Poverty as a ground of unfair discrimination in post-apartheid South Africa

by

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Thesis presented in fulfilment of the requirements for the degree of Master of Laws in the Faculty of Law at Stellenbosch University

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April 2022

DECLARATION

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Gideon Burnett Basson
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SUMMARY

Since the advent of constitutional democracy, the project of transformative constitutionalism has had limited success in addressing structural poverty and inequality in post-apartheid South Africa. The stubborn nature of poverty and inequality is a result of four-hundred-odd years of politically calculated spatial ghettoisation, infrastructural neglect, land dispossessions, privileged citizenship, elite capture, perpetual wealth hoarding and unequal access to socio-economic goods. As a result, impoverished people continue to experience pervasive forms of discrimination such as violence, abhorrent prejudices, political marginalisation and structural barriers to accessing basic needs. Despite this reality, poverty is not recognised as an entrenched prohibited ground of discrimination.

This study develops a comprehensive interpretative framework to conceptualise poverty as a ground of discrimination under the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. It does so specifically by developing a transformative conception of substantive equality that should undergird impoverished people's right to equality and non-discrimination.

It draws from the work of the global justice critical social theorist Nancy Fraser as well as South African critical legal scholars to postulate an appropriate framework for conceptualising poverty as a ground of unfair discrimination under current capitalist conditions within the South African constitutional regime. The study employs a critical methodology to examine the implications of a reimagined transformative conception of substantive equality for the adjudication and litigation of poverty as a ground of unfair discrimination.

ISISHWANKATHELO

Ukusukela ngethuba ekwavela ngalo idemokhrasi yomgaqo-siseko, iprojekthi yenguqu yomgaqo-siseko ibenempumelelo elinganiselweyo ekusombululeni ubuhlwempu kunye nokungalingani eMzantsi Afrika emva kocalucalulo. Ukungagungqi kobume bentlupheko kunye nokungalingani yimiphumela yeminyaka engamakhulu amane ephenjelelwe zezopolitiko yokubekela bucala abantu, ukungahoywa kweziseko zophuhliso, ukufudulwa kwabantu kumhlaba wabo, ubumi bokubanelungelo elikhethekileyo, urhwaphilizo lwabo bakwizikhundla eziphezulu, ubutyebi obungapheliyo kunye nokungalingani kwabantu kukufikelela kwizinto zentlalo nezoqoqosho.

Ngenxa yoko, abo bahlwempuzekileyo baqhubeka nokujamelana neendlela ezixhaphakileyo zocalucalulo ezinje ngobundlobongela, intiyo ecekisekayo, ukucinezeleka kwezopolitiko kunye nokuthinteleka ekufikeleleni kwiimfuno ezisisiseko. Ngaphandle koku, ubuhlwempu abunakubonwa njengengcambu engalunganga yocalucalulo.

Olu phando lwakha isikhokelo esibanzi sokucacisa ubuhlwempu njengesizathu socalucalulo phantsi koMgaqo-siseko kunye noMthetho -4 ka-2000 wokuKhuthaza ukulingana kunye nokuthintela ucalucalulo (the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000). Ikwenza oko ngokukodwa ngokuzisa ingcinga yenguqu yokulingana okufanelekileyo ekufuneka kuxhase ilungelo labantu abahlwempuzekileyo lokulingana nokungacalucaluli. Ivela kwimisebenzi yobulungisa yehlabathi ingcali yezentlalo ebalulekileyo uNancy Fraser kunye nabaphengululi bezomthetho baseMzantsi Afrika ukuba babeke isikhokelo esifanelekileyo sokuqiqa ubuhlwempu njengesizathu sokucalucalulwa ngokungenabulungisa phantsi kweemeko zangoku zongxowankulu kulawulo lomgaqo-siseko woMzantsi Afrika. Ngoko ke, olu phando lusebenzisa indlela yokuqokelela ulwazi lophando (methodology) ephambili ukuphonononga imiphumela yendlela yokuqiqa eqinisekileyo eza nenguqu ekugwebeni intlupheko eyimiphumela nengcambu yocalucalulo.

OPSOMMING

Sedert die aanvang van grondwetlike demokrasie het die projek van transformatiewe konstitusionalisme in post-apartheid Suid-Afrika beperkte sukses behaal om strukturele armoede en ongelykheid ongedaan te maak. Die hardnekkige verwantskap tussen armoede en ongelykheid is die gevolg van meer as vierhonderd jaar se politiese projekte van krotgebiede skep, infrastrukturele verwaarlosing, grondbesit, bevoorregte burgerskap, staatskaping, die voortdurende opgaar van rykdom en ongelyke toegang tot sosio-ekonomiese goedere. As ‘n gevolg hiervan, ervaar arm persone onafwendbare vorme van diskriminasie soos geweld, grusame vooroordele, politieke marginalisering en strukturele hindernisse vir toegang tot basiese behoeftes. Ondanks hierdie werklikheid word armoede steeds nie regstegnies as ‘n onbillike grond van diskriminasie erken nie.

Hierdie studie ontwikkel 'n omvattende interpretatiewe raamwerk om armoede as ‘n grond van onbillike diskriminasie ingevolge die Grondwet en die Wet op die Bevordering van Gelykheid en Voorkoming van Onbillike Diskriminasie 4 van 2000 te konseptualiseer. Dit word spesifiek gedoen deur 'n transformatiewe opvatting van substantiewe gelykheid te ontwikkel wat arm mense se reg tot gelykheid en nie-diskriminasie behoort te onderlê.

Die studie gebruik die werk van die globale geregtigheids- en kritiese sosiale teoretikus Nancy Fraser en Suid-Afrikaanse kritiese regsteoretici om 'n gepaste raamwerk vir die konseptualisering van armoede as 'n grond van onbillike diskriminasie onder huidige kapitalistiese toestande binne die Suid-Afrikaanse grondwetlike regime daar te stel. Die studie gebruik 'n kritiese metodologie om die implikasies van 'n heroorweegde transformatiewe opvatting van substantiewe gelykheid vir die beregting en litigasie van armoede as ‘n grond van onbillike diskriminasie te ondersoek.

ACKNOWLEDGEMENTS

There is no duty more urgent than that of returning thanks.

To my supervisors, Professors Liebenberg and Botha, thank you for saving me from lots of embarrassment. Professor Liebenberg, thank you for pushing this study to places where it deserved to go and lending a helpful hand in sharing your expertise and constantly invigorating our shared passion for socio-economic justice. Professor Botha, thank you for your soft and hard questioning eyes and for reminding me of my voice amidst the melancholy of research and writing in a deeply confined yet rich field such as constitutional and human rights law. It was a dream come true to have had two incredible thinkers guiding me through the ebb and flow of justice-related research and tolerating my somewhat strange engagement with the world.

Then a special thanks to my family, both found and biological, that lent me their ears, time, and soft landings to flesh out many of the complexities of this study. Your presence throughout this process shored me up.

I also acknowledge the Mandela Rhodes Foundation. Thank you for believing in me and creating spaces where I could belong, question, and revolt. Also thank you to my fellow 2020 scholars that contested identity and reparations with me and providing me space to healing in communion.

