appeal'.[334] The French system effectively creates an 'unfavourable presumption' as to the persuasive force of their legal arguments and, thus, 'makes a loss in court more likely'.[335] Indeed, the decision denying legal aid is based on 'the lack of an arguable ground of appeal'. This 'negative inference' presumably means that applicants who managed to go through with the appeal process 'despite being refused legal aid will be disadvantaged in comparison to appellants who have not applied for legal aid'.[336]

Under the capability approach, however, the question would not have been whether the applicant in *Gnahoré* formally had the capability to lodge his appeal – which he did. Sen cautions not to construe one's 'opportunity' in formal and limited terms. Determining whether the applicant had the real opportunity to access justice should, therefore, not be confined to whether 'the doors of [the courtroom] are formally open'.[337] Instead, the legal reasoning should examine whether, once before the Court, there exist any barriers preventing the applicant (who did not have a lawyer) from having 'the real opportunity of using the facilities there'[338] on an equal footing with others.[339]

The case of *O'Donoghue and Others v the United Kingdom*[340] is also of interest, albeit in a different manner. Here, the ECtHR appears to have displaced the economic precarity and the migration status of the applicants.[341] *O'Donoghue* can be regarded as another case where the Court's Article 14 reasoning would have gained by adopting a more contextualised approach based on the applicants' capabilities to achieve their valued functionings. The case concerned the alleged discriminatory character of an asylum and immigration scheme requiring 'persons subject to immigration control who wish to get married, but are not willing or able to do so in the Church of England [to] apply [for a certificate of approval]', subject to the payment of a fee.[342] The first applicant was a woman dependant on welfare while the second applicant was a Nigerian asylum-seeker not permitted to work – both of them cared for two children and

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[334] Gnahoré v France, Joint Partly Dissenting Opinion of Judges Tulkens and Loucaides, para. 1.
[335] David (n 12) 232.
[336] Gnahoré v France, Joint Partly Dissenting Opinion of Judges Tulkens and Loucaides, para. 1.
[337] Sen, *Commodities and Capabilities* (n 30) 4.
[338] ibid.
[339] In the same vein, the dissenting judges considered that 'the least well-off members of society should not […] be denied access to justice and a category of litigants forfeit the substance of their right to access to a court, as guaranteed by Article 6 of the Convention'. See Gnahoré v France, Joint Partly Dissenting Opinion of Judges Tulkens and Loucaides, para. 1.
[340] O'Donoghue and Others v the United Kingdom App no 34848/07, ECHR 2010 (extracts).
[341] David (n 12) 240–241.
[342] O'Donoghue and Others v the United Kingdom, paras. 7, 8, 13.

the first applicant's parents who suffered from a disability.[343] Wishing to marry and given their economic precarity, the applicants unsuccessfully applied for a waiver of the fee.[344]

Noting that these requirements applied neither to European Economic Area (EEA) nationals nor to persons seeking to marry in the Church of England,[345] the applicants brought a complaint before the ECtHR alleging, *inter alia*, a violation Article 12 (right to marry), both alone and together with Article 14 ECHR (prohibition of discrimination). As regards the discrimination angle, the applicants claimed that, apart from religion, 'the scheme was also discriminatory on grounds of nationality and poverty'.[346] Yet, with regards to the discrimination claims, the Court only found a violation on the ground of religion.[347] This is deplorable as the case presumably raises important issues of '[intersectional] discrimination against a subgroup of immigrants' – namely persons subject to immigration control who declined to be wed in the Church of England and 'could not afford the permission fee'.[348]

Had the Court examined the case in the space of capabilities, however, it would have become apparent that the repercussion of 'income on capabilities is contingent and conditional'.[349] Sen attests that the correlation between 'low income and low capability is *variable* between different communities […] families and […] individuals'.[350] This means that the applicants' capabilities were not only curtailed by their religion, nor only by their belonging to various other status groups – the intersection of which created a unique and exacerbated form of disadvantage. But also by their personal circumstances (including having to care for two children and parents with a disability), which impacted their capability to convert income into functionings. In fact, the applicants themselves invited the Court to consider their concrete position, arguing that the scheme 'failed to take account of the different personal circumstances which could affect different individuals'.[351] What is more, discarding the claims of migration and poverty-related discrimination suggests that the Court attaches more weight to religious discrimination. It is as if 'only a disadvantage [based on] religion raises an issue of inequality, while the unfavourable treatment accorded to migration and socioeconomic status does not'.[352]

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[343] O'Donoghue and Others v the United Kingdom, paras. 30-32.
[344] O'Donoghue and Others v the United Kingdom, para. 86. Note that '[t]he first and second applicants only obtained a Certificate of Approval after their friends helped them to pay the fee. The couple married on 18 October 2008'.
[345] O'Donoghue and Others v the United Kingdom, paras. 8, 40.
[346] O'Donoghue and Others v the United Kingdom, para. 98.
[347] O'Donoghue and Others v the United Kingdom, paras. 90-92, 103-105.
[348] David (n 12) 240–241.
[349] Sen, *Development as Freedom* (n 266) 88.
[350] ibid (emphasis in original).
[351] O'Donoghue and Others v the United Kingdom, para. 65.
[352] David (n 12) 241.

From a capability perspective, the Court's shortcomings in *Gnahoré* and *O'Donoghue* further demonstrate the importance of a 'poverty-sensitive'[353] and contextualised approach which considers all possible constraints to the capability to enjoy ECHR rights. In the following sub-section, it will be seen that in some cases, however, the Court did take account of the socioeconomic deprivation at issue. At times, the Court even hinted that it is willing to bring in capabilities consideration in its reasoning.

3.5.4. Cases where the ECtHR took the socioeconomic deprivation into account in its contextualised analysis

Of interest here is the well-known case of *Airey v Ireland*, dating back to 1979.[354] The background to the complaint was as follows. Lacking the required funds to retain a solicitor, and in the absence of a legal aid scheme, the applicant was unable to obtain a judicial separation from her abusive husband. She alleged, *inter alia*, to have sustained discrimination on the ground of poverty in breach of Article 6(1) (access to court) in conjunction with Article 14 (prohibition of discrimination). The applicant was a mother of four experiencing domestic violence and who had previously been dependent on social benefits. She submitted that the fact that 'judicial separation is more easily available' to well-off individuals 'than to those without financial resources' raises issues of discrimination.[355] The Court found a violation of Article 6(1) ECHR but discarded the non-discrimination claim.[356] Although the dismissal of Article 14 ECHR is regrettable, the instant case remains relevant for the Court's noteworthy rationale, which can be regarded as being in line with the capability approach.

Despite the absence of explicit reference to the capability approach in the judgment, one can interpret *Airey v Ireland* as an unwitting application of the concept. To reach its conclusion, the Court seems to adopt a contextualised approach by considering the applicant's concrete circumstances to determine whether she enjoyed an effective right to access to court. Transposed in the space of capabilities, this approach amounts to appraising her 'capability set' and deducing whether it was sufficient for her to achieve her functionings – namely to have effective access to court.

Likewise, holding that '[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and *effective*'[357] sits well with the capability approach. This concept of effectiveness in the ECtHR's reasoning is consistent with Sen's view that opportunity freedom is not limited to mere formal considerations (*de jure*) but instead extends to the sphere of substantive analysis (*de facto*). Hence, in considering whether by

[353] Lavrysen (n 86) 308.
[354] Airey v Ireland, 9 October 1979, Series A no 32.
[355] Airey v Ireland, para. 13. The applicant additionally alleged a violation of Articles 8 (right to respect for private and family life) and 13 (right to an effective remedy).
[356] Airey v Ireland, paras. 28, 30.
[357] Airey v Ireland, para. 24 (emphasis added).

appearing before the High Court in person and without the assistance of a lawyer, the applicant would have enjoyed access to court (as the government contended), the ECtHR focused on the applicant's background. It noted, in particular, that the applicant came 'from a humble family' and that the proceedings before the High Court are regarded 'as the least accessible' due to the complex procedures involved, especially in separation cases.[358] Consequently, the ECtHR held that it was 'most improbable that a person in [the applicant's] position [could] *effectively* present her own case'.[359]

Moreover, the Court negated the government's argument that in the absence of 'positive obstacle[s] emanating from the State […] the alleged lack of access to court stems […] solely from [the applicant's] personal circumstances, a matter for which [the State] cannot be held responsible'.[360] On the contrary, according to the Court, 'the State cannot simply remain passive' since, in some cases, 'fulfilment of a duty under the Convention […] necessitates some positive action on the part of the State'.[361] Such a finding is again consistent with Sen's idea that 'major sources of unfreedom' should be removed to allow for greater opportunity freedom to achieve valued functionings.[362] Conceivably, therefore, *Airey v Ireland* can be regarded as a major case in which the ECtHR adopted a comprehensive and contextualised approach to examine the applicant's *capability* to enjoy her Convention rights.

