

Non-discrimination in private rental housing as a means to promote workers' mobility and equal treatment Ana Afonso*

1. General approach. 2. European Union rules on prohibition of discrimination with respect to housing rental and its implementation by Member States (Portugal in special). 3. Prohibited forms of discrimination in private rental housing. 4. Distinguishing prohibition of discrimination from protection of vulnerability in tenancy contract law. 5. The proof obstacle and the burden of proof provision. 6. Sanctions and remedies. Payment of compensation. Intersectional discrimination as an element to calculate compensation. 7. Addressing the delicate question of reconciling freedom to choose a contractual partner and prohibition of discrimination in rental housing.

Abstract

Discrimination in housing is a pervasive phenomenon throughout Europe, creating significant obstacles to worker's mobility and a truly free labor market. Despite the enhancement legal protection against discrimination in housing has seen in the past twenty years, legal policies and application of anti-discrimination provisions in practice are highly challenging. Among other difficulties, commonly shared with labor law, such as the burden of proof, prohibition of discrimination in tenancy contracting poses the complex question of where to set a line of exemption to adequately preserve individual choice, social peace, and policy efficiency. Shall prohibition be limited to public announced tenancies? What relevance shall the «protection of private and family life» have in this context?

Keywords: Labor's mobility; Tenancy contracts; Non-discrimination; Freedom of contract; Remedies; Private life.

1. General approach.

Discrimination in access to housing may be a significant obstacle to a desirable free and equitable labour market. Unless the employer provides for the housing of its workers by its own means, a migrant worker will have to struggle, not only to find an affordable house, but also, and foremost, to surpass the landlord's prejudices when letting its premises. Discrimination in rental housing (or in access to housing more broadly speaking) is a pervasive phenomenon throughout Europe, but one that has just recently become object of

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a more thorough academic analysis.¹ This is probably due to the late attention that prohibition of discrimination in tenancy contracts has received by Member States² and the more vague or non-specific manner the question is still addressed at a European level, specially, when compared to the development labour law principles of equal treatment have received.

Inequalities in the labour market are frequently a result of discrimination in diverse domains, such as education, transport, and accommodation. Labour market efficiency is closely linked to protection against discrimination in other areas outside it, particularly, with respect to housing (given its central, undisputable role, in a dignified existence).³ Attaining the objectives of the EU treaties and a truly democratic and tolerant society requires a coherent set of policies going beyond the original concern of creating a European wide labour market and to that end assuring equality in employment and vocational training.

Although a fair use of freedom of contract may only up to a certain level be implemented by Decree, for it requires combatting intrinsic human nature prejudices, relevance of Law in guiding behaviors and setting systemic principles must be trusted as an efficient path to achieve a fair society in protecting its members against discrimination.

2. European Union rules on prohibition of discrimination with respect to housing rental and its implementation by Member States (Portugal in special).

An equal access to national housing markets has been prescribed by European Law early on, based, precisely, on the protection of freedom of movement for workers (*see* art. 9 of

¹ The impressive comparative study that has been made under the coordination of Christoph Schmid, «TENLAW – Tenancy Law and housing policy in multi-level Europe» in 2015 doesn't include significant references to discrimination (or anti-discrimination policies) in tenancy contract laws. Discrimination in housing is indicated as the least frequent type of problem within tenancy law and housing policies, when compared to others as homelessness or poor-quality living conditions. Nevertheless, in its introduction to the comparative study, Christoph Schmid underlines the relevance of tenancy law for the single market, due to the «growing mobility of citizens and the transnational expansion of job markets». The study is available at the following link: <https://www.uni-bremen.de/index.php?id=23475>.

² Spanish *Ley* 15/2022, of 12 July (*Integral para la igualdad de trato y la no discriminación*) is a good example of how the problem can be addressed. *See* specially article 20, no. 2, with respect to housing. A previous good example of national law goal on prohibition of discrimination in tenancy contracts is given by UK's Equality Act of 2010.

³ As Fredman S., *Discrimination Law*, Clarendon Law series, Oxford University Press, Oxford, 2011, 144-145, stresses, containing anti-discrimination legal policies within the labour market «inevitably curtails the effectiveness of anti-discrimination protection». In its conclusions of a study on discrimination against immigrants on housing access, Spanish Federación SOS Racismo, *Puertas que se cierran. Testing sobre discriminación a la población inmigrante en el acceso a la vivienda de alquiler*, 2015, available at the following link <https://sosracismo.eu/wp-content/uploads/2016/07/Puertas-que-se-cierran-Testing.pdf> signaled that discrimination against immigrants in rental housing access is one of a subtle nature that has significant consequences in the process of social and labour integration of those persons. In its relevant essay, Yinger J., *Closed doors, opportunities lost. The continuing costs of housing discrimination*, Russell Sage Foundation, New York, 1995, 146ff., underlined that housing segregation and job suburbanization created higher unemployment rates for minorities (blacks and Hispanics). The author concluded that «housing discrimination spills over from housing choices into labor market choices» and that residential segregation gives employers an incentive to discriminate.

Regulation (EEC) No 1612/68, later included in Regulation (EU) No 492/2011).⁴ This Regulation was limited to European national workers and strictly linked to assuring free movement for workers in a European wide labour market. There were no specific provisions, sanctions or political measures associated with assuring equal access to housing market.

It was only in the beginning of this millennium, that prohibition of discrimination gained a broader scope with Directive 2000/43/EC, of June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origins. The preamble of the Directive explicitly highlights the need to take specific action in the field of discrimination beyond access to «employed and self-employed activities» and hence to cover four different new areas: education, social protection and healthcare, social advantages and access to and supply of goods and services. The Directive's scope extends to «all persons, as regards both the public and the private sectors», closing the discussion on whether anti-discrimination provisions refer to public institutions or private institutions executing public functions. Housing is not autonomously considered but it is particularly mentioned within the fourth sector «access to and supply of goods and services which are available to the public including housing» (*see* art. 3, h), of the Directive).

A few more years later, equal treatment for men and women, outside the labour market, was also addressed at EU level. Directive 2004/113, aimed at implementing the principle of equal treatment between men and women in the access to and supply of goods and services, prohibits gender discrimination in access to housing.