ABBREVIATIONS

CESCR	Committee on Economic, Social and Cultural Rights
COIDA	Compensation for Occupational Injuries and Diseases Act 130 of 1993
Constitution	The Constitution of the Republic of South Africa, 1996
CWMS	Credit Water Meter System
ERC	Equality Review Committee
NSP	National School Nutrition Programme
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
PEPUDA AMENDMENT BILL of 2021	Promotion of Equality and Prevention of Unfair Discrimination Amendment Bill 2021
PPWMS	Prepaid Water Meter System
SANDF	South African National Defence Force
SAPS	South African Police Services
WLC	Women's Legal Centre

REFERENCING STYLE

This study utilises the Stellenbosch Law Review style guide for referencing purposes in combination with the Stellenbosch University Faculty of Law Writing Guide for technical purposes and the format followed in the Bibliography.[1]

[1] For access to the Stellenbosch Law Review Writing Guide, see <http://blogs.sun.ac.za/iplaw/files/2018/02/Stellenbosch-Law-Review-Style-Guide.pdf> and for the Stellenbosch University Faculty of Law Writing Guide, see <https://blogs.sun.ac.za/legalwriting/files/2021/03/Writing-Guide-2021.pdf>.

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CHAPTER 1: INTRODUCTION

1 1 Motivation and background

Against the backdrop of South Africa's historic and present forms of institutionalised discrimination, the concept of unfair discrimination remains contested.[1] However, in anti-discrimination law, unfair discrimination has a broad meaning that renders any conduct, omission or policy that deepens or perpetuates the "patterns of group disadvantage and harm" unfair and therefore unlawful.[2] Unfairness essentially turns on whether there is a disproportionate impact, harm, prejudice, or disadvantage that flows from the impugned discrimination of an identifiable group.[3]

In post-apartheid[4] South Africa, it is trite that the identifiable groups of black people, women, non-nationals, and people living with disabilities experience pervasive forms of discrimination on the grounds of their race, gender, citizenship, and disability. This deepens their political, economic, and socio-cultural disadvantage. Moreover, poverty remains disproportionately concentrated within status groups[5] of race, gender, citizenship, and disability.[6]

However, the notion that the condition of living in poverty amounts to an independent source of discrimination is not well developed or explored in jurisprudence and legal discourse. The dimensions of this source of discrimination also remain elusive, under-documented, and under-researched in legal literature. This is surprising as people living in poverty experience many similar dimensions of discrimination to those experienced by status groups.[7]

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1 O Horta "Does Discrimination Require Disadvantage?" (2015) 2 *Moral Philos Politics* 277 278-283.

2 *Brink v Kitshoff* 1996 4 SA 197 (CC) para 42 per O'Regan J who coined the term "patterns of group disadvantage and harm". For a discussion on the concept of discrimination as established by the Constitutional Court and clarified and codified under PEPUDA, see further Chapter 4 part 4 2.

3 For an evaluation and analysis on the impact on an identifiable group, see Chapter 4 part 4 3 2.

4 Critical scholars have indicated that the term "post-apartheid" have been used too loosely without interrogating the socio-economic legacy of our past that continue to pervade the present. See JM Modiri "Towards a '(Post-)apartheid' Critical Race Jurisprudence: 'Divining Our Racial Themes'" (2012) 27 *SA Public Law* 231 231. From a discrimination law perspective, this is a vital temporal indicator to illustrate that poverty discrimination is the result of systemic discrimination that is built into the fabric of society.

5 In discrimination law a "status group" relates to an identifiable group that share the same characteristics or experience that leads to diminished social esteem in relation to others. This indicates a "recognition" harm where some group's equal moral worth is disregarded. A recognition harm typically relays prejudices, stereotypes, and denigrations of and towards a group. See S Fredman & B Goldblatt *Gender Equality and Human Rights* (2015) United Nations Women Discussion Paper No 4 6.

6 For specific statistics based on the most recent national data, see R Moletsane & V Reddy "The National Development Plan as a Response to Poverty and Inequality in South Africa" in C Soudien, V Reddy & I Woolard (eds) *The State of the Nation: Poverty & Inequality: Diagnosis, Prognosis* (2019) 235-237.

7 S Fredman "The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty" (2011) 3 *Stell LR* 5 66 574-576.

A press statement by Abahlali baseMjondolo ("Abahlali"), the self-proclaimed shack dwellers' movement, illustrates some of the layers of the disadvantage, harm, and prejudice impoverished people in post-apartheid South Africa face. Their media statement declares:

> "If you are poor and black your life does not count to the government. Your dignity can be vandalised at any time. Your home can be destroyed at any time. You can be humiliated, robbed, assaulted and murdered by the police, the anti-land invasion units, private security or the army. It is assumed that you are beneath the law, and that law enforcement and the state as a whole are above the law. […] We can be humiliated, robbed, assaulted, tortured and murdered with impunity. If we try to open a case against a police officer or government official at a police station we are most likely to be insulted and chased away. We might also be assaulted. This reality is our daily bread. This reality is often ignored by the elites. It is taken as something normal."[8]

In Abahlali's statement above, several dimensions of discrimination are highlighted. First, impoverished people face "misrecognition" in the sense that their human dignity is violated through humiliation, denigration, murder, and robbery.[9] This pervasive stereotyping and denigration of impoverished people results in the injustice of misrecognition as their dignity is continuously undermined. Their dignity is denied where they are not treated with equal concern and respect.[10] To this end, Abahlali states that when you are "poor and black" your life does not count.

Abahlali also mentions a second form of harm, which refers to degraded or inadequate political participation and influence. They state that impoverished people are rendered beneath the law and excluded from important democratic institutions such as the police. This gives rise to a "misrepresentation" injustice where impoverished people are not afforded a chance to influence decisions that impact their lives.[11] This form of injustice is vividly expressed by Abahlali voicing that their concerns are "ignored", and, further, that their predicament is so entrenched that it is normalised.

Third, Abahlali alludes to another form of disadvantage that, for example, manifests in the lack of access to adequate food, and the demolition or unavailability of adequate housing. This pertains to the "maldistribution" of resources that suggests an unequal,

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8 M Bonono, N Sizani & M Sindane "Minister Sisulu is Playing Dirty Politics with our Lives & Dignity" (03-07-2020) *Abahlali baseMjondolo Press Statement* <http://abahlali.org/node/17145/#more-17145> (accessed 20-08-2020).

9 "Misrecognition" as developed by Fraser in N Fraser & A Honneth *Redistribution or Recognition? A Political Philosophical Exchange* (2003) 29.

10 Fraser expands on her "equal moral worth" condition in N Fraser *Scales of Justice: Reimagining Political Space in a Globalizing World* (2009) 16.