Another such case is the right to life case of *Mehmet Şentürk and Bekir Şentürk v Turkey*[363]. It concerned a thirty-four weeks pregnant woman – the applicants' wife and mother, respectively – who, after having been examined by hospital doctors, was informed that her unborn child had died and that she required immediate surgery. Unable to pay the deposit required for the hospitalisation and operation, the patient could not be admitted and was instead transferred to another facility in a private ambulance with no medical personnel on board where she eventually died on the journey.[364] The applicants alleged a violation of Article 2 ECHR (right to life) but did not invoke Article 14 ECHR for a *prima facie* violation of the right not to be discriminated against based on poverty. The ECtHR unanimously found a violation of the substantive and procedural aspects of Article 2 ECHR.[365]

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[358] Airey v Ireland, paras. 8, 24.
[359] Airey v Ireland, para. 24 (emphasis added).
[360] Airey v Ireland, para. 25.
[361] Airey v Ireland, para. 25.
[362] Sen, *Development as Freedom* (n 266) 3–4.
[363] Mehmet Şentürk and Bekir Şentürk v Turkey App no 13423/09, ECHR 2013.
[364] Mehmet Şentürk and Bekir Şentürk v Turkey, paras. 6-10.
[365] It is settled jurisprudence that Article 2 ECHR (right to life) 'contains two substantive obligations: the general obligation to protect by law the right to life, and the prohibition of intentional deprivation of life, delimited by a list of exceptions.' Additionally, it 'contains a procedural obligation to carry out an effective investigation into alleged breaches of its substantive limb'. See 'Guide on Article 2 of the European Convention on Human Rights – Right to Life' (Council of Europe: European Court of Human Rights 2021) para 3 <www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf> accessed 4 May 2022.

In *Mehmet Şentürk and Bekir Şentürk*, although the applicant had not invoked Article 14 ECHR which meant that the Court did not consider the discrimination angle, it did take the applicant's socioeconomic deprivation into account to a certain extent. As Lavrysen noted, such an approach 'could be construed as a recognition that poverty could result in a "capability deprivation" under the ECHR'.[366] Indeed, noting that 'the provision of treatment […] was subordinated to a prior financial obligation', the ECtHR considered that 'the domestic law did not have provisions in this area *capable* of preventing the *failure* in this case to provide the medical treatment required by the deceased woman's condition'.[367] To conclude to a violation of Article 2 ECHR, the Court further posits that 'the deceased woman […] was *deprived of the possibility* of access to appropriate emergency care'.[368]

Although it would have been appropriate to explore the capability failure as a socioeconomic discrimination issue, *Airey v Ireland* and *Mehmet Şentürk and Bekir Şentürk v Turkey* are, nonetheless, noteworthy. They should be praised insofar as they attest that the ECtHR is not, in principle, opposed to considering socioeconomic deprivation in its reasoning, and examining its impact on capability deprivation in the enjoyment of ECHR rights. The foregoing does not mean, however, that the Court has 'endorsed the "capability approach" as such'.[369] Instead, as matters stand, it can merely be regarded as 'an implicit recognition of the relevance of the "capability approach"' in some cases.[370] For true headway to be made, a welcomed next step would be for the Court to expand this approach to cases of *prima facie* poverty-related discrimination under Article 14 ECHR.

3.6. CONCLUDING REMARKS

Overall, this chapter aimed at highlighting the contribution of the capability approach to the protection from discrimination of persons living in poverty under Article 14 ECHR. It also sought to emphasise the need to recognise poverty as a discrimination ground under that provision. Four main takeaways emerge.

First, the absence of poverty among the list of prohibited grounds, at times, results in a mischaracterisation of the applicants' situation and vulnerability. This leads the ECtHR to grant a vulnerable status to some destitute categories of applicants (such as asylum-seekers in *M.S.S. v Belgium and Greece*) but not to others (such as single mothers in *Garib v the Netherlands* and *Yeshtla v the Netherlands*). In some cases, this might be conducive to an inconsistent appraisal of the applicants' situations and capability sets. Hence, recognising persons living in poverty as a vulnerable group *per se* would avoid the pitfall of misidentifying

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[366] Lavrysen (n 86) 303.
[367] Mehmet Şentürk and Bekir Şentürk v Turkey, paras. 95-96 (emphasis added).
[368] Mehmet Şentürk and Bekir Şentürk v Turkey, para. 97 (emphasis added).
[369] Lavrysen (n 86) 303.
[370] ibid.

applicants who may not appear vulnerable *prima facie* but who, nonetheless, see their capability to enjoy ECHR rights compromised due to their poverty. In this regard, applying the capability approach to such cases would enable the Court to see beyond prejudiced beliefs that poverty results from individual fault and recognise the State's responsibilities in promoting individual agency and securing the enjoyment of Convention rights without discrimination.

Second, the absence of a poverty discrimination ground also arguably leads to a form of self-censorship by applicants who rarely frame their claims in terms of socioeconomic discrimination, even where it constitutes a central element of the case. That carries the attendant risk of rendering invisible the distinct impact poverty has on an experience of discrimination, both in cases of intersectional discrimination and where poverty is the main ground. Consequently, either the applicants do not even raise the issue of discrimination to begin with (*M.S.S. v Belgium and Greece*; *Gnahoré v France*; *Mehmet Şentürk and Bekir Şentürk v Turkey*), or when they do, they tend to rely on other discrimination grounds as proxies (*Hudorovič and Others v Slovenia*). Here again, the capability approach would enable the Court to identify the underlying poverty-related discrimination resulting in a capability failure, even when the applicant did not raise the non-discrimination issue.

Third, with poverty not being recognised as a discrimination ground, even when the socioeconomic component is raised by the applicants, the ECtHR can easily discard it (*Gnahoré v France*) or displace it (*O'Donoghue and Others v the United Kingdom*). Both the discarding and displacing of the socioeconomic aspect raise important concerns in terms of the weight accorded by the ECtHR to the applicants' deprivation and attendant disadvantage in claiming their rights. Such a dismissive attitude would not have been tenable had the ECtHR adopted the substantive and contextualised analysis inherent in the capability approach. Then, it would have been compelled to consider the applicants' actual capabilities and take the socioeconomic deprivation and its consequences into account.

Fourth, *Airey v Ireland* and *Mehmet Şentürk and Bekir Şentürk v Turkey*, two cases where the Court adopted a reasoning akin to the capability approach – albeit not under Article 14 ECHR – demonstrate the potential of a contextualised and capability-based analysis and what it can bring to the table in terms of grasping the capability deprivation involved. The Court's reliance on the concept of effectiveness is particularly conducive to achieving *de facto* equality and should arguably be mainstreamed in all cases of *prima facie* poverty-related discrimination.

As was discussed above, the contribution of the capability framework in *prima facie* socioeconomic discrimination cases is that it considers the freedoms and opportunities that form part of a person's 'capability set' as well as 'the underlying variables that explain this set

(entitlements, contextual variables, conversion factors etc.)'.[371] One should not lose sight, however, of the fact that 'the system of rights – including the system of human rights protections – is one such underlying variable'.[372] Thus understood, the unwillingness of the Court to add poverty as a discrimination ground is an underlying variable that impacts the capability set of rights-holders, particularly of persons living in poverty. The Court's current stance means that it declines to consider the right not to be discriminated against based on poverty as one of the 'focal variables' of its inequality assessment. This results in a rights deficit, as it fails to grasp the scope of the disadvantage at play and often conceals the 'element of difference and potential inequality involved in [a] case'.[373]

When considering future developments in the case law, one could push the argument even further and suggest that, under the capability approach, holistic responses to poverty-related discrimination would entail two significant inferences. Discussing possible ways forward, albeit not concerning the capability approach, David indicated that the Court could first, 'recogni[se] impoverished and socially excluded people as a "social group" to be considered in decision-making affecting them'.[374] Additionally, she posits that insofar as the Court acknowledged that underprivileged persons require 'assistance not available to the majority, poverty-related claims could also give rise to duties of accommodation'.[375] Transposed in the space of capabilities, this approach could have far-reaching implications in terms of positive duties to correct factual inequalities and actively assist those at the margins of society (*Thlimmenos v Greece*) – here persons living in poverty. It would also lead to welcomed developments in terms of substantive equality (*D.H. and Others v the Czech Republic*) and effective enjoyment of ECHR rights (*Airey v Ireland*) – all concepts in keeping with the Court's current case law.[376]

Finally, the capability approach and its conception of poverty as capability deprivation ties in well with Fredman's four-dimensional concept of substantive equality. As Sen posits, an inequality assessment must 'come to terms with the existence of pervasive human diversity' and should avoid the pitfall of formal equality rhetoric.[377] He asserts that despite the egalitarian pretences of the prevailing view that "all men are born equal" (formal equality as consistency of treatment),

> the effect of ignoring the interpersonal variations can, in fact, be deeply inegalitarian, in hiding the fact that equal consideration for all may demand very unequal treatment in

[371] Vizard, Fukuda-Parr and Elson (n 291) 4.
[372] ibid.
[373] David (n 12) 230.
[374] ibid 239.
[375] ibid.
[376] See *infra* Chapter 2, Section 2.2.
[377] Sen, *Inequality Reexamined* (n 28) 1.