Antidiscrimination norms should pursue, on one hand, elimination of hostility, prejudice, and stigma, and on the other hand, recognizing cultural diversity and ensuring a fair distribution of important social goods and resources, such as housing.

The Member States have implemented these Directives, but haven't all created more consistent anti-discriminatory provisions with respect to housing. Some countries have, nevertheless, published autonomous statutes with regards to discrimination law, where tenancy contracts are included. French law no. 2002-73, 17 January 2002 (*“Loi de modernisation sociale”*), was mainly focused on Labour Law and social protection, but managed to introduce significant modifications to *“Code de la construction et de l'habitation”*, reinforcing protection of tenants in access to housing, forbidding discrimination. Spanish Law no. 15/2022 of 12 July, *“Integral para la igualdad de trato y la no discriminación”*, comprehends a systemic view of anti-discriminatory provisions including access to housing. The German *“Allgemeines Gleichbehandlungsgesetz”* of 2006 also entails a cohesive broaden view.

In Portugal, on the contrary, there are various detached statutes aiming to combat discrimination upon diverse grounds: Law no. 93/2017 of 23 August refers to racial and ethnic origin, color, nationality, ascendancy, territory of origin (following Law no. 18/2004 of 11 May, which implemented Directive 2000/43/CE, has been modified by Law no. 3/2024 of 15 January, creating a Committee for equality and against racial discrimination);

⁴ Regulation (EEC) No 1612/68, art. 9: «1. A worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy all the rights and benefits accorded to national workers in matters of housing, including ownership of the housing he needs. 2. Such worker may, with the same right as nationals, put his name down on the housing lists in the region in which he is employed, where such list exists; he shall enjoy the resultant benefits and priorities».

Law no. 46/2006 of 28 August, respects to disability and aggravated health risk; Law no. 14/2008 of 12 March, prohibiting discrimination upon sex (implemented Directive no. 2004/113/CE). These Laws include among other services and diverse contracts access to housing through private residential contract. Diversely, Law no. 38/2018 of 7 August, prohibiting discrimination upon gender identity and sexual characteristics, and Law Decree no. 82/2022 of 6 December (implementing Directive 2019/882/EU), on accessibility to products and services for people with disabilities, don't include specific references to housing. In 2019, a new provision was introduced to the Portuguese Civil Code, exclusively regarding conclusion of tenancy contracts: art. 1067.^o-A includes numerous grounds of discrimination (such as sex, ascendancy or ethnic origin, language, territory, nationality, religion, beliefs, political ideas, gender, sexual orientation, age, disability), but it does not contain or refer to specific sanctions, remedies or consequences. Where there is a coincidence, between one of the designated grounds and provisions of a detached statute, consequences therein regulated may be commanded, but some doubts may arise where this coincidence fails. In the same year of 2019, Basic Law of Housing (Law no. 83 of 3 September) created an extra provision (art. 2) that prohibits discrimination on diverse grounds (going beyond art. 1067.^o-A and referring also to instruction, economic situation, and health condition; noticeably Basic Law includes public and/or social housing).⁵

3. Prohibited forms of discrimination in private rental housing.

To ensure the principle of equal treatment, anti-discrimination Laws (European and national) draw on three specific legal concepts: direct discrimination; indirect discrimination; harassment. More recently, intersectional or multiple discrimination has been making its way through.

Direct discrimination is the most straightforward legal concept, that may consist of a plain refusal to contract or to initiate negotiations by a landlord, based on color, race, religion, or sexual orientation of the proposed tenant. It may also consist of imposing particularly stringent or restrictive conditions, such as charging higher prices, asking for more onerous guarantees (advance payment, for example), setting stricter solvability requirements, as compared to other tenants, or the contractual market uses or practices. Direct discrimination can also refer to an instruction to discriminate given to real estate agents (frequently proprietors instruct mediators not to accept offers from foreigners or people from certain religious or ethnic groups) or received from an owner's association (which for example would have forbidden allowing Roma as residents in the buildings area) or something of the kind. In these cases, both the instructor and the person instructed to look for potential tenants

⁵ Albeit the newest provisions inserted in Portuguese Civil Code and in Basic Law for Housing appear to be more of a pedagogic proclamatory nature, than of a perfect norm, its relevance in combatting discrimination in access to private rental housing shall not be diminished. For an analysis of art. 1067.^o-A of the Portuguese Civil Code, as a relevant expression of non-discrimination principle in contracts, see Brandão Proença J.C., *Arrendamento urbano e discriminação*, in Afonso A. (coord.), *Estudos de arrendamento urbano. Vol. V*, UCP Editora, Lisbon, 2025, 9 ff.

shall be liable for violating the prohibition of non-discrimination.⁶ Direct discrimination is a comparative concept, and the need for a comparator is one of the most difficult aspects of it, even if a «hypothetical comparison» is permitted.⁷ Instead of asserting that the perpetrator treated someone «less favourably than another» on the grounds of a protected characteristic but that it «would have» treated others differently. Direct discrimination may derive from outright hostility or from a stigma constructed against certain groups. This type of discrimination is very present in our societies but perceiving it within a community is far easier than to expose it and sanction it in a specific case. Nonetheless, an «individual situational test»,⁸ references made in a public announcement,⁹ or declarations explicitly made upon refusal¹⁰ may be sufficient to sustain a complaint in Court.

