



Socio-economic inequalities: Rethinking equality law's architecture

Dr. Juan Carlos Benito Sanchez
Independent Human Rights Researcher and Consultant
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Equinet report (2021)



Expanding the List of Protected Grounds within Anti-Discrimination Law in the EU

AN EQUINET REPORT



SARAH GANTY
JUAN CARLOS BENITO SANCHEZ



Co-funded by
the European Union

Co-authored with Dr. Sarah Ganty

Review of relevant literature and case law, survey of Equinet members, individual interviews with stakeholders, individual interviews with selected equality bodies, elaboration of a catalogue of cases and examples, three separate sets of recommendations

Report available [here](#)

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Forthcoming book (2022)

Securing Housing for All in Diverse European Societies

Applying International and European Antidiscrimination Law to the Housing Context

JUAN CARLOS BENITO SANCHEZ

Editions Pedone/Hart

2022 (forthcoming)

The central argument of this book is that the application of anti-discrimination law to the field of housing complements and enriches a right to adequate housing approach in two ways: firstly, it helps to elaborate and expand the rationale and implications of certain components of the right to housing; secondly, it allows us to address human rights concerns that cannot be adequately tackled through the right to housing alone.

Thesis available in OA [here](#)

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I. Rethinking equality law's architecture

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A pluralistic account of equality law

- Equality law is concerned with a particular subset of inequalities: *structural* inequalities resulting from unfair treatment or particular disadvantage related to specific characteristics or statuses
- Inequalities are structural when they operate across multiple important spheres of life, as a result of deeply embedded patterns of disadvantage and exclusion
- Consensus as to the moral condemnation of inequality, but debate regarding the specifics of what constitutes inequality
- Different accounts of equality law provide various reference points to assess existing norms, suggesting a particular interpretation and guiding efforts for reform and evolution

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A pluralistic account of equality law

- I defend a *pluralistic* account of equality law, justified by the observation that inequality responds to a multiplicity of “wrong-making characteristics”, which may only be apprehended by means of an all-encompassing approach
- Blum’s list of distinct wrong-making characteristics: demeaning, subordinating, and stigmatising individuals or groups; reinforcing social stereotypes; unfairness in the distribution of important social benefits; impinging on the freedom to deliberate about important life decisions without having to take account of irrelevant factors
- This pluralistic approach is itself premised on the idea of substantive equality as a foundational principle

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Theories of justice

- Fraser’s *participatory parity*: justice requires social arrangements that allow individuals to interact with each other as peers
- Anderson and Rosanvallon’s *relational equality*: all members of a democratic society have a just claim to stand in relations of equality with their fellow citizens
- At the core of this notion of social justice is the idea that material resources must be such as to ensure participants’ independence and voice (distributive justice), and at the same time that institutionalised patterns of cultural value must express equal respect for all and ensure equal opportunities to achieve social esteem (recognition dimension of justice)

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Theories of justice

- Fraser: capitalist societies encompass two analytically distinct orders of subordination
 - On the one hand, class stratification, rooted in economic dynamics which create social arrangements that institutionalise deprivation, exploitation, and gross disparities in wealth, income, and leisure time
 - On the other hand, status hierarchy, based on institutionalised patterns of cultural value which label some actors as inferior, excluded, wholly other, or invisible
- Result: a two-dimensional conception of justice that encompasses both distribution and recognition, without reducing either one to the other

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Defining substantive equality

- Substantive equality allows anti-discrimination norms to address these multiple dimensions in a holistic, complex, and nuanced manner
- Fredman's four-dimensional approach to substantive equality: redistributive dimension, recognition dimension, participative dimension, transformative dimension
- It is not sufficient to guarantee fair conditions under which distributive processes may operate. Certain substantive outcomes must be ensured so that participatory parity and relational equality are effectively safeguarded in light of persistent material inequalities and misrecognition