> favour of the disadvantaged. The demands of substantive equality can be particularly exacting and complex when there is a good deal of antecedent inequality to counter.[378]

Against this backdrop, the next chapter focuses on the contribution of Fredman's four-dimensional concept of substantive equality to the protection from poverty-related discrimination.

[378] ibid.

4. CHAPTER 4: THE CONTRIBUTION OF FREDMAN'S SUBSTANTIVE EQUALITY FRAMEWORK TO THE ECtHR'S APPROACH TO POVERTY AND EQUALITY

4.1. INTRODUCTORY REMARKS

The right not to be discriminated against and the right to equality have generally been regarded as being 'two faces of one same institution'.[379] As 'reciprocal' concepts, '[e]quality [was said to be] the positive face of nondiscrimination' while '[d]iscrimination [was said to be] the negative face of equality'.[380] This understanding of the terms has somewhat shifted in recent years, however, with 'an increased emphasis on the positive formulation' regarded as imposing 'a duty to […] take positive action to achieve real equality'.[381] In the present inquiry as to how better protect persons living in poverty, the concept of equality and particularly of *substantive* equality, therefore, offers a promising perspective. As has been seen in previous chapters, the protection afforded by the ECtHR to socioeconomically underprivileged persons is indirect and partial, at times, and often lacking. It remains to be seen what contribution Fredman's four-dimensional approach to substantive equality can make to the analysis. Before delving into Fredman's concept, some definitions are in order.

4.2. EQUALITIES EXPLAINED

The notion of equality, as both a moral ideal and a legal aspiration, is embedded in most domestic, regional, and international human rights instruments.[382] Yet, despite the 'widespread adherence' to the concept of equality, 'there is so little agreement on its meaning and aims'.[383] As previously touched upon in the introductory chapter,[384] formal and substantive equality ought to be distinguished. Formal equality focuses on procedural fairness regardless of the results and considers equality as consistency of treatment. The Aristotelian maxim that 'likes should be treated alike'[385] or concepts such as "equality before the law"[386] mostly protect against 'direct and overt' discrimination[387]. This was the approach taken by the

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[379] IACtHR, Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 of January 19, 1984, Separate vote of Judge Rodolfo E. Piza E, para. 10.
[380] IACtHR, Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 of January 19, 1984, Separate vote of Judge Rodolfo E. Piza E, para. 10.
[381] Moeckli (n 35) 149.
[382] Sandra Fredman, *Discrimination Law* (2nd edn, Oxford University Press 2011) 1. See for instance the non-discrimination provisions, *inter alia*, in: Articles 1, 2(1) and 7 UDHR; Article 1(3) UN Charter; Articles 2, 3 and 26 ICCPR; Articles 2(2) and 3 ICESCR; CERD, CEDAW, Article 5 CRPD, Article 2 CRC, Article 7 ICRMW, Article 14 ECHR and Protocol No 12 ECHR; Articles 1 and 24 ACHR; Articles 2, 3, 18(3)-(4) ACHPR.
[383] ibid 3.
[384] See *infra* Chapter 1, Section 1.4.2.
[385] Aristotle, The Nicomachean Ethics of Aristotle (JM Dent, 1911) Book V3, paras 1131a–b.
[386] Moeckli (n 35) 151.
[387] Rory O'Connell, 'Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECHR' (2009) 29 Legal Studies 8 <https://papers.ssrn.com/abstract=1328531> accessed 3 March 2022 citing Aileen McColgan, *Discrimination Law: Text, Cases and Materials* (Oxford: Hart, 2005), 19.

ECtHR in its early non-discrimination jurisprudence. It focused solely on direct discrimination, which entailed treating differently 'persons in analogous, or relevantly similar, situations based on an identifiable characteristic or "status"'[388] without an objective and reasonable justification.

Abdulaziz, Cabales and Balkandali v the United Kingdom[389] is an apt example of the ECtHR's former adherence to formal equality and sameness of treatment. The Court rejected the applicants' submission that the new Immigration Rules – which introduced stricter conditions for family reunification – disproportionately impacted applicants from the New Commonwealth and Pakistan, in breach of Article 14 ECHR.[390] To reach this conclusion, the Court considered that the fact that, 'at the material time', the immigration rules affected 'fewer white people than others', was not 'a sufficient reason to consider them as racist in character'.[391] It continued by stating that 'it is an effect which derives not from the content of the […] Rules but from the fact that, among those wishing to immigrate, some ethnic groups outnumbered others'.[392]

This reasoning demonstrates how formal equality reduced to the non-arbitrary application of the law will not uncover and challenge underlying disadvantages[393] (such as historic, systemic, or structural discrimination[394]). Quite the opposite, it commonly helps 'perpetuate inequalities'.[395] Hence, often regarded as an 'empty idea',[396] moves have been afoot to 'give substance to the abstract notion of equality',[397] through the concept of substantive equality.

As an umbrella term, substantive equality can refer to several concepts which mostly formed to mitigate the shortcomings of formal equality. These are premised on the common understanding that consistency of treatment is ill-suited to achieve equality for all. The ECtHR has progressively shifted from a formal to a substantive concept of equality (*D.H. and Others*

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[388] Biao v. Denmark [GC], para. 89.
[389] Abdulaziz, Cabales and Balkandali v the United Kingdom, 28 May 1985, Series A no 94. Note that this case does not relate to poverty discrimination but is used here to demonstrate what applying formal equality might resemble in practice and what results it might entail.
[390] Abdulaziz, Cabales and Balkandali v the United Kingdom, paras. 21, 70, 86.
[391] Abdulaziz, Cabales and Balkandali v the United Kingdom, para. 85.
[392] Abdulaziz, Cabales and Balkandali v the United Kingdom, para. 85.
[393] Fineman (n 120) 3.
[394] Concerning racism, the term 'systemic' is said to 'emphasiz[e] the involvement of whole systems, and often all systems – for example, political, legal, economic, health care, school, and criminal justice systems– including the structures that uphold the systems'. The term 'structural' refers to 'the role of the structures (law, policies, institutional practices, and entrenched norms) that are the systems' scaffolding'. See Paula Braveman and Elaine Arkin, 'Systemic And Structural Racism: Definitions, Examples, Health Damages, And Approaches To Dismantling' (2022) 41 Health Affairs 171, 172 <www.healthaffairs.org/doi/epdf/10.1377/hlthaff.2021.01394> accessed 8 May 2022.
[395] Fredman, *Discrimination Law* (n 31) 2.
[396] Peter Westen, 'The Empty Idea of Equality' (1982) 95 Harvard Law Review 537 <www.jstor.org/stable/1340593> accessed 8 May 2022.
[397] Moeckli (n 35) 149.

v the Czech Republic[398]) in its non-discrimination case law. On the whole, substantive equality is generally presented as comprising two main schools of thought, namely equality of results and equality of opportunity.[399]

Equality of results entails 'achieving a fairer distribution of benefits' to reach an equal result for all.[400] Proponents of this approach frequently praise its recognition that the seemingly uniform treatment of formal equality 'can in practice reinforce inequality because of past or ongoing discrimination'.[401] At its 'most controversial' degree of implementation, equality of results 'goes beyond the removal of exclusionary criteria' by demanding 'preferential treatment of [an] underrepresented group'.[402]

Equality of opportunity is often exemplified by reference to a race in which contestants each enjoy different levels of obstacles ahead before reaching the finish line. Some have a clear path, while others have to overcome significant obstacles representing societal and systemic disadvantages. The notion of equality of opportunity, therefore, aims at levelling the playing field by providing each contestant with the same chances of reaching the finish line. It does not, however, busy itself with the outcomes achieved by each contestant, once they all have been provided with equal opportunities. Under this 'model', providing individuals with equal opportunities is said to resolve the issue of 'institutional discrimination'.[403] Therefore, 'fairness demands that they be treated [based on] their individual [merits], without regard to [their criteria of disadvantage]'.[404]

These preliminary definitions aside, it should be noted that Fredman does 'not attemp[t] to pin substantive equality to a single meaning'.[405] Instead, she believes that 'it should be understood as a multidimensional concept'.[406] Hence, Fredman's framework is articulated around 'four complementary and interrelated objectives'.[407] These include 'redressing stigma,