Where there are objective reasons conditioning celebration of the tenancy contract, such as size of premises for number of family members; student category for students only residences or, more arguably, some proof or guarantee of income) equally applicable to all candidates, there is not discrimination. Hence, refusing to let an apartment to a family does not constitute discrimination when selection is made only upon the objective ground of the size of the dwelling.¹¹

⁶ A Spanish government funded study of 2020 by Asociación Provivienda (Martínez Goytre E. (coord.), *Se alquila? Racismo y xenofobia en el mercado del alquiler*, 2020, available at the following link <https://www.provivienda.org/wp-content/uploads/Se-alquila.-Racismo-y-xenofobia-en-el-mercado-del-alquiler.pdf>) exposed that seven out of ten real estate agencies refused to rent (or sell) to people based on their origins despite fulfilling all other requirements; in 2024, the number had risen, being reported that nearly 99% of real estate agencies accepted discriminatory practices demanded from proprietors. In the UK, a BBC undercover investigation (2013) revealed how letting agents in London are prepared to discriminate against would-be tenants on the grounds of race, indicating that 99% of their landlords' clients didn't want Afro-Caribbeans (see Lynn G., Davey E., *London letting agents "refuse black tenants"*, in BBC News, 14 October 2013, <https://www.bbc.com/news/uk-england-london-24372509>).

⁷ As pinpointed by Fredman S., nt. (3), 168.

⁸ An «individual situational test» was considered sufficient to expose a case of direct discrimination and to sustain a complaint in a German court of law, in January of 2020: a local court of Charlottenburg decided there had been direct discrimination on the grounds of ethnic origin based on the different treatment a man had received when using his Turkish sounded name and a German sounded fictitious one, when applying for an apartment to let by a leading building company. The complainant was awarded a compensation of 6000€. This case is reported by Mahlmann M., *Discrimination by large building society*, European network of legal experts in gender equality and non-discrimination – Flash Report, 2020, <https://www.equalitylaw.eu/downloads/5115-germany-discrimination-by-large-building-society-73-kb>. Telephonic and face-to-face testing are often used to expose discrimination cases. A Spanish study made by Federación SOS Racismo, nt. (3), 75, concluded that when using telephone 70% of foreigners had been refused housing against only 30% of nationals and on a person-to-person situation the first number raised to 86,7%.

⁹ For example: «premises will only be rent out to candidates aged to 20-26 with Belgian parents». See the case before first instance court of Gand (Belgium) on 28 March 2018, <https://www.unia.be/fr/legislation-et-jurisprudence/jurisprudence/tribunal-premiere-instance-gand-28-mars-2018>. The Court decided there was discrimination on a double ground: ethnic origins and age. A rental advertisement imposing more strict conditions to foreign candidates was judged discriminatory by a French equality body on 9 March 2018, available at juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=17326.

¹⁰ In Belgium a homosexual couple was considered being the victim of direct discrimination when the landlord explicitly stated he wished to rent out to a «traditional» couple, available at the following link www.unia.be/fr/legislation-et-jurisprudence/jurisprudence/refere-premiere-instance-nivelles-19-avril-2005.

¹¹ In many States there are in fact some legal provisions on this matter (for example article D542-14-2 of French social security code which defines «sur-occupation des logements»). The objective ground of the dwelling size may not, however, be used as a support to masquerade the real reason for not letting the premises to a mother and daughter. See the decision by French equality body, *Défenseur des Droits*, available at the following link

An ethnic group that has structurally been suffering from direct discrimination in housing access is Roma, a pervasive situation that is sufficiently identified, as many recommendations have been adopted at a European level and many cases have come before monitoring bodies and even courts.¹²

Indirect discrimination goes beyond the contractual relationship between two people (landlord and tenant) focusing on exclusionary effects of certain practices or policies. Indirect discrimination results from an apparently neutral policy, norm, or practice, that creates a particular difficulty or mistreatment for a specific group of people defined by a prohibited discriminatory ground. The fulfillment of this concept requires three elements: 1) practices, criteria or provisions are fair in form, since the treatment is equal; 2) but they cause disparate, unequal, impact or result (persons of a racial or ethnic origin are put at a particular disadvantage compared with other persons); 3) the disparate impact cannot be excused or justified («objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary», art. 2, 1, b) of Directive 2000/43). Unequal result can be justified by business needs or State social policy.¹³ Results are part of the diagnosis of the problem: where a fair distribution of protected categories fails, it is a sign that there might be an obstacle to access, which, when unjustifiable, must be removed.¹⁴ Whereas direct discrimination compares «treatment», indirect discrimination comparison is based on results or impact. Statistics are a very important tool to this end but, from collecting data to electing the adequate perspective to analyzing them, a statistical focus entails numerous difficulties.¹⁵ The EU Law uses the likely «particular disadvantage» test. Proof that an unequal impact has effectively occurred is not required, it is enough to state that the risk or liability of disparate result exists («where an apparently neutral provision, criterion or practice *would* put persons of a racial or ethnic origin at a *particular disadvantage*»). The risk of a particular disadvantage test is necessary when statistics are insufficient or non-existent, but in spite of the technical difficulties of statistics, they may be helpful in those situations where the disparate impact is unsuspected or obscured by the neutrality of the measure.¹⁶

juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=16800, where an agency was recommended to pay compensation to a woman who was reported to have been discriminated on her family situation ground.

¹² See, for example, Council Recommendation of 9 December 2013 *on effective Roma integration measures in the Member States*, 2013/C 378/01.

¹³ Since there was not an obligation to achieve a result in the language proficiency, Constitutional Court in Belgium (Judgement no. 101/2008) judged as non-discriminatory a Belgian provision (Flemish Decree of 15 December 2006) that required applicants to social housing either to understand or to be enrolled in free of charge courses to learn the language. Such criteria may, however, constitute indirect discrimination as it hinders non-Belgian applicants. In 2002, an Italian Court (Milan Court of first instance, judgement 20/21, 03.2002) ruled that a «national priority» criterion in public housing allocation was discriminatory. The cases are referred by Boccadoro N., *Housing rights and racial discrimination*, in *European Anti-Discrimination Law Review*, 9, 2009, 27-28. On the Italian case, see Simoni A., *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC. Country Report: Italy. State of affairs up to 8 January 2007*, 2007, available at the link https://www.migpolgroup.com/_old/public/docs/125.Italy_DiscriminationCountryReport_EN_01.07.pdf; see also the comment by Simoni A., *La discriminazione razziale alla vigilia dell'attuazione della direttiva 43/2000: considerazioni a partire da alcune recenti pronunce giurisprudenziali*, in *Diritto, Immigrazione e Cittadinanza*, 4, 2002.