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Equality law's central aims

Central aims

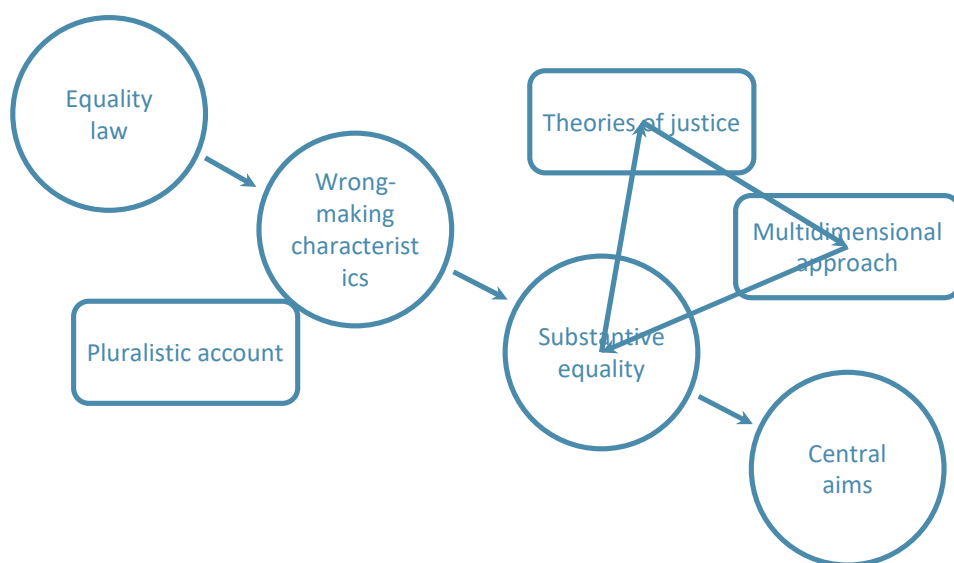
1. **Eliminating** hostility, prejudice and stigma
2. **Respecting** cultural diversity and avoiding misrecognition
3. **Transforming** existing structures
4. **Ensuring** a fair distribution of important goods in society

Securing substantive outcomes beyond fair processes

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Equality law's central aims



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Equality law concepts

- | | |
|---|---|
| 1.
Eliminating hostility,
prejudice and stigma | Direct discrimination,
discriminatory harassment |
| 2.
Respecting cultural
diversity and
avoiding
misrecognition | Indirect discrimination |
| 3.
Transforming
existing structures | Reasonable accommodation,
accessibility |

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Equality law concepts

4.
Ensuring a fair
distribution of important
goods in society

Reflection around the incorporation and effectiveness of
socio-economic disadvantage as a discrimination ground

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II. Socio-economic disadvantage as a prohibited discrimination ground

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Conceptualising socio-economic discrimination

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Conceptualising socio-economic discrimination

- Equality law has not traditionally been concerned with socio-economic disadvantage, or at least not directly
- Originally, focus on the prejudice and stigma attached to racialised populations, particularly Black individuals and groups. These norms then evolved to cover other status grounds like gender and disability, and were later extended to include age, religion or belief, and sexual orientation
- Socio-economic discrimination features in many international and national equality law frameworks, but it remains underdeveloped and underused
- The relationship between discrimination and socio-economic disadvantage is a complex one

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Conceptualising socio-economic discrimination

- The overlap between status-based disadvantaged groups and socio-economically disadvantaged groups is very significant
- Groups which suffer from discrimination on status grounds are disproportionately represented among people living in poverty, and status-based discrimination is closely correlated with socio-economic disadvantage
- Structural socio-economic disadvantage has traditionally been tackled through the framework of socio-economic rights and policies. However, socio-economically underprivileged people are also subjected to stereotyping, prejudice, stigma, and discrimination because of their socio-economically precarious situation

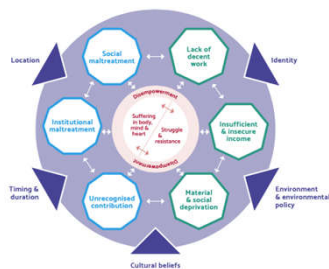
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Conceptualising socio-economic discrimination

The hidden dimensions of poverty

International participatory research



This report presents findings from research that has sought to refine the understanding and measurement of poverty by engaging with people directly experiencing poverty, practitioners and academics. The longer-term goal is that the research should contribute to more sensitive policy design at national and international level and thereby to the eradication of poverty

Report available [here](#)

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Conceptualising socio-economic discrimination

- The experience of people living in poverty is crucial to fight against poverty:
 - Well-known dimensions related to deprivation: lack of decent work, insufficient and insecure income, material and social deprivation
 - Relational dimension: social maltreatment, institutional maltreatment, and unrecognised contributions, as well as the core experience of poverty, which places “the anguish and agency of people” at the centre of the conceptualisation of poverty and relates to suffering in body, mind, and heart, disempowerment, and struggle and resistance
- These dimensions are essential when speaking of discrimination on grounds of socio-economic disadvantage, since they acknowledge that discrimination and exclusion are fully part of the phenomenon of poverty and nurture it

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Conceptualising socio-economic discrimination

- The prohibition of discrimination on grounds of socio-economic status is crucial to break the cycles that perpetuate poverty and socio-economic disadvantage
- Need to tackle socio-economic disadvantage and inequality through more structural measures and policies and to link socio-economic disadvantage to discrimination operating on traditional grounds more broadly
- In this context, anti-discrimination legislation prohibiting socio-economic discrimination should be seen as complementary to anti-poverty policies and measures, in a mutually reinforcing relationship
- A challenge: designing appropriate and effective positive action measures linked to socio-economic disadvantage