11 N Fraser "Social Exclusion, Global Poverty, and Scales of (In)Justice: Rethinking Law and Poverty in a Globalizing World" (2011) 22 *Stell LR* 452-462; Fraser *Scales of Justice* 6.

unjust or insufficient distribution of the resources needed for a dignified human existence.[12]

These three forms of disadvantage, prejudice and harm indicate that poverty in South Africa is multidimensional and a complex socio-cultural, economic, and political phenomenon.[13] It extends beyond merely material deprivation, socio-cultural or political disadvantage, and entails intersecting forms of disadvantage.[14] At first glance, the intersecting forms of disadvantage described by Abahlali are at odds with equality as a socio-economic ideal guaranteed by the Constitution of the Republic of South Africa, 1996 ("Constitution").[15]

Equality is a prominent right and value that commits the state and private sphere to the "achievement of equality".[16] Section 9 of the Constitution protects the right to equality by stipulating that everyone is equal before the law and ought to benefit from the law equally. Furthermore, the right to equality contains a general prohibition against unfair discrimination in section 9(3).[17] Although the section lists specific grounds of discrimination, the list is not exhaustive, thus allowing the legislature and judiciary to develop new grounds of discrimination in light of the complex interplay between historic, social, economic and political factors.[18] In this way, the Constitution allows for the inclusion of new grounds of discrimination as a necessary legal response to a distinctive manifestation of inequality.[19] Section 9(5) also creates a presumption of unfairness on allegations of discrimination on any listed ground.

More ambitiously, section 9(2) broadens the right to equality to include "the full and equal enjoyment of all rights and freedoms." Section 9(2) expressly allows for legislative and other measures to be taken to advance and protect people that are disadvantaged by unfair discrimination.[20] Section 9(4) tasks parliament to enact anti-discrimination legislation that prohibits and prevents discrimination. The Promotion of Equality and

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12 Fraser (2011) *Stell LR* 455-457.
13 C Soudien, V Reddy & I Woolard (eds) *The State of the Nation: Poverty & Inequality: Diagnosis, Prognosis and Responses* (2019) 2.
14 B Goldblatt "Intersectionality in International Anti-Discrimination Law: Addressing Poverty in its Complexity" (2015) 1 *AJHR* 47 48.
15 I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2016) 211.
16 S 1(a) of the Constitution; for the horizontal application of the right to equality and non-discrimination, see ss 8(2) and 8(3) read with s 9(4) of the Constitution.
17 C Albertyn & B Goldblatt "Equality" in S Woolman & M Chaskalson (eds) *Constitutional Law of South Africa* 2 ed (2002) 35-1 35-14.
18 S Fredman *Discrimination Law* 2 ed (2011) 143.
19 38.
20 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) paras 61-63.

Prevention of Unfair Discrimination Act 4 of 2000 ("PEPUDA") was passed to give effect to section 9(4) and became fully operational on the 16th of June 2003.[21] The equality right, read as a harmonious whole,[22] and PEPUDA's text and objectives[23] illustrate the need to redress systemic inequalities in order to halt or minimise instances of unfair discrimination.[24] The inverse, that anti-discrimination measures must be used to halt, minimise or redress systemic inequalities, is not immediately apparent. However, the equality right's operation is informed by a conception of equality that underlies its various constitutive parts and aims to guide the theoretical and practical relationship between various parts of the right.

Courts and academic commentators have interpreted the constitutional equality right and PEPUDA to endorse a substantive version of equality.[25] The endorsement of substantive equality suggests a pivot away from formal equality that a-contextualises and depoliticises an unjust socio-economic order based on the norm of treating like-cases alike.[26] According to a substantive conception of equality, redistributive measures are not seen as inimical to equality but as an essential part of achieving equality.[27] Substantive equality is also a critical component of the Constitution's transformative vision that aims to uproot and restructure South Africa's unjust legal, social, political and economic structures.[28]

Unfortunately, the project of transformative change, rooted in the idea of transformative constitutionalism,[29] has had limited success in addressing structural poverty and the inequality that drives it.[30] The evidence remains overwhelming that South Africa is one of the most unequal societies globally, based on income, asset, wealth and intergenerational socio-economic indicators.[31] Both South Africa's history and present

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21 Currie & De Waal *Bill of Rights Handbook* 244.
22 *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 28.
23 See a further explication of the specific parts of the Act in Chapter 3 part 3 5.
24 C Albertyn, B Goldblatt & C Roederer (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 3-4.
25 Albertyn & Goldblatt "Equality" in *CLOSA* 35-6. For an exposition of judicial pronouncements, see Chapter 2 part 2 2.
26 Albertyn & Goldblatt "Equality" in *CLOSA* 35-5-35-8.
27 *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) paras 29, 33, 35.
28 For the seminal text of the transformative vision of the Constitution, see K Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146-188.
29 Klare coined the term "transformative constitutionalism" in Klare (1998) 14 *SAJHR* 146.
30 S Sibanda "When Do You Call Time on a Compromise? South Africa's Discourse on Transformation and the Future of Transformative Constitutionalism" (2020) 24 *Law Democr Dev* 384-412.
31 Moletsane & Reddy "The National Development Plan as a Response to Poverty and Inequality in South Africa" in *The State of the Nation* 235-237.

are rife with varying forms of class stratification and inequalities.[32] The class stratifications emanate from South Africa's history of racially coded conquests, land dispossessions, legislation, social and spatial engineered separation, and systemic forms of discrimination, all of which continue to shape entrenched racialised and gendered forms of poverty.[33]

Since the inception of constitutional democracy, significant redistributive efforts have been made.[34] At most, these efforts have alleviated poverty at the bottom and left spiralling inequality levels unchecked and unchanged.[35] Scholars have indicated that the redistributive efforts made thus far are caught up in a liberal-egalitarian paradigm that is only concerned with sufficiency where inequality is tolerated.[36] In the liberal-egalitarian tradition, poverty alleviation has a calculable sufficiency threshold, that seldomly requires addressing or postulating a ceiling to inequality.[37] Sufficiency-based human rights discourses have not been able to challenge rampant economic inequalities and may even have fuelled them.[38] The current South African redistributive efforts suggest a form of substantive equality that is somewhat inclusionary for impoverished people but not transformative. By contrast, transformative substantive equality seeks to detect and address the underlying structures that generate economic inequalities and entrench impoverished people's disadvantage.

In seeking innovative human rights avenues to challenge the underlying structures that fuel rampant economic inequalities, there is a recent global upsurge of anti-discrimination law scholarship contemplating the potential benefits of grounds akin to

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[32] Economic scholars indicate that South Africa continue to have a schema of stark socio-economic stratification that showcases the distribution of resources that either exclude the risk of living in poverty or secure conditions of poverty. See S Schotte, R Zizzamia & M Leibbrandt "A Poverty Dynamics Approach to Social Stratification: The South African Case" (2018) 110 *World Dev* 88 89-90.

[33] PT Mellet *The Lie of 1652: A Decolonised History of Land* (2020) 3, 6; T Madlingozi "Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution" (2017) 28 *Stell LR* 123-147; S Terreblanche *Lost in Transformation: South Africa's Search for a New Future Since 1986* (2012) 124-130.

[34] Amongst other programmes that have contributed to redistributive efforts are the Reconstruction and Development Programme of 1994 ("RDP") and the National Development Plan in 2012. The mass rollouts of social security grants, RDP houses, and infrastructure improvement to access water and electricity have "lifted" some out of absolute poverty. See Soudien et al *The State of the Nation* 1-18. On a judicial front, see the critiques of Albertyn (2018) *SAJHR* 455 and S Moyn *Not Enough: Human Rights in an Unequal World* (2018) 295-359 where they criticise the sufficiency based human rights discourse that has crept into the jurisprudence of the Constitutional Court, with a specific reference to *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

[35] Albertyn (2018) *SAJHR* 455; A Ashman & B Fine "Neo-liberalism, Varieties of Capitalism, and the Shifting Contours of South Africa's Financial System" (2013) 81 *Transformation* 148 156.