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[398] D.H. and Others v the Czech Republic [GC] App no 57325/00, ECHR 2007-IV.
[399] Other conceptions of substantive equality have also developed around the concept of human dignity, which will not be considered here. See for instance: Rory O'Connell, 'The Role of Dignity in Equality Law: Lessons from Canada and South Africa' (2008) 6 International Journal of Constitutional Law 267 <https://academic.oup.com/icon/article-lookup/doi/10.1093/icon/mon004> accessed 8 May 2022; Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 European Journal of International Law 655 <https://academic.oup.com/ejil/article/19/4/655/349356> accessed 8 May 2022.
[400] Fredman, *Discrimination Law* (n 31) 14.
[401] ibid.
[402] ibid 15.
[403] Fredman, 'Substantive Equality Revisited' (n 39) 723.
[404] Fredman, *Discrimination Law* (n 31) 18. As such, equality of opportunity can be seen as a 'middle ground between formal equality and equality of results'. Fredman observed that this notion is compatible with both 'inequality of treatment and inequality of results'. Admittedly, equal opportunity might require unequal treatment, 'but once opportunities are equal, different choices and capacities might lead to inequality of results'. See Fredman at 18, 2.
[405] Fredman, 'Emerging from the Shadows' (n 25) 282.
[406] ibid.
[407] ibid.

stereotyping, humiliation, and violence because of membership of an identity group' (recognition dimension); 'break[ing] the cycle of disadvantage associated with status [groups]' (redistributive dimension); 'facilitat[ing] full [social and political] participation in society' (participative dimension); and combating requirements of assimilation 'as a price of equality [by] 'accommodat[ing] difference […] to achieve structural change' (transformative dimension).[408]

4.3. Relevance of Fredman's four-dimensional concept to achieve substantive equality for persons living in poverty

This section will examine the potential contribution of the four-dimensional concept to guarantee substantive equality for persons living in poverty. Fredman's framework largely debunks two underlying assumptions about a rights-based approach to poverty, namely that 'freedom consists in absence of state intervention [and that] equality consist[s] only [of consistency of treatment] or formal equality before the law'.[409] By adopting a substantive concept of equality which warrants the imposition of positive duties on States, Fredman's approach demonstrates how the human rights paradigm can meaningfully 'include a poverty perspective'.[410]

4.3.1. *Inclusion of poverty as a discrimination ground for recognition purposes*

The recognition dimension will be discussed along two axes. First, it will be examined to what extent the non-legal repercussions of misrecognition impact the ways in which underprivileged applicants claim their rights before the ECtHR. Second, this sub-section will study the benefits of recognising poverty as a discrimination ground and what it would mean in terms of substantive equality.

4.3.1.1. *Repercussions of misrecognition on rights claims*

The relevance of the recognition dimension is not only to open new legal avenues to socioeconomically precarious applicants – for instance by allowing direct scrutiny of *prima facie* socioeconomic discrimination. It is also a major step in combating the pernicious effects of stigma, stereotyping, humiliation, and violence against the poor in the wider society. As Timmer rightly mentions, combating stereotyping and stigma first requires naming and identifying the stereotypes at play before contesting them in court.[411] For her, naming stereotypes requires the Court to 'determine the actual role [they play] in the context of a

[408] Fredman, *Discrimination Law* (n 31) 25.
[409] Fredman, 'Poverty and Human Rights: A Peril and a Promise' (n 6) 224.
[410] ibid.
[411] Alexandra Timmer, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' (2011) 11 Human Rights Law Review 707, 718 <www.corteidh.or.cr/tablas/r27637.pdf> accessed 9 May 2022.

particular case'.[412] But further than that, consideration must also be given to the ways in which stigma and stereotyping occurring outside the courtroom influence the legal claims made by applicants before the Court. And accordingly, how this framing of the claims leads the Court to consider – or not – the socioeconomic disadvantage in its legal reasoning.

Both Sen and Fredman insist that the 'stigma often associated with poverty is itself a harm which needs to be addressed'.[413] Sen 'recognises the shame accompanying poverty as a deprivation in itself'.[414] Likewise, Fredman explains that poverty is not just a matter of misdistribution: 'it also carries with it the stigmatic effects often thought to be confined to status inequalities'.[415] On that point, she quotes Lister to the effect of highlighting the profound impact the "us" and "them" dynamic has on an experience of poverty.[416] This "othering" of the poor is 'imbued with negative value judgements that construct "the poor" variously as a source of moral contamination, a threat, an "undeserving" economic burden, an object of pity'.[417] In the same vein, Porter posits that 'welfare recipients [are] seen in "unremittingly negative terms by the economically secure"'.[418] According to him, such discriminatory attitudes result in 'social exclusion [and] transforms social assistance from an entitlement of citizenship linked with the right to security and dignity, into a source of shame, guilt, and insecurity'.[419]

Already outside the courtroom, such stigma 'reinforce[s] poverty', as it is a major disincentive causing socioeconomically disadvantaged persons to sometimes renounce the social benefits they are entitled to for fear of further stigmatisation.[420] In turn, this 'sense of shame and responsibility for their state'[421] tends to be transferred in Court, whereby applicants frame their claims in socioeconomically neutral terms even where it represents a main issue[422] (*Hudorovič and Others v Slovenia*[423]; *M.S.S. v Belgium and Greece*[424]; *Gnahoré v France*[425], *Mehmet Şentürk and Bekir Şentürk v Turkey*[426]). Yet, acknowledgement by the ECtHR of 'the patterns that lead to structural discrimination' remains an 'essential' element even when the

[412] ibid 718–719.
[413] Fredman, 'Poverty and Human Rights: A Peril and a Promise' (n 6) 243.
[414] Fredman, 'The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty' (n 91) 573.
[415] ibid 575.
[416] Fredman, 'Poverty and Human Rights: A Peril and a Promise' (n 6) 244; citing Lister (n 66) 100.
[417] Lister (n 65) 101.
[418] Fredman, 'The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty' (n 91) 576; citing Bruce Porter, 'Claiming Adjudicative Space: Social Rights, Equality and Citizenship' in Susan Boyd and others (eds), *Poverty Rights, Social Citizenship, and Legal Activism* (UBC Press 2007) 82.
[419] Porter (n 418) 85.
[420] Fredman, 'The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty' (n 91) 576.
[421] Ganty (n 139) 992.
[422] David (n 12) 229.
[423] Hudorovič and Others v Slovenia App nos 24816/14 and 25140/14 (ECtHR, 10 March 2020).
[424] M.S.S. v Belgium and Greece [GC] App no 30696/09, ECHR 2011.
[425] Gnahoré v France App no 40031/98, ECHR 2000-IX.
[426] Mehmet Şentürk and Bekir Şentürk v Turkey App no 13423/09, ECHR 2013.

Court finds for the applicant 'on other aspects of the case'.[427] Ganty also highlights the symbolic importance of recognition in 'fighting against structural discrimination and the applicant's feelings of humiliation, shame and unworthiness'.[428] Hence, misrecognition by the ECtHR of poverty and the 'stigma and prejudice' attached to it 'constitute real social [and legal] barriers and have to be combated through the right to not be discriminated against based on socioeconomic status'.[429]

4.3.1.2. *Added benefit of recognising poverty as a discrimination ground*

Recognising poverty as a discrimination ground would enable applicants to make group-based claims. It would contribute to acknowledging that experiences of socioeconomic disadvantage are not an isolated phenomenon confined to the particular case at hand. Instead, it affects the enjoyment of Convention rights of large segments of the population and deserves attention by the ECtHR. It is conceded that some commentators take the view that 'the last thing [the proletariat] needs is recognition of its difference'.[430] Perhaps a better view would be to consider that 'those who live in poverty or have low income […] want to see their difference – their poverty – not recognised, but eliminated'.[431]

The foregoing notwithstanding, impoverished persons continue to experience disadvantage and stigma due to their precarity and turn to the ECtHR for remedies.[432] It is the role of the Court to determine how it can best be responsive to their claims and whether it is willing to regard persons living in poverty as a "vulnerable group". Opinions seem to differ in that regard. On the one hand, dissenting Judges López Guerra and Keller in the *Garib* Chamber judgment pleaded that 'the poor are a vulnerable group in and of themselves'.[433] On the other hand, the ECtHR's overall jurisprudence seems to reveal that 'poverty is frequently discarded as a group characteristic or as an aspect of identity holding legal relevance'.[434] In any case, acknowledging poverty 'as a source of vulnerability [would] trigger specific normative responses',[435] including the imposition of positive duties to take, *inter alia*, positive measures to correct factual inequalities (*Sejdić and Finci v Bosnia and Herzegovina*[436]) and pay special consideration to the needs of impoverished persons (*D.H. and Others v the Czech Republic*[437]).