¹⁴ Fredman S., nt. (3), 181.

¹⁵ Such as explained by Fredman S., nt. (3), 184.

¹⁶ We share the view of Fredman S., nt. (3), 188-189, that statistics should remain an alternative and complementary method of proving unequal results, since «apparently scientific and neutral measures might never invite scrutiny unless data is available to dislodge these assumptions».

The third form of discrimination, harassment, is a «powerful concept», since it includes certain cases of illegitimate behavior that would be difficult to subsume under the other discrimination legal concepts. Unlike direct or indirect discrimination, discriminatory harassment does not require a comparative element, consisting of hostile or degrading treatment of tenants. Housing harassment may consist of creating an obstacle or impediment to an adequate use of premises, namely, intent to evict the tenant or force abandonment by unlawful means or degrading treatment.¹⁷ As a form of discrimination, housing harassment should be characterized by the perpetrator's intent to obstacle or impede the realization of the right to housing in connection with a prohibited ground.¹⁸ Housing harassment most commonly consists of a landlord expelling a tenant through unlawful means trying to put a forced end to a contract with more stringent conditions, aiming at celebrating a new contract with higher rent or more favorable regulation. To fall under the scope of antidiscrimination law that conduct must be related to an unlawful discrimination ground. Indicators of housing harassment could be: unjustified refusal of landlords to receive rental payments by tenants; refusal to conduct maintenance or conservation works or conducting works with a risk for security or health of the tenant; verbal abuse; threats; interrupting water, gas or electricity; placing objects that obstacle movement of people from or to the premises; throwing litter to the premises.

Discrimination by association may correspond either to direct or indirect discrimination. An example of direct discrimination by association in housing access is given on Inmaculada Segundo essay, where she mentions refusal to contract to a young woman who had moved from its original city to work in a foundation for gypsies, the owner refused to contract with immigrants and Roma, although the woman was not herself neither.¹⁹

In our view, the refusal of reasonable accommodation does not constitute an autonomous form of discrimination since, in a way, it can be considered indirect discrimination.²⁰ The omission of policies to adapt buildings and houses to people with disabilities (or difficulties linked to aging) may lead to the exclusion of physically vulnerable people from access to housing. From another perspective – an unindividualized one – the failure to provide reasonable accommodation reveals that prohibiting discrimination is not enough and that a positive action is necessary. Refusal of reasonable accommodation can also appear as direct discrimination, when a landlord refuses to make minor adjustments in the house or does not

¹⁷ Prohibition of harassment in tenancy contracts and its consequences have been in 2019 incorporated in Portuguese civil law legislation (*see* arts. 13-A e 13-B of Law 26/2006). This legal concept is kept separated from the prohibition of discrimination provision. It is more of a general ultimate safeguard of the right to housing than a tool to react to discrimination. Diversely, according to Catalan Right to Housing Act (Law 18/2007, of 28 December), housing harassment is prohibited as a form of discrimination.

¹⁸ Benito Sanchez J.C., *Securing housing for all in diverse European societies. Applying International and European antidiscrimination law to the housing context*, UCLouvain PhD Thesis, 2020, 80.

¹⁹ San Segundo I.L., *La prohibición de discriminación en el acceso a la vivienda residencial*, in *Revista General de Legislación y Jurisprudencia*, 2, 2017, 281. The concept finds its origins in the ECJ sentence of 17 July 2008, C-303/06, *J. Coleman v. Attridge Law and Steve Law*, in which a woman was considered discriminated against at work for having a son with a disability.

²⁰ Benito Sanchez J.C., nt. (18), 34, considers «refusal of reasonable accommodation» a separate form of discrimination (from direct, indirect discrimination and harassment).

accept that works are made by the handicapped person (refusal to allow installation of a stairlift or denial of removing a doorstep or adapt the entrance structure).²¹

Respecting cultural diversity could entail an expansion of the concept of «house», including alternative forms of housing not falling under the representation of «bricks and mortars» spatially fixed. Housing must be understood as premises where people actually live, which could be a boat, a caravan or a shelter.²² To our view merely guaranteeing identical treatment as a means of protection is not enough and relevant differences in Traveller's cultural identity or others should be taken into account. Stigma and prejudice are only surmounted when «travellers» assimilate the majority-dominated comprehension of housing. Indirect discrimination could be considered as an adequate instrument to address the housing situation of «Travellers», by considering that an insufficient number of legalized camping sites violates anti-discrimination Laws.

Housing segregation is a form of discrimination, usually deriving from a prejudice/stigma against ethnic minorities or from socioeconomic disadvantage (as low-income families cannot aspire to live in several neighborhoods). Though benign intragroup preferences frequently justify constitution of neighborhood communities, it usually entails residential stigma and less chances to separate from the personal identity negative bias.

Although the conceptualization of «multiple discrimination» still lacks clarification and refinement, it has been recognized that discrimination may occur on the basis of more than one ground, which can create cumulative disadvantage and must therefore be object of specific consideration and properly remedied. Discrimination on different grounds and on different occasions, designated as «sequential multiple discrimination», can find an adequate answer in existing legal frames and concepts, but «additive multiple discrimination» already asks for a different, stronger reaction, and when the result isn't simply an addition but one of a qualitatively different nature, «intersectional discrimination», it requires an autonomous visibility or reframing. Existing statutory provisions that include prohibition of discrimination in access to housing don't go beyond considering it a form of aggravated discrimination, thus allowing an enhanced compensation, reason why we make some remarks on this form of discrimination under that topic.

4. Distinguishing prohibition of discrimination from protection of vulnerability in tenancy contract law.

Although the two goals share a common area, prohibition of discrimination aims at an equal treatment, whereas the protection of vulnerability consists in creating a special set of rules that positively discriminate those underprivileged by age, disease, or economic conditions. The goal of making the price of housing accessible to those without sufficient resources (*see* art. 31 European Social Charter Reviewed) aims at protecting a vulnerability and not exactly at eliminating a stigma or unjustifiable prejudice. States are required to adopt

²¹ Netherlands case of a refusal to park a mobility scooter in a garage.