[36] Albertyn (2018) *SAJHR* 455; Moyn *Not Enough* 295-359.

[37] C Albertyn "(In)equality and the South African Constitution" (2019) *Dev South Afr* 18-9; Moyn *Not Enough* 361- 425.

[38] Moyn *Not Enough* 333-34.

poverty such as socio-economic status, disadvantage and condition, social class or origin.[39] However, there is little consideration of the added value and challenges of conceiving *poverty* as a fully fleshed ground within the context of South Africa's entrenched structural inequality. This study therefore proposes to investigate whether and to what extent poverty can and should be conceptualised as a ground of unfair discrimination in post-apartheid South Africa.

1 2 Research problem: Integrating poverty in discrimination law

The literature indicates that there are significant challenges to developing poverty as a ground of unfair discrimination due to doctrinal and theoretical issues within anti-discrimination law.[40] The main contention is that poverty is too imprecise for a legal definition and caught up in value judgements to form the basis for explicit legal protection.[41] The inclusion of poverty as a ground also raises democratic concerns, as it is argued that poverty's justiciability would breach the separation of powers doctrine.[42] Courts are seen as ill-equipped to consider or pronounce on technical budgetary or policy questions.[43] Anti-discrimination measures are also said to be inadequate to combat poverty as discrimination measures only protect people against pervasive stereotyping and stigma.[44] This view conceptualises anti-discrimination law as primarily an anti-misrecognition device and not an anti-maldistribution device.[45]

Another argument against poverty's inclusion is that, unlike other grounds, poverty does not refer to an immutable characteristic.[46] Others warn that poverty could "overshadow" other established status grounds such as race, gender and disability.[47] In addition, symmetric formulations[48] of socio-economic status could be open for abuse as

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[39] S Ganty "Poverty as Misrecognition: What Role for Anti-Discrimination Law in Europe?" (2021) *Hum Rights Law Rev* 1 14-17; J Eriksson *Poverty-Based Discrimination: Does International Human Rights Law Care?* LLM thesis, *University of Lund* (2019); JCB Sánchez "Towering Grenfell: Reflections around Socioeconomic Disadvantage in Antidiscrimination Law" (2019) 5 *Hum Rights Law Rev*; DE Peterman "Socio-Economic Status Discrimination" (2018) 104 *Va Law Rev* 1283-1359.

[40] See an exploration of this literature in S Fredman "Redistribution and Recognition: Reconciling Inequalities" (2007) 23 *SAJHR* 214 228-229.

[41] S Kilcommins, E McClean, M McDonagh, S Mullally & D Whelan *Extending the Scope of Employment Equality Legislation: Comparative Perspectives on the Prohibited Grounds of* Discrimination (2004) 86.

[42] S Fredman "Positive Duties and Socio-Economic Disadvantage: Bringing Disadvantage onto the Equality Agenda" (2010) *Eur Hum Rights Law Rev* 1 4-5.

[43] Fredman (2005) *SAJHR* 164.

[44] Ganty (2021) *Hum Rights Law Rev* 3.

[45] Sánchez (2019) *Hum Rights Law Rev* 4-5.

[46] Kilcommins et al *Extending the Scope of Employment Equality Legislation* 86-87.

[47] 86-87.

[48] For an explanation and implications for a disadvantage-centric discrimination model, see Chapter 2 part 2 4.

those who are better off could challenge programmes that benefit the poor.[49] A recent critique is that socio-economic rights already provide an avenue to address poverty and, therefore, challenging poverty by relying on an anti-discrimination framework is unnecessary.[50]

In the South African legal landscape these concerns warrant further investigation as PEPUDA includes a "directive principle" in section 34(1) that "socio-economic status" should be considered as a possible prohibited ground of unfair discrimination. Yet, the directive awaits "special consideration" from the Minister of Justice and Constitutional Development[51] and the Equality Review Committee ("ERC").[52] This delay is regrettable, as the Act expressly mentions that special consideration should be given to the inclusion of this ground given the "overwhelming evidence of the importance, impact on society and link to systemic disadvantage and discrimination on the ground of […] socio-economic status."[53] Despite the lack of independent legislative recognition, section 34(2)(a) of PEPUDA establishes that a court of law has jurisdiction to resolve a dispute that is instituted based on socio-economic status.[54] Furthermore, section 34(2)(b) states that "nothing" in the section precludes a complainant from instituting proceedings based on socio-economic status. Moreover, section 34(2)(c) creates the possibility that a court can determine whether socio-economic status should be established as a recognised ground of unfair discrimination.[55]

PEPUDA defines "socio-economic status" in section 1(1)(xxviii) as "including" a "*social or economic condition* or perceived condition of a person who is *disadvantaged by poverty*, low employment status or lack of or low-level educational qualifications."[56] This definition highlights that poverty is a socio-economic condition that is disadvantageous. However, neither PEPUDA nor jurisprudential pronouncements elaborate on the

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49 Fredman (2010) *Eur Hum Rights Law Rev* 5.

50 Sánchez (2019) *Hum Rights Law Rev* 5.

51 S 1(1)(xvii) of PEPUDA establishes that the Minster referred to in the Act relates to the Minister of Justice and Constitutional Development.

52 S 34(1)(b) of PEPUDA stipulates that the Minister should have given special consideration to the inclusion of the ground on recommendation from the Equality Review Committee within one year. It should be noted that to date the Equality Review Committee is yet to come into existence.

53 S 34(1) of PEPUDA.

54 See s 16 of PEPUDA that determines that every magistrate's court and every High Court is an equality court when the Act is applied.

55 S 34(2)(c) expressly states that a Court could make a finding that socio-economic status should be regarded as a prohibited ground of discrimination, implying that it will become a listed ground after the test in paragraph (b) of the definition of "prohibited grounds" in s 1 of the Act is considered. S 34(2)(c) also states that a Court could interpret socio-economic status to be a part of the listed ground stated in paragraph (a) of definition of "prohibited grounds" on s 1.

56 Emphasis added.

disadvantageous dimensions of poverty within a transformative substantive equality anti-discrimination law framework. Should a court be asked to adjudicate a claim of poverty discrimination, an appropriate theoretical framework that will guide the interpretation of the different dimensions of poverty discrimination is not available. Moreover, how effectively the current anti-discrimination law paradigm can respond to the disadvantageous dimensions of poverty as informed by a transformative substantive conception of equality remain unclear.

In the recent case of *Social Justice Coalition v Minister of Police*, the Western Cape Equality Court, sitting as a High Court, found poverty to be a ground of indirect discrimination and effectively cemented it as a prohibited ground of unfair discrimination.[57] The Court's finding was based on the unequal distribution of resources that led to the insufficient allocation of resources to the Khayelitsha police station, thereby undermining effective policing.[58] More recently, in *Mahlangu v Minister of Labour* the Constitutional Court stated that the exclusion of poor black female domestic workers from the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ("COIDA"), as a form of social security, is unconstitutional as it unfairly discriminated against them on the grounds of gender, race and "class".[59] The Court interchangeably referred to "extreme",[60] "generational"[61] and "abject" poverty,[62] "class"[63] and "social origin".[64] The legal status of poverty, as an independent ground of discrimination, and how it relates to social origin, socio-economic status, disadvantage, condition or class, is not immediately apparent from these judgments.