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[427] Ganty (n 139) 992.
[428] ibid.
[429] ibid 992–993.
[430] Nancy Fraser, *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition* (Routledge 2013) 18.
[431] David (n 12) 3.
[432] ibid.
[433] Garib v the Netherlands App no 43494/09 (ECtHR, 23 February 2016), Joint Dissenting Opinion of Judges López Guerra and Keller, para. 14.
[434] David (n 12) 235.
[435] ibid.
[436] Sejdić and Finci v Bosnia and Herzegovina [GC] App nos 27996/06 and 34836/06, ECHR 2009, para. 44.
[437] D.H. and Others v the Czech Republic [GC] App no 57325/00, ECHR 2007-IV, para. 181.

What is more, '[p]overty […] and deprivation of basic social goods are "lack-of-opportunity categories" that the current framework of identity group does not recognise; such disadvantage transcends group boundaries'.[438] Hence, the importance of recognising poverty as a discrimination ground *per se* also lies in intersectional considerations. When it comes to 'poverty-related litigation', failure to consider the intersectional links between various status groups 'results in an impoverished analysis of the nature and extent of the harms' produced by an impugned measure.[439] Adopting an intersectional approach is central to achieving substantive equality and is also consistent with the capability approach in that it requires a contextualised analysis.

B.S. v Spain[440] is a rare occasion where the ECtHR has adopted an 'intersectional interpretation of discrimination based on the indivisible combination of the factors in question'.[441] This approach led the Court to find a violation of Article 14 ECHR together with Article 3 ECHR (prohibition of ill-treatment in its procedural aspect). The case concerned a female sex worker of Nigerian origin and a legal resident of Spain who had been stopped numerous times by the police for identity checks and who was physically and racially abused.[442] After lodging various criminal complaints to no avail, the applicant brought a claim before the ECtHR alleging to have been discriminated against on account of her race, gender, and profession.[443] This claim was substantiated by the third-party interveners[444] who joined the applicant in inviting the Court to consider the relevant factors, not separately, but as constituting 'intersectional discrimination'.[445]

The ECtHR concurred with this argument considering that the domestic courts overlooked 'the applicant's particular vulnerability inherent in her position as an African woman working as a prostitute'.[446] Accordingly, '[t]he authorities failed to comply with their duty under Article 14 [together] with Article 3 to take all possible steps to ascertain whether or not a discriminatory attitude might have played a role in the events'.[447] The approach taken by the ECtHR in *B.S. v Spain* is intersectional in all but name. As Ganty pointed out, the ECtHR relies on its traditional concept of "vulnerability" instead of expressly referring to "intersectionality".[448] But in any case, it is a welcomed decision for non-discrimination law and substantive equality. It

[438] Fineman (n 120) 4.
[439] David (n 12) 222; citing Gwen Brodsky and Shelagh Day, 'Poverty Is a Human Rights Violation' (2001) Paper Prepared for the December 2001 Consultation of The Poverty and Human Rights Project (Canada) 12.
[440] B.S. v Spain App no 47159/08 (ECtHR, 24 July 2012).
[441] Ganty (n 139) 999.
[442] B.S. v Spain, paras. 6-10, 21-22.
[443] B.S. v Spain, para. 29.
[444] European Social Research Unit (ESRH) at the Research Group on Exclusion and Social Control (GRECS) at the University of Barcelona; AIRE Centre.
[445] B.S. v Spain, paras. 52, 56-57.
[446] B.S. v Spain, para. 62.
[447] B.S. v Spain, para. 62.
[448] Ganty (n 139) 999.

demonstrates the importance of taking the socioeconomic discrimination – here the applicant's employment – 'as an essential component of the overall discrimination'.[449]

Most of the cases considered in the previous chapters also involved various grounds of disadvantage, and their intersection with poverty further created a unique and exacerbated form of disadvantage. In the absence of a poverty-related discrimination ground, considering these grounds separately amounts to appraising the situation of the applicants in a vacuum. Such was the case in *Garib v the Netherlands*[450] (gender, social origin, poverty), *Emabet Yeshtla v the Netherlands* (dec.)[451] (race, gender, HIV positive status, poverty), and *O'Donoghue and Others v the United Kingdom*[452] (migration status, religion, poverty), only to name a few.

Hence, under the principles developed in the ECtHR's current non-discrimination jurisprudence, the recognition of impoverished persons as a vulnerable group and of poverty as a discrimination ground would represent a welcomed evolution in many regards. Besides implying a better framing and reviewing of rights claims, it would also be conducive to an intersectional interpretation of discrimination and lead to the imposition of positive duties. Regarding this last element, it remains to be seen what contributions Fredman's redistributive, participative, and transformative dimensions could potentially make.

4.3.2. Imposition of positive duties on States

Fredman asserts that 'without a positive duty to promote equality, patterns of discrimination and social exclusion will remain unchanged'.[453] Accordingly, '[a]n explicit commitment to redressing disadvantage, combating social exclusion and facilitating positive participation all require positive provision'.[454]

4.3.2.1. *Redistributive dimension*

As opposed to formal equality and its 'anti-classification' approach,[455] substantive equality does not view the belonging to a status group as problematic *per se*, but rather focuses on 'the detrimental consequences attached to that status'.[456] Therefore, instead of attempting

[449] ibid.
[450] Garib v the Netherlands App no 43494/09 (ECtHR Grand Chamber, 6 November 2017). Note that dissenting Judge Pinto de Albuquerque stressed the intersectional character of the applicant's experience of discrimination. See Garib v the Netherlands [GC], Dissenting Opinion of Judge Pinto de Albuquerque joined by Judge Vehabović, para. 31.
[451] Emabet Yeshtla v the Netherlands (dec.), App no 37115/11, (ECtHR, 15 January 2019).
[452] O'Donoghue and Others v the United Kingdom App no 34848/07, ECHR 2010 (extracts).
[453] Sandra Fredman, *Human Rights Transformed. Positive Rights and Positive Duties* (Oxford University Press 2008) 311.
[454] Lavrysen (n 86) 315.
[455] Fredman, 'Emerging from the Shadows' (n 25) 282.
[456] Fredman, *Discrimination Law* (n 31) 26.

to afford equal treatment to all, regardless of status – which might be a 'function of previous discrimination' – substantive equality 'aims to redress disadvantage, rather than prohibit classification'.[457] To do so, it focuses 'on the group which has suffered disadvantage: women rather than men, black people rather than whites, people with disabilities rather than able-bodied',[458] or the impoverished rather than the wealthy. In that regard, the redistributive dimension is premised on the assessment that 'economic disadvantage is not randomly distributed in society'.[459] Instead, status groups are 'disproportionately represented among people living in poverty'[460] or social exclusion. Against this backdrop, Fredman identifies three main conceptions of disadvantage within the redistributive dimension.

First, in its most common understanding, disadvantage is 'understood in the context of redistribution of resources and benefits'.[461] It seeks to 'correct the cycle of disadvantage experienced because of [one's precarity]'.[462] In this sense, the redistributive dimension of substantive equality highlights the 'links between distributive inequalities, which have traditionally been regarded as the terrain of the welfare state or socioeconomic rights, and discrimination law'.[463] Based on ideas of distributive justice, redistribution entails an equal distribution of social goods.[464] Accordingly, States are under a duty to 'take positive measures to promote equality, including, where appropriate, [through] allocation of resources'.[465]

The ECtHR's case law suggests that the Court has not yet adhered to such a redistributive principle. *Garib v the Netherlands*[466] and *Emabet Yeshtla v the Netherlands* (dec.)[467] are two instances where the ECtHR discarded the discriminatory consequences resulting from distributive inequalities. In *Garib*, instead of being conducive to increased equality, the impugned policy quite overtly disadvantaged the impoverished by introducing an income-based restriction. By contrast, redistribution would demand that the State take poverty-related policies that 'facilitate agency by removing some of the central constraints and obstacles'.[468] In *Yeshtla*, the contested policy discontinued the allocation of means-tested housing benefits on account of the applicant's cohabitation with her son, an unlawful resident. This measure did not consider the fact that status groups (including persons with a migratory background) are among the most reliant on social benefits. Nor did it take account of its disparate effects on those already at the margins by entrenching distributive inequalities.

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[457] Fredman, 'Emerging from the Shadows' (n 25) 282.
[458] Fredman, *Discrimination Law* (n 31) 26.
[459] David (n 12) 222.
[460] Fredman, 'The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty' (n 91) 567.
[461] Fredman, 'Poverty and Human Rights: A Peril and a Promise' (n 6) 242.
[462] Fredman, *Discrimination Law* (n 31) 26.
[463] ibid.
[464] Lavrysen (n 86) 314.
[465] Fredman, *Human Rights Transformed. Positive Rights and Positive Duties* (n 453) 163.
[466] Garib v the Netherlands App no 43494/09 (ECtHR Grand Chamber, 6 November 2017).
[467] Emabet Yeshtla v the Netherlands (dec.), App no 37115/11, (ECtHR, 15 January 2019).
[468] Fredman, 'Poverty and Human Rights: A Peril and a Promise' (n 6) 245.