²² Boccadoro N., nt. (13), 29.

positive measures to ensure a right to adequate housing and to eliminate homelessness. The right to adequate housing requires a «dwelling which is structurally secure, safe from a sanitary and health point of view and not overcrowded». Also, housing may not be considered adequate when it is situated in the outer periphery of cities without access to employment options, schools, or healthcare and assistance. States should assure proportionality between housing costs and families income. Furthermore, all persons are entitled to legal security of tenure, namely protection against forced eviction.

There is a significant overlap between those who are discriminated against upon some specific characteristics and those who are socioeconomically disadvantaged, hence, housing policies must be conceived and implemented as to mitigate the effects of discrimination against disadvantaged groups. However, the two areas are not coincident, and those who may have a comfortable socio-economically status are also discriminated against, for their gender, color, religion, or sexual orientation.

The debate on whether to include a category of discrimination based on socio-economic status is ongoing in human rights law.

Recognition of a right to adequate housing by itself is not sufficient to ensure substantive equality since it may not protect individuals or communities against rooted prejudice and stigma. Where economic and social rights are not enshrined in constitutional or ordinary laws, or are insufficiently protected, tending to be subject to progressive realization upon the financial availability of States, antidiscrimination law obligations can offer a more immediate solution.²³ Correction of socio-economic disadvantages cannot be sufficiently accomplished through the path of antidiscrimination legal solutions and obligations.

Although it is justifiable to sanction a landlord who refuses or gives instruction to refuse a contract upon sexual orientation, color of the skin or ethnic origin, it is not justifiable to force him/her to enter into a contract with a tenant who is unemployed or has insufficient income. Guarantee of payment, whose protection is a legitimate interest of a private landlord, could in those cases be at risk. On the other hand, conditioning contracting to the source of income, refusing to let premises to a person who lives by social welfare or subsidies, should not be admissible, as it may entail discriminatory behavior of an indirect form, since single mothers and migrants would be those most commonly reported to find themselves in this situation. Including «social precarity» as a forbidden ground of discrimination in antidiscrimination law texts could promote a more broaden protection to all individuals. Nonetheless, I am inclined to consider it is not an autonomous ground of discrimination law and it should be addressed through other legal means being considered, for example, a violation of a right to protection against poverty and social exclusion. With respect to tenancy private law contracts a low income or an unemployment status can surpass the discriminatory test, as they may reasonably be considered an objective reason to a legitimate refusal of contract. State's policies could, nonetheless, be addressed at finding adequate solutions, which, without demeaning the legitimate interest of payment guarantees' for the landlords mitigate the impact of this factor in tenants: for instance (as Benito Sanchez suggests) by limiting the percentage in which the income exceeds the monthly rent and restricting the

²³ As Benito Sanchez J.C., nt. (18), 112, states.

information a landlord could require a potential tenant to expose (for example allowing landlords to ask for proof of income but not the source of the income).²⁴

In our view, the omission of State's policies to impede or mitigate the effect of housing «commodification» and «financialization» cannot be considered an unlawful discrimination of the socio-economic disadvantaged. It is though a policy option that doesn't ensure the right to housing and is dismissive in what regards the protection of vulnerability that a democratic social State should be compromised with.²⁵

5. The proof obstacle and the burden of proof provision.

Notwithstanding the concern of the Directives with the burden of proof (*see* art. 8 of Directive 2000/43²⁶ and also article 9 of Directive 2004/113), aiming to implement a presumption of discrimination²⁷ upon certain facts on behalf of the victim, this remains as one of the most difficult aspects to solve when dealing with discrimination: to demonstrate that one has been refused a tenancy contract because of its ascendance, ethnical origin, or gender. A case may however be brought before a court (or other competent authority) when a public announcement to contract has been made that includes discriminatory references²⁸ or when the refusal to let the premises, made available for renting, is justified by a most recent conclusion of a contract with another party, but the premises remain vacant. It is, nonetheless, very difficult to identify and control personal discriminatory decisions in housing renting. The juridical system cannot control and impede mere discriminatory intentions that subtly make their way defining chances for private housing access. Moreover, impenetrable regulations of the host country and poor conditions of the houses, not meeting

²⁴ Benito Sanchez J.C., nt. (18), 196-197. The author suggests landlords could demand an income 2,5 times the amount of the rent. This limit would be too high in a country like Portugal, where rents are disproportionality higher than medium wages: the medium wage is 1694€ and the price of a two pieces apartment rent will not cost less than 1200€.

²⁵ It is nonetheless worth noticing the path Benito Sanchez J.C. trails in its work (Benito Sanchez J.C., nt. (18), 183 ff.) to subsume commodification and financialization in housing within antidiscrimination law. The author underlines how and why housing must be treated as a right and not as a commodity. «*If the State does not regulate private housing markets in a way that protects lower income individuals and groups, or if it develops housing policies that neglect and compound the vulnerability of these groups, a plausible case of discrimination linked to socioeconomic disadvantage can be made...*».

²⁶ «1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment».

²⁷ According to San Segundo I.L., nt. (19), 287-288, the Directives do not establish a legal presumption with a reversal of the burden of proof, since the claimant has to apport sufficient evidence of a discriminatory behavior. What the claimant doesn't have to prove is the inexistence of a legitimate reason to unequal treatment. Ormazabal Sánchez G., *Discriminación y carga de la prueba en el proceso civil*, Marcial Pons, 2011, 61 ff., had also sustained that there isn't a strict reversal of the burden of proof, underlining that such understanding would create an unjust inequality between actor and defendant.

²⁸ Since it had been asserted that some public announcements for housing rental contained discriminatory references, Law no. 13/2019 of 12 February, introduced to the Portuguese Civil Code a specific prohibition (*see* no. 2 of *supra* quoted art. 1067.º-A). The measure is of a proclamatory nature without corresponding sanctions or adequate measures.

minimum legal standards are significant obstacles not attainable by a prohibition of discrimination.