In the aftermath of these significant legal developments, general questions remain regarding future reliance on poverty as a ground of unfair discrimination. Would the benefit of poverty as a ground be primarily to combat the social exclusion the poor face in terms of stereotyping and prejudice? Would it therefore purely operate as an anti-misrecognition device?[65] Or would it be possible that poverty as a ground could be extended to facilitate challenges to the material inequalities between and within groups?

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57 2019 4 SA 82 (WCC) para 65.
58 Para 41.
59 2021 2 SA 54 (CC). The Court also found two other independent rights violations of s 27(1)(c) read with subsection (2) and human dignity found in s 10. For the rights violation of s 27(1)(c), see para 95. For the violation of the right to dignity, see paras 108-155.
60 Para 39.
61 Para 23.
62 Para 52.
63 Paras 65, 90, 96 and 185.
64 Para 74.
65 S Liebenberg & M O'Sullivan "South Africa's New Equality Legislation – A Tool for Advancing Women's Socio-Economic Equality" (2001) *Acta Juridica* 70 94.

Could it therefore also serve as an anti-maldistribution device?[66] Moreover, could the inclusion of poverty as an anti-maldistribution device possibly provide an opening for challenging policies, practices, or the lack thereof, that preserve or exacerbate poverty?[67]

These questions are informed and guided by the specific conception of substantive equality that underlies the equality right. The core research problem this study engages with is what light the idea of *transformative* substantive equality could shed on the possible inclusion of poverty as a ground of unfair discrimination in the context of adjudication. It further investigates whether this idea could assist litigators and adjudicators in strengthening the restitutionary and anti-discrimination aspects of the right to equality, as well as assisting them in coming to terms with the intersections between the different forms of disadvantage associated with poverty. This exploration poses significant challenges to anti-discrimination law and could help reconfigure the overarching aims of discrimination measures in productive ways.[68] The aim and purpose of poverty as a discrimination provision is still unclear and in need of development. The study therefore proposes the following research questions, hypotheses and aims.

1 3 Research questions, hypotheses and aims

Considering the motivation and background above, together with the description of the core research problem, this study explores the following primary research question: What is an appropriate theoretical framework for conceiving poverty as a ground of unfair discrimination, and what are the implications for its adjudication under section 9 of the Constitution and PEPUDA? The overarching research question will be approached by considering the following supplementary research questions.

The first supplementary research question that will be explored is the following: What is an appropriate theoretical framework for conceptualising poverty as a ground of unfair discrimination? The correlated hypothesis is that a transformative substantive equality framework provides an appropriate theoretical interpretative foundation for conceiving and adjudicating poverty as a ground of unfair discrimination.

The second supplementary research question the study investigates is: What are the possibilities and potential pitfalls of conceiving poverty as a ground of unfair discrimination within the framework of transformative substantive equality under the Constitution and PEPUDA? The hypothesis linked to this question is that such an

66 Liebenberg & O'Sullivan (2001) *Acta Juridica* 94.
67 94-95.
68 Fredman *Discrimination Law* 230.

interpretation of the Constitution and PEPUDA's discrimination provisions provide significant possibilities in litigating and adjudicating poverty within an anti-discrimination law framework. It also presents several difficulties, which must be investigated.

The third supplementary research question that the study investigates is: What are the implications for the interpretation and adjudication of the constitutional guarantee of non-discrimination and PEPUDA in terms of judicial legitimacy and competency issues? The hypothesis tied to this question is that a transformative substantive equality interpretation of the prohibition of non-discrimination has far-reaching implications for issues of judicial legitimacy and competency.

Ultimately, this study aims to provide an interpretative framework for the conceptualisation and adjudication of poverty as a ground of unfair discrimination under the Constitution and PEPUDA. This framework is important, as it would elucidate legal duties and obligations on the state and private sphere.[69] Moreover, such a framework could assist courts and litigators to establish the legal obligations that flow from anti-discrimination law. Further, such a framework could help identify the potential and drawbacks of the current anti-discrimination law framework to respond to challenges of discrimination based on poverty.

1 4 Methodology

The study departs from transformative constitutionalism that emphasises the importance of using law as one of the tools for socio-economic change.[70] In the context of South Africa's legalised discriminatory systems of colonialism and apartheid, which produced enduring structural economic inequality, transformative constitutionalism refers to a political project that aims at bringing about extensive socio-economic transformation via political methods anchored in law.[71] This requires a protracted process where the Constitution should be interpreted, implemented, and enforced through various democratic avenues to change all unjust social, economic and political arrangements into a "participatory, and egalitarian" direction.[72] As a result, the idea of transformative constitutionalism does not make a sharp break between law and politics. Rather, it is sensitive to the type of political ideas that should enter the terrain of the protracted process that the Constitution demands. This study aligns itself with the critical stance that

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69 S 9 of the Constitution states that neither the state (subsection 3) nor any person (subsection 4) may unfairly discriminate against anyone; s 6 of PEPUDA.

70 C Albertyn "Substantive Equality and Transformation in South Africa" (2007) 23 *SAJHR* 253 255.

71 Klare (1998) *SAJHR* 150.

72 150.

has warned against an overly optimistic or romanticised view of the Constitution, but that has not abandoned the ideal of constitutionalism and has sought to press for fundamental reform by reimagining the law, the Constitution, and jurisprudence.[73] Such a reimagination requires a self-reflexive process that draws from theoretical insights outside of law to infuse it with meaning.[74]

This study relies on the work of Nancy Fraser, whose scholarship is grounded in critical social theory, to develop the implications of a transformative understanding of substantive equality for the conceptualisation of poverty as a ground of discrimination.[75] The tradition of critical social theory has its inception with a group of neo-Marxist thinkers who engage with the question of what poverty eradication, as opposed to poverty alleviation, would entail.[76] The theory, which roots back to the Frankfurt School in Germany,[77] extends and problematises the thought of Karl Marx.[78]

Broadly, critical social theory comprises three dimensions. As a start, critical theory is normative in that it postulates a normative ideal. Flowing from this ideal, it diagnoses which conditions are not met and how that impedes the realisation of the stipulated normative ideal. Finally, critical social theory aims to produce a *praxis* that provides a workable and practical remedial solution to the problems that have been diagnosed. Critical social theory is therefore interested in the underlying power relations, contradictions and structural forms of domination that shape impoverished people's deprivation.[79] Fraser aligns herself with this theoretical tradition and uses Marxist thought to critique contemporary social, economic, and political phenomena within capitalist societies.[80]

Fraser's normative theory of justice, understood as "parity of participation", resonates with a transformative understanding of substantive equality that seeks to address the underlying structures that generate deprivation. Her account of justice, which focuses on

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[73] Van Marle (2019) *Law Democr Dev* 203. This is not to say that other possibilities such as abandoning the constitutional project altogether, as it manifests and furthers past injustices, is not a possibility. The abolitionist stance engages fruitful ideas in showing the limits of rights discourses and the Constitution and paves a way for a possible different possibility; JM Modiri "Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence" 34 (2018) *SAJHR* 300-325.