In both cases, the ECtHR appears to turn a blind eye to the disadvantage at play, which would not have been the case under the redistributive dimension. Yet, Fredman stresses that 'poverty is not simply about insufficient income […] [i]t is also about relative deprivation, absence of agency, stigma and exclusion'.[469] Consequently, redistribution is not confined to the mere allocation of 'material goods [and benefits]'.[470]

Second, the disadvantage that ought to be redressed here also encompasses the constraints imposed on impoverished persons due to subordination and power imbalances in dominant social structures.[471] Thus understood, the redistributive dimension requires that States promote access, *inter alia*, to education, employment, healthcare, power structures and the ability to influence them. For instance, in *Wallová and Walla v the Czech Republic*[472] the applicants were deprived of their decision-making power over their personal and family life due to their material deprivation. In *D.H. and Others v the Czech Republic,*[473] the applicants sustained indirect discrimination which impeded their access to the social good of education.

Third, disadvantage can also be construed as a 'deprivation of genuine opportunities to pursue one's own valued choices'.[474] Drawing on Sen's capability approach, this understanding of redistribution entails to 'facilitate genuine choice'.[475] Arguably, in *Mehmet Şentürk and Bekir Şentürk v Turkey,*[476] because of their socioeconomic deprivation and the fact that the provision of emergency care was subordinated to the payment of a fee, the applicants lacked a genuine choice. In this case, their deprivation prevented them to access appropriate healthcare to achieve what they minimally wished to be or do and resulted in the death of the victim in violation of her right to life (Article 2 ECHR).

What is more, in this sense of disadvantage akin to Sen's capability approach, redistribution demands more than just 'having the undeveloped, unused capacities for autonomy and liberty but also [having the ability to] exercis[e] them'.[477] Consider the example of *Gnahoré v France*[478] and *M.S.S. v Belgium and Greece*[479]. In these cases, the disadvantage (under Fredman's concept) or capability deprivation (under Sen's approach) complained of was not the absence of procedures capable of protecting the underlying right – namely the right to access to court (Article 6(1) ECHR) and the right to an effective remedy (Article 13 ECHR). Formally speaking, the applicants in both cases had the possibility of having their rights

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[469] ibid 241.
[470] Fredman, *Discrimination Law* (n 31) 26–27.
[471] Fredman, 'Poverty and Human Rights: A Peril and a Promise' (n 6) 224.
[472] Wallová and Walla v the Czech Republic App no 23848/04 (ECtHR, 26 October 2006).
[473] D.H. and Others v the Czech Republic [GC] App no 57325/00, ECHR 2007-IV.
[474] Fredman, 'The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty' (n 91) 578.
[475] Sandra Fredman and Sarah Spencer, 'Beyond Discrimination: It's Time for Enforceable Duties on Public Bodies to Promote Equality Outcomes' [2006] European Human Rights Law Review 598, 603.
[476] Mehmet Şentürk and Bekir Şentürk v Turkey App no 13423/09, ECHR 2013.
[477] James Griffin, *On Human Rights* (Oxford University Press 2008) 183.
[478] Gnahoré v France App no 40031/98, ECHR 2000-IX.
[479] M.S.S. v Belgium and Greece [GC] App no 30696/09, ECHR 2011.

protected since the necessary structures existed. Substantially speaking, however, a contextualised assessment of the applicants' disadvantage quickly reveals that they lacked the resources required (financial means in *Gnahoré* and a permanent or at least a temporary address in *M.S.S.*) to be able to meaningfully use the structures in place.

On that point, Fredman describes the 'system of judicially enforceable human rights [as one] where the expense and complexity of legal claims might allow human rights to be captured by elites to entrench their position regardless of non-egalitarian implications for the poor'.[480] Analysing these cases in compliance with Fredman's redistributive dimension would, therefore, entail recognition by the ECtHR that the applicants' substantive equality required a fairer distribution of resources – both economic and non-economic. A rights-based approach to poverty should, therefore, not be 'abstracted from the social context of power and inequality'.[481]

As regards the participative and transformative dimensions, '[t]he limited visibility of [class or economic disadvantage as an] aspect of people's lives in the rights discourse supports the view […] that normative discussions about diversity and inclusion rarely include class or economic difference'.[482] It is this under-inclusiveness that Fredman's last two dimensions seek to address.

4.3.2.2. *Participative dimension*

The third dimension of substantive equality focuses on social inclusion and political voice. As regards political participation, Fredman's third dimension draws on Ely's "representation-reinforcing" theory. According to Ely, judicial review aims 'to compensate for the absence of political power of groups who are permanently marginalised and therefore "to whose needs and wishes elected officials have no apparent interest in attending"'.[483] The participative dimension is, therefore, premised on the assessment that 'past discrimination or other social mechanisms have blocked the avenues for political participation by particular minorities'.[484] Besides political participation, this dimension also relates to social exclusion and the 'ability to participate on equal terms in community and society more generally'.[485] In this sense, enhancing participation entails focusing on 'structures which exclude people from participation in determining their actions'.[486]

[480] Fredman, 'Poverty and Human Rights: A Peril and a Promise' (n 6) 225.
[481] ibid.
[482] David (n 12) 235.
[483] Fredman, 'Emerging from the Shadows' (n 25) 282 citing John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press 1980) 46.
[484] Fredman, 'Poverty and Human Rights: A Peril and a Promise' (n 6) 244.
[485] ibid.
[486] ibid.

Lăcătuş v Switzerland[487] exemplifies how social exclusion and lack of political voice relate to issues of poverty and substantive equality. In this case, alongside the claims under Articles 8 and 14 ECHR, the applicant also submitted that her right to freedom of expression (Article 10 ECHR) had been violated by the impugned measure. She argued that begging was a form of speech. Consequently, the general ban on begging constituted an unjustified interference with her freedom of expression, in that it prevented her from expressing her socioeconomic distress by drawing attention to the issue of poverty.[488] In that regard, the participative dimension of substantive equality demands that 'decision-makers hear and respond to the voices of groups sharing a protected characteristic rather than imposing top-down decisions'.[489]

A reasoning in keeping with Fredman's framework would have struck down the contested policy[490] for further impeding the voice and participation of the most excluded. Instead, the ECtHR overlooked the applicant's extreme vulnerability, lack of political voice, and social exclusion to reject her claim.[491] Another important implication of the participative dimension is that it also requires the imposition of 'positive duties on the state to ensure that those affected have the capacity to participate meaningfully'.[492] States should do so by 'compensat[ing] for this absence of political voice and open[ing] up the channels for greater participation in the future'.[493] The *Lăcătuş* judgment demonstrates how important social and political participation can be in terms of substantive equality, especially for persons at the margins of society who often lack a voice to draw attention to their situation of destitution.

Although the ECtHR did not consider the applicant's lack of voice and participation in *Lăcătuş*, it had already adopted a more protective approach in a previous case. In *Yordanova and Others v Bulgaria* – which will be discussed in greater detail below – the ECtHR concluded that 'the disadvantaged position of the social group to which the applicants belong could and should have been taken into consideration'.[494] This finding can potentially be construed as 'recogni[sing] impoverished and socially excluded people as a "social group" to be considered in decision-making affecting them'.[495] Such an inference would be consistent with the participative dimension of substantive equality.

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[487] Lăcătuş v Switzerland App no 14065/15 (ECtHR, 19 January 2021).
[488] Lăcătuş v Switzerland, paras. 8, 118.
[489] Fredman, 'Emerging from the Shadows' (n 25) 282.
[490] The policy had the purported aim to safeguard public order and safety, the economic well-being of the country, namely the city's appeal as a tourist attraction, as well as the protection of the rights and freedoms of others. See Lăcătuş v Switzerland, paras. 76-79.
[491] This prompted three judges to append concurring and partly dissenting opinions to the judgment. See Lăcătuş v Switzerland, Concurring Opinion of Judge Keller; Partly Concurring and Partly Dissenting Opinion of Judge Lemmens; Partly Concurring and Partly Dissenting Opinion of Judge Ravarani.
[492] Fredman, 'Emerging from the Shadows' (n 25) 282–283.
[493] Fredman, *Discrimination Law* (n 31) 31.
[494] Yordanova and Others v Bulgaria App no 25446/06 (ECtHR, 24 April 2012), para. 132.
[495] David (n 12) 239.