It is not, however, necessary to identify a specific victim, neither an intention to discriminate, proof of an objective difference in treatment is sufficient. Hence, public announcements of a discriminatory content will suffice to apply the respective sanctions. Furthermore, although «testing» is seldomly mentioned by Member States Law and it is not referred to in Directives texts, it is admitted as evidentiary material (situations are created to test the good faith of a landlord when refusing to contract to a colored person or one of an ethnical minority in comparison to a male white candidate).²⁹ The claimant must present facts that indicate objective discrimination providing a «prima facie» evidence to build a court case and it is the defendant's burden to demonstrate he has some exception or justification for the unequal treatment; when this proof is not apported the defendant succumbs.

6. Sanctions and remedies. Payment of compensation. Intersectional discrimination as an element to calculate compensation.

Sanctions – which must be «effective, proportionate and dissuasive» – may comprise the payment of compensation to the victim. The wronged person can rely on the presumption of a violation of equal treatment, but carries, nonetheless, the burden of proof of all statutory requirements to build a civil liability judicial case, according to the Member State regulation.

Hence, the victim would have to prove the existence of fault, the amount of damages and the sufficient connection between the first and the latter. Regarding «fault» whereas in Portugal legal literature insists this requirement should be asserted,³⁰ Spanish authors state discrimination Law is a no-fault or strict liability system.³¹ Judicial Court of the European Union has ruled indirect discrimination does not require proof of motivation to discriminate.³² Compensation shall include both pecuniary (the surplus of a substitution rental contract when there's discriminatory refusal to contract or a forced abandonment of premises because of hostile, intimidating treatment) and non-pecuniary damages (moral offense and suffering caused by the diminishing conduct), but it is dubious, in many juridical systems whether compensation of a punitive nature or «punitive damages» may be awarded. In countries, such as Portugal and Spain, compensation of a punitive nature is not traditionally included in civil liability statutory system, and a shift towards that end is discussed. The EUCJ has already ruled that anti-discrimination Directives do not impose or authorize a Member State where punitive damages are not provisioned to award them in a

²⁹ See some examples *supra* provided and the report from Federación SOS Racismo, nt. (3). Telephonic and face-to-face situations were created to measure unequal treatment in landlord's behavior towards immigrants and nationals.

³⁰ Mota Pinto P., *Autonomia privada e discriminação: algumas notas*, in *Estudos em homenagem ao Conselheiro José Manuel Cardoso da Costa*, Vol. II, Coimbra Editora, Coimbra, 2003, 331 and 362; Brandão Proença J.C., nt. (5), 44-45.

³¹ See San Segundo I.L., nt. (19), 300. Sustains, nonetheless, the relevance of subjective elements such as an intention to discriminate, Guillermo Ormazabal Sanchez, nt. (27), 50-57.

³² EUCJ, C-83/2014, *CHEZ Razpredelenie Bulgaria*, 16 July 2016.

discrimination case.³³ Punitive damages are not mandatory to attain the dissuasive effect goal; this can be achieved through compensation payment of a restitutive nature. The regular amount of compensations paid for violation of anti-discrimination laws (including in countries where punitive damages are admissible) has, nonetheless, been considered insufficient to pertain its goal of effectiveness and dissuasiveness.³⁴

One element that can be considered, when calculating compensation, is «intersectional» or «multiple» discrimination (for example, access to tenancy being denied to a black woman or to an aged gipsy). Multiple discrimination may refer to a concurrence of grounds, creating a form of additive discrimination, or to a combination of factors that creates a distinct form of disadvantage. Legal and institutional protection against discrimination is often based on separate instruments for separate grounds; however, individuals may experience multiple or combined discrimination which can amplify their vulnerability. A person may suffer discrimination on different grounds on different occasions, what is named «sequential multiple discrimination». A second possibility could be when a person is discriminated on the same occasion but on two different grounds, what is designated by «additive multiple discrimination». A third manifestation could appear when a person is discriminated on more than one ground, but this addition results in a qualitatively different result, a «synergistic» one, and this is what is usually referred to as «intersectional discrimination».³⁵ Sequential and additive multiple discrimination can be dealt within existing legal frameworks, but intersectional discrimination poses a diverse challenge. Despite the difficulties found to chronicle intersectional experiences and to manage the proliferation of subgroups (turning anti-discrimination law into a «many headed Hydra, impossible to contain»), intersectionality discrimination slowly makes its way in human rights legislation and case law.

Whereas (14) of Directive 2000/43 considers this category of «multiple discrimination» stating that «in implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should [...] promote equality between men and women, especially since women are often the victims of multiple discrimination».³⁶

In Portuguese Law (Law no. 93/2017 of 23 August) the concept of «multiple discrimination» is defined (art. 3, no. 1, e)), but without specific explicit legal consequences, except for the necessity to justify for each of the discrimination grounds involved that a practice or provision that could constitute indirect discrimination is legitimate, adequate and necessary. Within the criteria that shall be considered by a court of law when calculating

³³ EUCJ, C-407/14, *María Auxiliadora Arjona Camacho v Securitas Seguridad España, S.A.*, 17 December 2015.

³⁴ As documented in the report prepared by Chopin I., Do T., *Developing anti-discrimination Law in Europe. The 27 EU Member States, Croatia, the Former Yugoslav Republic of Macedonia and Turkey compared*, Publication Office of the European Union, Luxembourg, 2011, 81.

³⁵ Fredman S., *Intersectional discrimination in EU gender equality and non-discrimination law*, European network of legal experts in gender equality and non-discrimination, Publication Office of the European Union, Luxembourg, 2016, 27.

³⁶ Women, and particularly women who are single parents, are often discriminated against when renting private housing. In spite of the data shortage, it is frequently suggested that old stereotypes that women are not as good as men at handling the practical aspects of maintaining a property or at being able to pay their debts. See Ringelheim J., Bernard N., *Discrimination in housing*, European network of legal experts in the non-discrimination field, Publication Office of the European Union, Luxembourg, 2013. On top of that, Brazilian women, for instance, are frequently biased as sex workers.

compensation, Portuguese law includes the «severity of the violation of the interests involved», «economic situation of the infringer» and «conditions of the victim». These indeterminate expressions can include the aggravated offense of an intersectional discrimination, albeit it is not explicitly referred to. To this regard one systemic question must be answered: how far shall a Private Law sanction, such as payment of compensation as a civil liability consequence, have a punitive nature?