[74] K Klare "Legal Theory and Democratic Reconstruction: Reflections on 1989" (1991) 35 *UBC L Rev* 69 101.

[75] C Browne *Critical Social Theory* (2016) 9 where Browne marks Fraser as one of the foremost contemporary critical theorists for global justice conceptions.

[76] *Browne Critical Social Theory* 1-25.

[77] 1-25.

[78] EO Wright *Foundations of Approaches to Class Analysis* (2005) 5.

[79] Browne *Critical Social Theory* 1-25.

[80] N Fraser "Behind Marx's Hidden Abode" in P Deutscher & C Lafont (eds) *Critical Theory in Critical Times* (2017) 143-146.

three dimensions, namely distribution, representation, and recognition, enables a critical understanding of the intersecting economic, political, and socio-cultural injustices faced by impoverished people. This conception is useful in trying to come to terms with the intersectional nature of poverty discrimination. She also provides a helpful analysis of the ability of different remedial tools to transform the various dimensions of poverty discrimination. Her work is therefore highly relevant to this study given South Africa's unjust socio-economic arrangements arising out of the intersections of race, gender, and class injustices.[81] Her work should not simply be viewed as a Euro-American theory as she specifically theorises within the discipline of global justice and examines cross-cutting transnational economic forces.[82] The study also draws on the scholarship of South African critical legal race and feminist theorists and, more recently, a group labelling themselves as "classcrits" that use neo-Marxist economic analyses to critique the nexus of law and economic inequality.[83]

Drawing from these theoretical insights, this study asks whether Fraser's conception of justice as parity of participation could facilitate a transformative *praxis* for the prohibition of discrimination based on poverty that could enable the creation of roughly equal political, social, and economic conditions. Thus, the three dimensions will give substance to the interests that impoverished people's right to equality and non-discrimination seek to protect and enhance.[84] These dimensions provide a diagnostic framework to determine which dimensions of impoverished people's right to equality and non-discrimination are infringed. In turn, the right to equality and non-discrimination provides a means for achieving equality by providing a legal avenue for contesting structural exclusion.[85] Hence, this study extends this legal avenue to critical social theory's objective to produce a *praxis* that is a transformative, workable and practical

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81 See the implications of Fraser's normative core of justice as parity of participation in Chapter 2 parts 2 2 1 and 2 3 1.

82 For some recommendations of other theoretical approaches, see Chapter 6 part 6 3.

83 A Mutua "Introducing Classcrits: From Class Blindness to a Critical Legal Analysis of Economic Inequality" (2012) 56 *Buff L Rev* 859-931.

84 In *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at paras 54-55 the Court held that the Constitution is not merely a formal document that regulates public power, but it also expresses an "objective, normative value system" in founding constitutional values. The endorsement of an objective normative value system relates to the core values constituting substantive equality that underlie the right to equality and non-discrimination. In this respect, the multitude of values of democracy, substantive equality, human dignity, and freedom constitute the right to equality and non-discrimination. Courts are also obligated to interpret the right to equality and non-discrimination within the purview of these values in terms of s 39(1)(a) of the Constitution. Moreover, the values of openness, democracy and social justice also have a bearing on the interpretation and adjudication of various parts of a discrimination claim. See further Chapter 3 part 3 2 3 2.

85 H Botha "Equality, Dignity, and the Politics of Interpretation" (2004) 19 *SA Public Law* 724 731.

solution to the structural issues of poverty discrimination. Against this background, this study also investigates how Fraser's remedial tools could provide a realistic yet ambitious vision for each dimension and its intersections of poverty discrimination.

The study will proceed to evaluate and analyse whether the current constitutional and legislative scheme of unfair discrimination law can respond effectively to the intersecting dimensions of poverty discrimination. The study then critically examines how various parts of an unfair discrimination analysis can respond to the three intersecting conditions of parity of participation. It will focus on an unfair discrimination analysis under both section 9 of the Constitution and PEPUDA. Even though PEPUDA will be relied on in the majority of cases, in line with the principle of subsidiarity, section 9 of the Constitution must be relied upon where provisions of PEPUDA or other legislation are constitutionally challenged.[86] Section 9 and its interpretation in case law must also be considered when interpreting PEPUDA,[87] which codifies and clarifies many aspects of the Constitutional Court's jurisprudence.[88] The study considers the interpretation of the two causes of action interchangeably and indicate throughout the evaluation where there are differences and the implications of these differences.

The study extensively analyses case law where poverty either was invoked expressly as a ground of unfair discrimination or indirectly influenced a court's decision. Where these cases are silent, the study will draw from discrimination jurisprudence relating to other prohibited grounds.

In considering the implications of the legitimacy and competency issues arising in adjudicating poverty discrimination, the study evaluates and analyses current jurisprudence where issues of poverty were discussed and influenced the Court's pronouncements. In addition, it draws from transformative constitutional scholars' work to develop a framework that could navigate these concerns in a finding of unfair poverty discrimination. Thereafter, it explicates the remedial provisions under the Constitution and PEPUDA and examines what possibilities these remedial powers pose to mitigate legitimacy and competency issues while issuing remedial orders that can vindicate impoverished people's right to equality and non-discrimination.

1 5 Scope and limitations

86 *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) para 40.
87 S 3 of PEPUDA stipulates that there should be reliance on the Constitution when PEPUDA is interpreted.
88 Albertyn et al *Introduction* 4.

Poverty and inequality in South Africa are complex and persistent phenomena with many avenues for redress. This study only engages this phenomenon from the perspective of anti-discrimination law within a South African judicial setting. It should be emphasised that courts have a limited function, and that other democratic institutions and organisations should also be responsive to poverty discrimination claims. These include, but are not limited to, the South African Human Rights Commission,[89] the Public Protector,[90] the media,[91] petitions, assemblies and protest actions[92] and a phenomenon called "constitutionalism from below".[93] Moreover, discrimination norms also bind the legislature and the executive arms of government.[94] How poverty as a recognised ground of unfair discrimination must influence the development of policy and legislation is a critical area for future research, but not the direct focus of this study.

Other issues that fall outside the scope of the study relate to the several practical and administrative issues that ensue with conceiving poverty as a ground of unfair discrimination. For example, the high cost of litigation and the denial of access to justice[95] pose significant challenges for impoverished people to use judicial fora to make claims.[96] In addition, this study does not embark on an extensive investigation regarding negative judicial attitudes towards the poor[97] and a conservative judicial ideology and culture[98] that may make the value added by the recognition of poverty as a ground of discrimination appear doubtful.