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Socio-economic disadvantage and related concepts

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Socio-economic disadvantage and related concepts

- The notion of socio-economic disadvantage raises some questions as regards its conceptual remit and the desirability of choosing it over other related concepts like socio-economic status, social origin, property, or birth
- Socio-economic status is conceptualised by reference to an individual's economic and social situation, measured by factors such as income, wealth, education, employment and occupation, social and political participation, cultural representation, access to power, capability development, and agency
- In many respects, social origin, property, and birth will signal whether an individual has a fragile position in society from a socio-economic perspective. However, although those three concepts all refer to situations that may predict, generate, or exacerbate socio-economic disadvantage, the material scope of these grounds does not entirely coincide

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Socio-economic disadvantage and related concepts

- A terminological distinction can also be made between socio-economic status and socio-economic disadvantage
- Distinction in equality law theory between symmetrical and asymmetrical discrimination grounds
- *Absolute* as it impedes people from satisfying their basic needs. Yet this defines needs on behalf of socio-economically disadvantaged people and exclude individuals slightly above the sufficiency threshold
- *Relative* to address the situation where an individual's income, even if adequate for survival, falls behind that of the community, capturing more accurately the manner in which social expectations structure disadvantage

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Socio-economic disadvantage and related concepts

- This theoretical debate on the best term to address socio-economic discrimination does not reach survey participants and interviewees in the Equinet research
- Emphasis that the ground of socio-economic disadvantage should also encompass *perceived* socio-economic disadvantage and not only actual socio-economic disadvantage
- It should be intelligible for equality bodies, courts, and victims of discrimination alike
- Terminology is not that important: we should rather aim towards a consensus or towards a term that fits well within the existing national equality legal framework

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Non-recognition or insufficient implementation

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Socio-economic rights

- Confusion between socio-economic rights and socio-economic discrimination
- It is sometimes believed that the existence of socio-economic rights makes it unnecessary to enshrine a prohibition of discrimination on grounds of socio-economic disadvantage
- Claims related to socio-economic rights and socio-economic discrimination might not be related to each other, as in cases of discrimination against people in socio-economically precarious situations regarding their civil and political rights
- Socio-economic rights are not able to address situations in which socio-economically disadvantaged people are treated differently, directly or indirectly, because of their socio-economically precarious situation

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Individual responsibility

- Socio-economic discrimination is sometimes not seen as a priority based on the false belief that socio-economic situation can be changed and it is related to individual responsibility
- Bridges' "moral construction of poverty": discourse according to which people are poor because there is something wrong with them and they are themselves responsible for their situation of poverty
- Countless studies show that people are poor because of structural reasons outside their control and that poverty is passed on from one generation to another
 - "In countries in the OECD, it would take around four to five generations for children from the bottom income decile to attain the level of mean earnings" (UN SR on extreme poverty)

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Under-reporting

- Even when the ground of socio-economic status is explicitly prohibited in equality legislation, people discriminated against on this ground will seldom report such discrimination
- Lack of self-esteem: people do not want to be labelled, especially when it comes to their socio-economic situation. They prefer to invoke another ground which is less “shameful”
- Financial and practical obstacles to claim rights and to bring cases before courts
- Other factors: fear of litigation and of public authorities (e.g. losing the custody of children), not used to dealing with the government, low level of knowledge of mechanisms available, perception of low reward, digital divide

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The issue of proof

- It may be difficult to find a violation on the basis of socio-economic disadvantage in some cases as the legal qualification is not always clear-cut. In this context, evidence of discrimination on other grounds might be easier to bring
- An important way to tackle the issue of proof is data collection in fields where discrimination on grounds of socio-economic status is likely to occur, such as education, housing, employment, healthcare, and access to services. This is particularly important when indirect discrimination is at stake
- This research and data constitute very important resources before courts in terms of proof, especially in cases of systemic discrimination

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Need for recognition and implementation

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Need for recognition and implementation

- Socio-economic rights are not always enshrined in national constitutions, while the right to non-discrimination generally is
- Anti-discrimination law obligations are generally considered as immediate, whereas socio-economic rights tend to be subject to progressive realisation standards
- Implementation experiences of socio-economic rights in certain countries reveal that they do not always suffice to address socio-economic disadvantage (“middle-class capture of public services”)
- Socio-economic discrimination has a strong added value when socio-economic rights have not yet been fully secured in local contexts. Furthermore, socio-economic discrimination plays a role in addressing discrimination in the allocation of above-minimum social goods

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Need for recognition and implementation