4.3.2.3. *Transformative dimension*

The transformative dimension is perhaps the most exacting in terms of implementation by the ECtHR. It stems from the acknowledgement that '[d]ifference should not […] attract detriment, and nor should assimilation be required as a precondition for the right to equality'.[496] Hence, Fredman's fourth aim of substantive equality is 'to respect and accommodate difference [by] removing the detriment but not the difference itself'.[497] The transformative dimension goes even further by requiring structural change, where appropriate by 'changing underlying structures, rather than expecting individuals to conform'.[498]

As regards the need to accommodate differences, the case of *Yordanova and Others v Bulgaria*[499] is of interest. In this case, the ECtHR unanimously ruled that the implementation of a removal order evicting Roma families from their informal settlements (unlawfully built on municipal land) would amount to a violation of the applicants' right to respect for their home (Article 8 ECHR).[500] The applicants argued that the eviction order overlooked their status as an 'outcast group' and their extreme socioeconomic precarity.[501] In this context, the ECtHR's finding for the applicants turned on the fact that the measure did not consider their risk of homelessness;[502] that there was no alternative accommodation provided;[503] and that as members of the Roma community, the applicants were a minority group, socially disadvantaged, and vulnerable to discrimination[504].

The ECtHR reiterated the positive duty imposed on States to treat 'groups differently [to] correct "factual inequalities" between them'.[505] It also noted that as a vulnerable group, the applicants 'may need assistance [to] be able effectively to enjoy the same rights as the majority population'.[506] Interpreted in line with Fredman's transformative dimension, this finding could amount to an obligation to accommodate. Transposed to the facts of the *Yordanova* case, such duty of accommodation 'could consist of exemptions from planning regulations, participation in the devising of solutions to their housing needs and even socio-economic assistance'.[507] Hence, if fine-tuned by the Court, the principles laid out in this case could have given rise to positive obligations to accommodate differences to cater to the needs of persons living in poverty.

[496] Fredman, 'Emerging from the Shadows' (n 25) 283.
[497] Fredman, *Discrimination Law* (n 31) 30.
[498] Fredman, 'Poverty and Human Rights: A Peril and a Promise' (n 6) 245.
[499] Yordanova and Others v Bulgaria App no 25446/06 (ECtHR, 24 April 2012).
[500] Yordanova and Others v Bulgaria, para. 144.
[501] Yordanova and Others v Bulgaria, paras. 85-90.
[502] Yordanova and Others v Bulgaria, para. 126.
[503] Yordanova and Others v Bulgaria, para. 133.
[504] Yordanova and Others v Bulgaria, paras. 129, 132.
[505] Yordanova and Others v Bulgaria, paras. 129.
[506] Yordanova and Others v Bulgaria, paras. 129.
[507] David (n 12) 239.

The subsequent case of *Hudorovič and Others v Slovenia*[508] disproves, however, that the ECtHR endorsed such an approach. Had it done so, it would have concluded that the impoverished and vulnerable situation of the applicants (members of the Roma community living in informal settlements) warranted differential treatment. The applicants relied, *inter alia*, on Articles 8 and 14 ECHR to seek access to safe drinking water and sanitation facilities despite domestic legislation refusing such infrastructure for illegally constructed buildings.[509] An approach based on the transformative dimension of substantive equality could 'reconcile affirmative action [and duties of accommodation] with the goal of equality'.[510] The ECtHR, however, rejected the applicants' claim and declined to impose a positive obligation to take 'concrete [accommodating] measures tailored to the applicants' specific situation'.[511]

This ruling is regrettable as it is a missed opportunity for the ECtHR to expressly acknowledge that 'equality is not necessarily about sameness'[512] and that members of minorities and status groups do not have 'to conform to the dominant norm'.[513] In sum, although the ECtHR has endorsed a substantive conception of equality, it appears reluctant to take the next step and commit to a fully transformative model of substantive equality. Achieving the fourth dimension would entail 'not only a negative obligation not to discriminate, but also a duty to recognise differences between people and to take positive action to achieve real equality', including through accommodation.[514]

Having discussed the contribution of Fredman's four-dimensional concept to particular ECtHR cases of *prima facie* poverty-related discrimination, it is fitting to briefly address the practical implementation of the framework by the ECtHR. In that regard, it should be emphasised that Fredman's model forms the basis of the framework adopted under the Convention on the Rights of Persons with Disabilities (CRPD)[515]. In its General Comment No. 6 on Equality and Non-discrimination, the CRPD Committee adhered to Fredman's model and clarified that inclusive equality based on substantive equality entails the four dimensions discussed above.[516] Arguably, this suggests that the ECtHR could also transpose Fredman's framework to persons living in poverty in its non-discrimination law under Article 14 ECHR.

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[508] Hudorovič and Others v Slovenia App nos 24816/14 and 25140/14 (ECtHR, 10 March 2020).
[509] Hudorovič and Others v Slovenia, paras. 38-41, 106, 125.
[510] Fredman, *Discrimination Law* (n 31) 26.
[511] Hudorovič and Others v Slovenia, para. 143.
[512] Fredman, 'Emerging from the Shadows' (n 25) 283.
[513] Fredman, *Discrimination Law* (n 31) 30.
[514] Moeckli (n 35) 149.
[515] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).
[516] CRPD Committee, General Comment No. 6 (2018) on Equality and Non-Discrimination, CRPD/C/GC/6, para. 11. The Committee asserted that equality entails '(a) a fair redistributive dimension to address socioeconomic disadvantages; (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality; (c) a participative dimension to reaffirm the

4.4. CONCLUDING REMARKS

This chapter aimed at highlighting the contribution of Fredman's four-dimensional approach in guaranteeing substantive equality under Article 14 ECHR to persons living in poverty. Two broad claims were made. Firstly, the ECtHR's non-discrimination law would gain in recognising poverty as a discrimination ground. Based on this, the ECtHR should secondly, impose positive duties on States to assist and pay special attention to the needs of socioeconomically deprived persons, in line with a substantive approach to equality. Indeed, Fredman posits that a 'wholehearted commitment to equality might well require far more imaginative legal structures, including not just prohibitions of discriminatory behaviour or practices, but positive duties to promote equality'.[517]

In that sense, Fredman's concept moves 'away from a paradigm based on non-interference and non-intervention, to a substantive understanding of human rights based on notions of human flourishing and positive duty'.[518] This approach is consistent with the ECtHR's well-established case law recognising that Convention rights entail 'positive obligations of assistance and aid (as well as negative obligations of non-intervention and restraint)'.[519] But further than that, Fredman's approach recognises that 'poverty is not simply about insufficient income: […] [i]t is also about relative deprivation, absence of agency, stigma and exclusion'.[520] As a multidimensional phenomenon, poverty requires a multidimensional response. Hence, by '[p]utting the insights of the poverty analysis together with theories of substantive equality [the four-dimensional framework] potentially yields a powerful analytic tool both to assess and to [respond] to poverty'.[521]

If fine-tuned in the sense of Fredman's substantive equality and transposed to cases *of prima facie* socioeconomic discrimination, the ECtHR's non-discrimination principles 'could have far-reaching consequences [and] amoun[t] to a legal duty to promote equality in fact, in at least some circumstances'.[522] It could open the door to a range of positive and protective duties to facilitate the substantive equality of persons living in poverty through a right not to be discriminated against based on socioeconomic precarity.

While the ECtHR 'clearly fall[s] short of applying such a multi-dimensional approach to substantive equality',[523] Fredman's concept does not contravene *per se* the principles established by the Court. On the contrary, many of the elements developed by Fredman are

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social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and (d) an accommodating dimension to make space for difference as a matter of human dignity.'

[517] Fredman, *Discrimination Law* (n 31) 4.

[518] Vizard, Fukuda-Parr and Elson (n 291) 6.

[519] Vizard (n 285) 215.

[520] Fredman, 'Poverty and Human Rights: A Peril and a Promise' (n 6) 241.

[521] ibid.

[522] O'Connell (n 106) 228.

[523] Lavrysen (n 86) 315.

consistent with recent evolutions in the ECtHR's non-discrimination jurisprudence, which on the whole demonstrates adherence to a 'broader and more searching conception of equality'.[524] Hence, the prohibition of discrimination of Article 14 ECHR 'can be appropriately fashioned to address poverty', provided the ECtHR recognises poverty as a discrimination ground and adopts an approach that 'incorporates the values of positive freedom, solidarity, and substantive equality'.[525] The fact that the CRPD Committee crafted its definition of substantive equality on Fredman's framework is a strong indication that the ECtHR could potentially follow in its footsteps.

[524] Fredman, 'Emerging from the Shadows' (n 25) 274.
[525] Fredman, 'Poverty and Human Rights: A Peril and a Promise' (n 6) 225.

5. CHAPTER 5: *LEX FERENDA* – FINDINGS AND CONCLUSIONS

5.1. MAIN FINDINGS

The main argument put forward in this thesis is that new developments are still awaited in poverty-related discrimination law. It would be a propitious time for the ECtHR to reconsider its current stance which largely overlooks this issue. It should craft a clear and consistent jurisprudence more protective of the rights of impoverished applicants. In that regard, Sen's and Fredman's concepts might prove to be invaluable instruments.