An important delimitation of the study is that the implications of the broader economic stratifications of the grounds of "socio-economic status" under PEPUDA or "social origin" that are enumerated in the Constitution and PEPUDA are not considered. Another delimitation pertains to how poverty interacts with other status grounds. This study delimits these interactions to the status grounds of race, gender, and sex. Other status

89 S 181 (1)(b) of the Constitution.
90 S 181 (1)(a).
91 S 16(1)(a).
92 S 17.
93 GW Anderson "Societal Constitutionalism, Social Movements, and Constitutionalism from Below" (2013) 20 *Indiana J Glob Leg Stud* 881-906.
94 S 8(1) of the Constitution.
95 M Jackman "Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian Charter and Human Rights Law" (1994) 2 *Rev Const Stud* 76 78-79.
96 SBO Gutto *Equality and Non-Discrimination in South Africa* (2001) 257-277.
97 Jackman (1994) *Rev Const Stud* 8.
98 On an explication of a conservative judicial culture and ideology, see Klare (1998) *SAJHR* 156-166; M Pieterse "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" (2004) 20 *SAJHR* 383 396-399.

grounds that are also significantly affected by poverty are not limited to, but include, citizenship, disability, sexual orientation, age, and HIV status.[99]

Furthermore, as is argued and sustained throughout this study, poverty discrimination adversely affects the equal enjoyment of all rights and freedoms. Increased consideration must be given to how poverty as a ground of unfair discrimination relates to the enjoyment of various specific rights and freedoms.

The study does not engage with comparative jurisprudence related to similar grounds such as socio-economic condition, disadvantage or status that have emerged in other jurisdictions such as Canada,[100] Australia,[101] and Ireland.[102] Finally, this study also does not extensively engage with international and regional human rights law instruments and soft law standards.[103]

1 6 Outline of chapters

Chapter 2 introduces the theoretical approach that guides the conception and adjudication of poverty as a ground of unfair discrimination. This chapter situates anti-discrimination measures within the framework of transformative substantive equality. In doing so, it explores how Fraser's concepts of transformation as "nonreformoist reform", parity of participation, representation, redistribution, and recognition can inform a conception of substantive equality.

Chapter 3 tracks the general features of a discrimination claim instituted under the Constitution and PEPUDA. It then introduces preliminary issues of a poverty discrimination claim. First, it considers the principle of subsidiarity. Second, it evaluates how poverty discrimination could be interpreted to bind the state and private sphere to

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99 These listed grounds are enumerated in the Constitution in s 9(3) and PEPUDA in s 1(1)(xxiii)(a).

100 There are several provincial statutes in Canada that include "social condition" as a prohibited ground of discrimination. The Quebec Charter of Human Rights and Freedoms of 1975 s 10; New Brunswick Human Rights Act RSNB of 1973 as amended by RSNB of 2004 s 1(1); Northwest Territories Human Rights Act SNWT of 2002 s 2.

101 See M Thornton "Social Status: The Last Bastion of Discrimination" (2019) 5 *Anti-Discrim Law Rev* 10-12.

102 See T Kadar *An Analysis of the Introduction of Socio-Economic Status as a Discrimination Ground* Equality and Rights Alliance (2016).

103 See "fortune" as enumerated in Article 2 of the African Charter on Human and Peoples' Rights, (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc CAB/LEG/67/3/Rev.5; see International Covenant on Economic, Social and Cultural Rights (Adopted on 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 article 2(2). In this regard, see "economic and social situation" as interpreted by Committee on Economic, Social and Cultural Rights *General Comment 20 Non-Discrimination in Economic, Social and Cultural Rights* (para 35) (2009) UN Doc E/C.12/GC/20. See the brief references made to international human rights standards in Chapter 2 parts 2 2 1 and 2 4, and Chapter 4 part 4 2 1 1 1.

enable transformative substantive equality. Third, it investigates the normative content of poverty discrimination by determining the transformative matrix of duties imposed by the right to equality and non-discrimination under the Constitution and PEPUDA. In addition, the chapter analyses current definitions of grounds akin to poverty and formulates a possible definition from a transformative substantive equality perspective.

Chapter 4 evaluates and analyses to what extent the jurisprudence under section 9 of the Constitution and PEPUDA can respond to discrimination on the ground of poverty within the framework of transformative substantive equality developed in chapter 2. It develops an unfair discrimination analysis consisting of three disentangled inquiries. First, it introduces the discrimination inquiry. Thereafter, it crafts a reconsidered fairness inquiry. In this regard, the chapter elaborates first on a context-sensitive adjudication method that must guide the second part of the unfair discrimination analysis pertaining to the impact of the discrimination on the impoverished claimants. It considers the current impact factors in light of the three conditions for parity of participation advanced in chapter 2, which provide an interpretative basis to understand the vulnerability of impoverished claimants. Lastly, it postulates the features of an optimal transformative substantive equality justification inquiry that considers the various factors relevant to the justifications for poverty discrimination which respondents may raise.

Chapter 5 focuses on judicial legitimacy and competency issues that could pose obstacles to the successful litigation of claims based on poverty discrimination. This chapter sheds light on the possibilities and limits of a transformative constitutional dialogue as a response to the justiciability issues that emerge. The chapter also considers potential remedies a court could order to strike a balance between respecting the functions of the other branches of government and taking its commitment to transformative substantive equality seriously. In practically actualising this balance, the chapter particularly considers the various transformative participatory remedies available in direct application of section 9 of the Constitution and section 21 of PEPUDA.

Chapter 6 synthesises the study. It draws attention to the main research findings concerning the key issues identified in this study. From this, it makes recommendations and indicate areas for further research.

CHAPTER 2: TRANSFORMATIVE SUBSTANTIVE EQUALITY

2 1 Introduction

The concept of transformative substantive equality is still inchoate, especially in offering an appropriate interpretative framework to conceptualise poverty as a ground of unfair discrimination. This chapter investigates how Fraser's egalitarian theory, with its emphasis on a normative core of justice, three socio-multidimensional conditions and its transformative *praxis* could inform the features of transformative substantive equality.

In doing so, it commences by setting out Fraser's three socio-multidimensional conditions that will become the diagnostic basis for detecting instances of poverty discrimination. Thereafter, it considers Fraser's transformative *praxis* as "nonreformist reform" that will become the remedial framework for each dimension of poverty discrimination.

This chapter then proceeds to extensively analyse each dimension of poverty discrimination within a transformative substantive equality constitutional framework. It first considers whether the political frame could assist courts in coming to terms with the pervasive political marginalisation of impoverished people. Thereafter, it considers how poverty as a recognised ground of discrimination could enable transformative representation in a judicial setting where impoverished people's voices, grievances and interests are overlooked or silenced in ordinary democratic forums. The focus then shifts to examining whether Fraser's conception of maldistribution could enable the redistributive potentials of impoverished people's right to equality and non-discrimination. By doing so, it investigates the material dimensions of poverty discrimination. Hereafter, it considers what remedial strategies could inform the breaking of the cycle of material deprivation and disadvantage faced by impoverished people. Lastly, this chapter explores how Fraser's recognition frame could assist in capturing impoverished people's equal moral worth. In conclusion, the chapter considers whether impoverished people could be regarded as an identifiable group and, if so, what remedial strategies would avoid the stigmatisation of impoverished people while simultaneously offering a basis to recognise their peculiar lived realities.