A simple form of setting the path to a more broaden consideration of multiple discrimination would be to simply add, in the anti-discrimination legal statutes, to the list of grounds the expression «any combination of these factors». Another simple way would be to consolidate separate pieces of legislation into just one Equality Act or anti-discrimination statutory provision.

With respect to housing, women in disadvantaged ethnic minorities may be put in an aggravated situation being asked higher rents or to celebrate shorter terms contracts; a Roma suffering from a physical disability, living in geographically isolated premises may face all kinds of obstacles in access to services.³⁷

Other than compensation, civil sanctions could consist in declaration of invalidity of some discriminatory contractual term (*see* art. 15 of Portuguese Law no. 93/2017, recognizing the demandant the right to the modification of the contract after the elimination of invalid terms). For instance, if the price of rent is higher for a foreigner than what's being charged for a local or if more onerous guarantees have been demanded, respective modifications must be introduced to the contractual terms.

Reintegration *in natura* by forcing the unlawful to contract is highly dubious. Such a solution is not provided for neither in EU laws nor in national regulations but is considered by legal literature.³⁸ However, recognition of an obligation to contract is usually conditioned to the satisfaction of strict requirements which would hardly be met: it would be necessary that the victim would not otherwise have access to the necessary good; a contract has not been established with someone else (that could not be dismissed); sufficient determination of contractual terms. For Navas Navarro only upon the fulfillment of these conditions would an obligation to contract could be considered proportionate to the attainable goal of equal treatment.³⁹ According to Inmaculada Segundo, with respect to housing discrimination, it would hardly be possible to satisfy these conditions and therefore imposing a duty to contract as a consequence of a discriminatory behavior. The author admits nonetheless this possibility in a small locality with few rental offers.⁴⁰

Besides civil sanctions, some Member States statutory provisions, such as the Portuguese law, also stipulate specific administrative remedies, such as the publication of the decision, confiscation of property, prohibition to exercise a profession, suspension of licenses or other authorizations (*see* arts. 16 and 24 of Law no. 93/2017).

³⁷ As Fredman S., nt. (35), 40 and 49, accurately pinpoints.

³⁸ In Portuguese legal literature, *see* Mota Pinto P., nt. (30), 360, admitting a duty to celebrate the unlawfully rejected contract, and Brandão Proença J.C., nt. (5), 47, refusing that possibility. In German legal literature, *see* Neuner J., *Diskriminierungsschutz durch Privatrecht*, in *Juristen Zeitung*, 58, 2, 2003, 61.

³⁹ Navarro S.N., *El principio de no discriminación en el Derecho contractual europeo*, in *Anuario Derecho Civil*, LX, 3, 2008, 186.

⁴⁰ San Segundo I.L., nt. (19), 298.

7. Addressing the delicate question of reconciling freedom to choose a contractual partner and prohibition of discrimination in rental housing.

Freedom of contract is a main pillar of the Private Law building. Deciding up to what extent shall its exercise be conditioned by the prohibition of discrimination's ground, is a central and delicate matter. Albeit in general and in its essence anti-discrimination Law has to deal with this conflicting value of freedom of choice,⁴¹ being considered an *intuitus personae* contract, with respect to the tenant, and one that creates a long-term possibly conflictual relation, private tenancy contracts add complexity to the conflict between freedom of contract and equality. As prohibition of discrimination becomes a wide range principle, a general limit to contractual freedom, and the legitimacy to refuse contracting with someone upon certain stigmatized characteristics becomes the exception, refusal to choose a candidate as a contractual party may not simply be sustained on freedom of choice and tenancy contract's essence.⁴²

The question to be answered is where to draw the line of exception of a discriminatory choice of a contractual partner in private tenancy contracts, in other words, in which situations – if any – should pure arbitrary individual choice prevail? The question is not whether a different treatment is admissible, since preference for a party instead of another may well be sustained upon legitimate reasons of a non-discriminatory nature (a difference in solvency and guarantees of regular payment, for example). The question is which causes may justify a discriminatory choice of a tenant, that is, which exceptions to prohibition of discrimination should be admitted to preserving individual freedom. To this end we must decide what role shall be played by «the protection of private and family life», while prohibiting discrimination, in the choice of the housing tenant party? Whereas (3) of Directive 2014/113 indicates that «while prohibiting discrimination it is important to respect other fundamental rights and freedoms, including the protection of private and family life»; furthermore, whereas (16) of this same Directive accepts differences in treatment between

⁴¹ Fredman S., nt. (3), 33, highlights: «possibly the most serious rival for priority with equality is freedom or liberty». Implementation of anti-discriminatory provisions in Member States found strong opposition from some Private Law authors fearing a «*Gesinnungs Polizei*», a moral and ethics excessive control. See, for example, Adomeit K., *Political correctness – jetzt Rechtspflicht!*, in *Neue Juristische Wochenschrift*, II, 2006, 2169-2171, and Adomeit K., *Diskriminierung – Inflation eines Begriffs*, in *Neue Juristische Wochenschrift*, I, 2002, 1622-1623, stating that a Private Law where the individuals may not freely choose their contracting partners is no longer Private Law («*Ein Privatrecht, das den Teilnehmern am Rechtsverkehr nicht mehr der freie Entscheidung belässt, wen man sich als Vertragspartner wünscht und wen nicht ist eigentlich kein Privatrecht mehr*», 1623); see also Picker E., *Antidiskriminierungsgesetz – Der Anfang vom Ende der Privatautonomie?*, in *Juristen Zeitung*, 2002, 880; in Portugal, namely, see the reserves of Hörster H., *A Directiva 2000/43/CE e os princípios de Direito Privado – Esboço de algumas reflexões*, in *Comemorações dos 35 anos do Código Civil e dos 25 anos da reforma de 1977*, Vol. II, Coimbra Editora, Coimbra, 2005, 159-182.