Chapter 2 began by exploring the ECtHR's *lex lata* and gave a bird's-eye view of the main principles developed under Article 14 ECHR in *prima facie* discrimination cases and poverty-related claims. It then went on to outline and challenge the main underlying reasons for the Court's reluctance to recognise poverty as a discrimination ground under that provision. On the whole, chapter 2 argued that the ECtHR has all the necessary legal means to include the socioeconomic ground within its non-discrimination case law. The open-ended list of prohibited grounds of Article 14 ECHR together with the concept of vulnerability, and the living instrument doctrine are all the more elements that could enable the ECtHR to recognise poverty-related discrimination. By doing so, the Court would set in motion an essential development in its non-discrimination law.

Against this background, chapters 3 and 4 aimed to apply Sen's and Fredman's theories to various poverty-related discrimination cases and highlight their contribution to better protect persons living in poverty from discrimination. Both chapters demonstrated that the ECtHR could have analysed these cases in a different light to reach a different and more protective outcome.

Chapter 3 contended that Sen's capability approach casts a wide net in considering the possible obstacles to human well-being. It, therefore, proves to be a promising tool for a multidimensional and contextualised analysis of discrimination and poverty. Inherent in the capability approach is the substitution of the variable chosen for inequality assessment. It moves away from the monetary measurement of poverty and towards an assessment in the space of capabilities. In this sense, by viewing poverty as more than an income deprivation but instead as a *capability* deprivation, Sen's approach aptly captures the potential interferences with the capability of impoverished persons. Chapter 3 further argued that the ECtHR's current approach often results in an inconsistent assessment of applicants' capability sets and a mischaracterisation of their vulnerability. Under Sen's concept, the system of human rights, including the ECtHR's interpretation of these rights, also constitutes an underlying variable that affects the capability sets of applicants. It follows that the Court's refusal to include poverty as a discrimination ground of Article 14 ECHR leads to a rights deficit

and curtails the capability of impoverished applicants to access and enjoy Convention rights on equal terms.

Chapter 4 offered a critical assessment of the ECtHR's *prima facie* poverty-related discrimination case law based on Fredman's four-dimensional concept of substantive equality. On the whole, Fredman's concept posits that substantive equality entails redressing stigma, stereotyping, humiliation, and violence (recognition dimension); redressing socioeconomic disadvantage (redistributive dimension); facilitating social and political participation (participative dimension); and accommodating difference by achieving structural change (transformative dimension). In that context, the main finding of chapter 4 is that, although the Court's current approach is not quite as broad and comprehensive as Fredman's concept would require, its general non-discrimination principles are nonetheless compatible with Fredman's concept. As previously touched upon, the recognition dimension is specifically provided for by Article 14 ECHR and its non-exhaustive list of grounds. Regarding the redistributive, participative, and transformative dimensions, they would all require positive State action, which is again in keeping with the ECtHR's interpretation of Article 14 ECHR regarding vulnerable groups – provided the Court accepts to add the socioeconomic discrimination ground.

In light of the above, chapter 5 suggests that Sen's capability approach and Fredman's substantive equality framework have great potential for future developments of the ECtHR's case law when considered together. Conceivably, once the Court has recognised the links between discrimination and poverty as capability deprivation, it could then address the substantive inequality in the capability of impoverished persons to enjoy their Convention rights. Both theories are premised on the need to depart from purely economic notions of poverty and instead treat it as the complex, dynamic, and multidimensional phenomenon that it is. The present thesis is a call in that direction as it could result in enhanced protection of persons living in poverty under Article 14 ECHR. The following section moves on to describe what the ECtHR's *lex ferenda* might resemble and discusses a possible practical implementation by the Court of the suggestions made so far.

5.2. PRACTICAL IMPLEMENTATION

Among the fundamental interpretative principles underlying the ECHR are the systemic interpretation principle and the living instrument doctrine. As regards the systemic interpretation principle, it should be borne in mind that: poverty is a discrimination ground of Article 30 of the Revised European Social Charter, Sen's definition of poverty as a capability deprivation has been recognised by international human rights bodies (CESCR; OHCHR), and Fredman's substantive equality model has been integrated to a major international human rights instrument (CRPD). The adherence of these human rights institutions to Sen's and Fredman's frameworks demonstrates their relevance for the protection from discrimination

of vulnerable groups, as well as their practicability in international human rights law. Consequently, the ECtHR could draw inspiration from these evolutions in the wider international human rights paradigm and take them into account to further develop its own non-discrimination case law.

As regards the living instrument doctrine, it requires the ECtHR to interpret the Convention in light of present-day conditions. Nonetheless, 'even where there is widespread acknowledgement that the State can play a positive role in modern society', Courts tend to consider that 'distributive equality is a policy issue, outside the purview of human rights'.[526] This is perhaps particularly the case for the ECtHR as a supranational and subsidiary Court affording a wide margin of appreciation to States on certain matters. However, by moving away from a purely monetary understanding of poverty in keeping with Sen's and Fredman's approaches, the ECtHR could meaningfully address important issues of poverty-related discrimination under Article 14 ECHR while still being within its competence *ratione materiae*.

In that context, it is suggested that the ECtHR should further develop its non-discrimination jurisprudence to achieve a two-fold objective. First, it should include socioeconomic discrimination as a prohibited ground of Article 14 ECHR. Second, it should impose positive duties on States to comply with their obligations under that provision. Premised on Sen's capability approach and Fredman's substantive equality concept, these two objectives would be consistent with the Court's current non-discrimination case law. What is more, the two objectives are interrelated since the latter is a direct consequence of the former. Hence, a rights-based approach to poverty, capable of guaranteeing substantive equality to impoverished applicants, could potentially entail the following legal implications.

First, it would presuppose the prohibition of both direct and indirect discrimination based on socioeconomic status, in line with a substantive approach to equality (*D.H. and Others v the Czech Republic*[527]). Second, the vulnerable groups approach of Article 14 ECHR would warrant a stricter justification test and affording increased weight to the harm sustained by impoverished applicants in the proportionality analysis.[528] Third, as a group historically subject to discrimination and prejudice and resulting in social exclusion, States' margin of appreciation would be narrowed (even on socioeconomic issues) for restrictions on the fundamental rights of persons living in poverty (*Alajos Kiss v Hungary*).[529] Fourth, States would be under 'enhanced positive obligations'[530] to 'pay special consideration to the needs' of impoverished persons (*D.H. and Others v the Czech Republic*[531]). They would be under a duty to take positive measures to attempt to correct factual inequalities and actively assist impoverished persons,

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[526] ibid 231.
[527] D.H. and Others v the Czech Republic [GC] App no 57325/00, ECHR 2007-IV.
[528] Arnardóttir (n 133) 150.
[529] Alajos Kiss v Hungary, para. 42.
[530] Lavrysen (n 86) 319; citing Peroni and Timmer (n 134) 1076–1079.
[531] D.H. and Others v the Czech Republic [GC] App no 57325/00, ECHR 2007-IV, para. 181.

including when necessary through differential treatment (*Sejdić and Finci v Bosnia and Herzegovina*).[532] A failure to do so, without a reasonable justification, would amount to a violation of Article 14 ECHR (*Stec and Others v the United Kingdom*).[533] Indeed, as a vulnerable group at the margins of society, socioeconomically deprived persons would be regarded as 'need[ing] assistance in order to be able effectively to enjoy the same rights as the majority population' (*Hudorovič and Others v Slovenia*).

Just like the CRPD represented a 'paradigm shift away from a social welfare response to disability to a rights-based approach',[534] the same can be done as regards poverty and equality. That can be achieved by recognising the importance not only of redistribution but also of one's capability to have a voice to participate in the social and political life, combating stereotyping and stigma associated with poverty, as well as achieving structural change for more inclusive societies where major barriers to the enjoyment of Convention rights have been removed. In sum, the foregoing arguments sought to accentuate Fineman's view that it might appear

> as though existing material, cultural, and social imbalances are the product of natural forces and beyond the ability of the law to rectify. While it may be beyond the *will* of the law to alter, existing inequalities certainly are not natural. Inequalities are produced and reproduced by society and its institutions. Because neither inequalities nor the systems that produce them are inevitable, they can also be objects of reform.[535]

[532] Sejdić and Finci v Bosnia and Herzegovina [GC] App nos 27996/06 and 34836/06, ECHR 2009, para. 44. See also Belgian Linguistics case (No 2), para. 10 of 'the law' part; Thlimmenos v Greece [GC], para. 44; D.H. and Others v the Czech Republic [GC], para. 175.

[533] Stec and Others v the United Kingdom [GC] App nos 65731/01 and 65900/01, ECHR 2006-VI, para. 51; Eweida and Others v the United Kingdom App nos 48420/10 and 3 others, ECHR 2013 (extracts), para. 87.

[534] Rosemary Kayess and Phillip French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 Human Rights Law Review 1, 3 <https://academic.oup.com/hrlr/article-lookup/doi/10.1093/hrlr/ngm044> accessed 20 May 2022.

[535] Fineman (n 120) 4–5 (emphasis in original).

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