- Socio-economic disadvantage as a prohibited discrimination ground would help to ensure that no discrimination takes place, directly or indirectly, by reason of an individual or a group's situation of disadvantage rooted in their socio-economic position
- Expanding the list of grounds allows us to name social groups in need for protection, sending a symbolic message
- If grounds are not named, there is a risk that they will not be covered by judicial interpretation and in policy and decision-making
- Explicitly recognised grounds catalyse and provide a legal basis for data collection and research

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Need for recognition and implementation

- Fighting against socio-economic discrimination is also a way of fighting against non-take-up and to guarantee a better access to rights
- When socio-economic disadvantage is not enshrined as a protected ground there is no alternative proxy ground available
- Discrimination affects low-income groups relatively more often
- Socio-economic discrimination is in many instances part of additive/cumulative or intersectional discrimination

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International and national overview

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International law: A general recognition

- Art. 2(2) ICESCR: “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to *race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*”
- The CESCR interprets *other status* in a flexible manner, as encompassing grounds such as place of residence and health status, but also economic and social situation:
 - “Individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society. A person’s social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping” (GC No. 20)

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International law: A general recognition

- Inter-American Court of Human Rights: the guarantee against discrimination contained in the American Convention on Human Rights includes “economic situation”
- Leveraged the concept of intersectionality to find discrimination based on the compounded effect of a number of grounds, including socio-economic disadvantage
- In 2016, the IACtHR found for the first time an instance of “structural historical discrimination on the basis of economic position” (*Hacienda Brasil Verde Workers v. Brazil*)
- The Inter-American Commission has confirmed that socio-economic disadvantage can now be considered as a prohibited category of discrimination within that system

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EU law: An unlikely way forward

- The EU treaties and anti-discrimination directives do not prohibit discrimination on the basis of socio-economic criteria, but only based on “sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation” (+ nationality)
- Social origin, property, and birth are nonetheless part of the enumeration contained in Art. 21 CFREU, as is the clause “any ground”
- EU institutions and agencies are bound not to discriminate on the basis of those grounds
- In practice, Member States will be acting within the scope of EU law in many instances when they regulate or when they implement policies linked to socio-economic rights. In those cases, Member States are also compelled not to discriminate on the basis of those grounds

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The ECtHR: A missed opportunity

- Art. 14 ECHR: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as *sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*”
- Interpreted as covering a number of grounds not explicitly mentioned in that list
- ECtHR case law: only differences in treatment based on an identifiable characteristic or status are capable of amounting to discrimination
- The ECtHR seems more comfortable making findings of discrimination on well-established grounds, rather than developing the “social origin” ground or creating a specific socio-economic discrimination category

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The ECSR: A promising approach

- The ECSR has, in some instances, found discrimination based on poverty and social exclusion
- In several decisions, the ECSR accepted the possibility of discrimination on the basis of socio-economic status in theory, but it found that in those particular cases there was no specific evidence supporting those allegations
- In two other cases, it considered this ground in the framework of overlapping or multiple discrimination, looking at the combined effect of health status, territorial location, and socio-economic status
- Finally, the ECSR has also found instances of discrimination on the basis of poverty and social exclusion besides the corresponding violation of the substantive right to protection against poverty and social exclusion, but not developed the circumstances warranting this separate finding

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The ECSR: A promising approach

- These decisions all suggest that the ECSR may be ready, at least in principle, to accept that certain policies may discriminate against socio-economically disadvantaged individuals and groups, as long as this discrimination is sufficiently demonstrated in particular complaints
- This avenue remains theoretically possible, but its practical articulation is less clear. A heightened threshold seems to be placed on complainants, but a lack of concrete guidance as to the appropriate data or evidence that should be produced to prove socio-economic discrimination remains
- The ECSR should develop its interpretation of this ground with the occasion of future collective complaints, clarifying the evidence required to make such a finding

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Selected domestic implementations

- France: the equality body found that the policy of refusing the public school enrolment of children living in a hostel was discriminatory on the basis of the particular vulnerability stemming from the economic situation of their families, alongside their origin and place of residence
- Belgium: the term “*fortune*”, which translates roughly as property or wealth, has been mobilised by some lower courts to make findings of discrimination based on source of income, especially in the private rented sector
- Hungary: the equality body found that the practice of terminating the tenancies of persons living in a marginalised neighbourhood amounted to discrimination on the grounds of social status, financial situation, and the Roma origin of the tenants affected

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III. Conclusions

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Conclusions

- A pluralistic account of equality law premised on substantive equality as a foundational principle
- Four central aims of equality law, among which ensuring a fair distribution of important goods in society ➤ Reflection around the incorporation and effectiveness of socio-economic disadvantage as a discrimination ground
- The prohibition of discrimination on grounds of socio-economic status is crucial to break the cycles that perpetuate poverty and socio-economic disadvantage
- Multiple reasons for recognition and implementation and inspiring international and national examples

Will the “last bastion” fall?

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Q&A

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