⁴² Jiménez Horwitz M., *La protección contra la discriminación en las relaciones entre particulares: la evolución desde la responsabilidad extracontractual hasta los remedios por incumplimiento*, in *Anuario Derecho Civil*, LXVII, 2, 2014, 494-495, signals a significant change on the juridical perspective of freedom of contract, since presently its exercise is limited by fairness in relation with the other persons. Proportionality is presently a criterion to be held when judging contractual freedom. As Aguilera Rull A., *Prohibición de discriminación y libertad de contratación*, in *Revista para el análisis del Derecho – InDret*, 1, 2009, 9-10, also stresses, the mere fact that tenancy contracts entail a trustworthy relation between the two parties, since the tenant gains access to a valuable asset of the landlord, is not sufficient to exempt it from the prohibition of discrimination principle.

men and women upon «reasons of privacy and decency (in cases such as the provision of accommodation by a person in a part of that person's home)». Whereas (4) of Directive 2000/43 also refers that it is important «in the context of the access to and provision of goods and services, to respect the protection of private and family life and transactions carried out in this context».

Following the criteria defined by the anti-discriminatory Directives, we may conclude that prohibition of discrimination is applicable both to public and private persons; equal treatment isn't only a command addressed to public bodies, but also to private entities.⁴³ The question to be answered is up to what extent shall private persons be bound by prohibition of discrimination when letting its premises; which situations must be exempted in order to safeguarding a sphere of private and family life? Which is the best solution to adequately and fairly reconcile freedom to choose a contractual party and condemnation of inequality in private housing rental? Limiting the subjective scope of the prohibition to professionals or entities letting a relevant number of houses doesn't meet the goals of the Directives, since the reference to «all persons as regards both the public and private sectors» appears to be intentionally broad. Having considered drawing the line of exemption within this limit of private professional bodies, Spanish legislator has set the limit of equal treatment and prohibition of discrimination in rental housing to cases where an «offer was made available to the public» (*see* article 20, no. 2, of *Ley* no. 15/2022 of 12 July, "*Ley integral para la igualdad de trato y no discriminación*"). An offer is made available to the public when it is published in a newspaper, an open-access site or in boards or street announcements. Limiting the prohibition to the cases where an offer is made to indeterminate persons can be envisaged as an adequate solution to reconcile private autonomy and the principle of non-discrimination, and one that respects the Directives' orientation referring to «goods and services which are available to the public». If the landlord opts to address the public there wouldn't be a legitimate ground to refuse contracting with an offeree that meets the offeror requirements, all the candidates should be treated equally.⁴⁴ Nonetheless, even when an offer has been made to the public the lessor should still be able to invoke protection of private and family life in those situations in which there could be a legitimate ground of the kind.

Although the Portuguese civil law provision that prohibits discrimination in tenancy contracts specifically refers to public announcement or publicity to a tenancy offer (*see* no. 2 of art. 1067.º-A of the Portuguese Civil Code), it appears to be intended more as an emphasis rather than a clear line of exemption.

In our view, it is preferable not to limit the scope of the legal solutions to public announcements. The principle of equal treatment should only be legally exempted in those cases where the landlord would have to co-habit, share the premises or establish a personal proximity with the tenant (for example when letting its own house already with some

⁴³ Instead of considering the public or private nature of the person, relevance is set on the public or private sphere or domain of the service or good.

⁴⁴ *See* Aguilera Rull A., nt. (42), 16; and Aguilera Rull A., *El Proyecto de Ley integral para la igualdad de trato y la no discriminación*, in *Revista para el análisis del Derecho – InDret*, 3, 2011, 6-7. Criticizing the Spanish Law Project solution, this Author referred the prohibition shouldn't depend on the non-professional nature of the offeror but upon a defense of the offeror's intimacy.

personal goods or furniture in it). Hence, we are prone to a solution such as the one enshrined in German Law (*see* § 19(5) of *Allgemeines Gleichbehandlungsgesetz – AGG*) which states that prohibition of discrimination is non-applicable only when the parties or their families would necessarily have to maintain a proximity or trust based relation.⁴⁵ Anti-discrimination German Law contains nonetheless a puzzling further limitation with regard to rental housing, admitting that differential treatment is permissible if it serves the creation and maintenance of socially stable resident structures, balanced settlement structures, and balanced economic, social, and cultural conditions (§19(3) of the *AGG*).⁴⁶ Through this door almost any ground of differentiation could be welcomed. Some authors have therefore noted that this limit may not be invoked upon race or ethnic origin.

Needless to say, sharing facilities and accommodations with others already leads to sufficient tension between family, partners, or acquaintances autonomously elected. Albeit it is more difficult to ascertain a discriminatory refusal to contract (or to conditioning contracting to the fulfillment of more onerous conditions), when an offer to contract was not made publicly – what could diminish the practical effect of a wider range solution –, we find non-discrimination should be legally recognized in the broadest possible sense. Pedagogic and cultural effect of a legal proclamation of a right or of a behavior's prohibition must not be looked down. Starting from legal wording, a case solution will always have to be built upon gathered proof and adequate reasoning.

Disregarding the privacy or decency limit between different genders, a Civil Court in Bruges (in a judgement of 10 November 2014) has, however, found there had been a direct discrimination on the ground of gender since the male applicant (a French national) had been refused a bedsit in a private residence because it was meant for girls only.⁴⁷

⁴⁵ In the precise legal wording, the exception is set within «*ein besonderes Nähe- oder Vertrauensverhältnis der Parteien oder ihrer Angehörigen begründet wird*».

⁴⁶ «*Bei der Vermietung von Wohnraum ist eine unterschiedliche Behandlung im Hinblick auf die Schaffung und Erhaltung sozial stabiler Bewohnerstrukturen und ausgewogener Siedlungsstrukturen sowie ausgeglichener wirtschaftlicher, sozialer und kultureller Verhältnisse zulässig*».

⁴⁷ This case is reported by Jacquemain J., “*Girls only*” Housing Illegal, News Report – European Network of Legal Experts in gender equality and non-discrimination, 14 April 2015, available at <https://www.equalitylaw.eu/downloads/2743-13-be-ge-girls-only-housing-illegal>.

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