2 2 Towards a transformative conception of substantive equality

South Africa has a rich equality jurisprudence that endorses the value of substantive equality.[1] In a legal sense, substantive equality, broadly understood, is the opposite of formal equality.[2] The former aims for equality of outcome and the latter for equality of treatment.[3] Formal equality is rooted in liberal legalism that requires equality of treatment, regardless of stark differentials between individuals and groups.[4] It is regarded as formal because equality is divorced from the relevant social and historical context. Formal equality would merely treat poverty discrimination as irrational and arbitrary manifestations of an otherwise just socio-economic order. A formal and liberal conception of non-discrimination norms would apply ostensibly neutral standards that reflect the interests of institutionalised norms and standards.[5]

Critical legal theorists have therefore challenged liberal legalism that sees people in an abstract and individualistic manner devoid of relationships and unjust socio-economic structures.[6] As a response, critical theorists introduced substantive equality to establish that people are embedded in concrete realities of social and economic inequality.[7]

However, numerous scholars have indicated that the form of substantive equality the Constitutional Court's jurisprudence illustrates is open for criticism.[8] Albertyn indicates that the strand of substantive equality that can be distilled from the jurisprudence can be labelled as liberal-egalitarian.[9] A liberal-egalitarian idea of equality retains the entrenched social, political and economic state of affairs, restricts and prevents the redistribution of power, wealth and resources and safeguards white, heteropatriarchal and middle-class norms as the standard.[10] The liberal-egalitarian approach results in somewhat expanding the realisation of rights and access to resources to impoverished people and

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1 For some case law in terms of the equality and non-discrimination right that departs from substantive equality as a subset of transformative constitutionalism, see *Minister of Finance v Van Heerden* 2004 6 SA 490 (CC) para 142; *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 29; *Mahlangu v Minister of Labour* 2021 2 SA 54 (CC) paras 77, 79, 89, 106; *King v De Jager* 2021 SA 4 (CC) paras 47, 77, 165, 167, 168.

2 C Albertyn & B Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" (1998) 14 *SAJHR* 248 249.

3 250.

4 C Albertyn & B Goldblatt "Equality" in S Woolman & M Chaskalson (eds) *Constitutional Law of South Africa* 2 ed (2002) 35-1 35-6.

5 35-6-35-7.

6 Albertyn & Goldblatt (1998) *SAJHR* 251.

7 252.

8 C Albertyn "Substantive Equality and Transformation in South Africa" (2007) 23 *SAJHR* 253 255; H Botha "Equality, Plurality and Structural Power" (2009) 25 *SAJHR* 1 3, 22-23; P de Vos "From Heteronormativity to Full Sexual Citizenship?" (2008) 1 *Acta Juridica* 254 256-261; S Fredman "Substantive Equality Revisited" (2016) 3 *Int J Const Law* 712 713-738; C Albertyn "Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion Towards Systemic Justice" (2018) 34 *SAJHR* 441 441-476.

9 Albertyn (2018) *SAJHR* 451.

10 451.

marginalised groups. This approach is highly inclusive, but it does not fundamentally restructure the socio-economic *status quo* as it incorporates impoverished people but in a subordinate manner. Although this approach "lifts" impoverished people out of calculable sufficiency thresholds, it fails to establish ceilings to inequalities and address the structures that create deprivation and inequality.[11] In addition, classic liberal bills of rights typically safeguard individual freedoms of, for example, property, contract, and testation. These individual freedoms enable an unfettered accumulation of wealth and discourage state regulation.[12]

A transformative conception of substantive equality instead invites law to detect and remedy the structural barriers that entrench inequality in, for example, the categories of race, gender, and class. The law is therefore conceived, not as a neutral body of rules, but as playing an active role in configuring material inequality between social groups.[13] Legal instruments and rights, and the social discourses associated with them, are seen as a product of political choices that would either challenge poverty discrimination or preserve the inequalities that underlie it. There exists a real danger that poverty as a ground of unfair discrimination can be co-opted into the current liberal-egalitarian rather than the transformative substantive equality paradigm. This is why it is necessary to draw from work outside of law to determine the transformative potentials and limits of impoverished people's right to equality and non-discrimination.[14] Fraser's normative conception of justice has influenced many of the critiques attached to a liberal and formalistic conception of substantive equality.[15] Her theory of justice could arguably inform the conceptualisation of poverty as a ground of unfair discrimination within a constitutional framework.[16]

Fraser's normative account of justice rests on her conception of "parity of participation".[17] According to this norm, justice commands social arrangements that will enable everyone to interact with each other as peers in all forms of social life.[18] The

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11 C Albertyn "(In)equality and the South African Constitution" (2019) 10 *Dev South Afr* 1 8-9.
12 R Dixon & J Suk "Liberal Constitutionalism and Economic Inequality" (2018) 85 *U Chi LR* 369, 385.
13 A Mutua "Introducing Classcrits: From Class Blindness to a Critical Legal Analysis of Economic Inequality" (2012) 56 *Buff L Rev* 866.
14 Chapter 1 part 1 4.
15 S Fredman *Discrimination Law* 2 ed (2011) 16-17, 32-33; S Liebenberg "Needs, Rights and Transformation: Adjudicating Social Rights" (2006) 17 *Stell LR* 5-36; Albertyn (2018) *SAJHR* 462, 466-467.
16 See further on the various synergies between Fraser's normative core of justice and the multifaceted conception of democracy endorsed by the Constitution as interpreted by jurisprudence in part 2 3 1 1 below.
17 N Fraser & A Honneth *Redistribution or Recognition? A Political Philosophical Exchange* (2003) 29.
18 Fraser & Honneth *Redistribution or Recognition?* 38.

principle deems any social, economic, and political-institutional arrangement that is an obstacle to parity of participation as unjust. Fraser theorises three conditions to be met to create substantively equal conditions for people to participate as equals in social life.[19] The three conditions are "representation", which presents the political, "redistribution", which presents the economic, and "recognition", which presents the socio-cultural.[20] Respectively, these conditions represent the "how", "what" and "who" of justice. The following section considers how these conditions could inform the intersecting structural dimensions of poverty discrimination.

2 2 1 The intersecting structural dimensions of poverty discrimination

Fraser's three conditions expand on a transformative conception of substantive equality that aims to achieve social and economic equality and eradicate structural inequalities.[21] It also seeks to enhance voice and participation and combat pervasive stereotyping, humiliation, and denigration.[22] The three preconditions for equal participation provide the basis of a critique of overreliance on a master frame for transformative change, which fails to come to terms with the intersecting nature of disadvantage. In the South African discrimination jurisprudence there is a tendency to over-rely on only the misrecognition aspect of discrimination claims.[23] This is an important aspect, as it captures the pervasive denial of the equal moral worth of groups that are discriminated against. However, misrecognition as a master frame tends to overlook the systemic material disadvantages and political marginalisation experienced by vulnerable groups.[24]

In the case of poverty discrimination, the disadvantage that poor people face is usually exclusively seen as a matter of distribution. The disadvantage is usually perceived as a result of the operation of neutral distributive market principles, or poor people's choice to be poor.[25] This perspective fails to recognise that some of the disadvantages attached to poverty are rooted in unjust patterns of production and distribution. It also overlooks the socio-cultural and political dimensions of the injustices attached to class structures.[26]

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19 N Fraser "Social Exclusion, Global Poverty, and Scales of (In)Justice: Rethinking Law and Poverty in a Globalizing World" (2011) 22 *Stell LR* 452 455.
20 Fraser & Honneth *Redistribution or Recognition?*; N Fraser *Scales of Justice: Reimagining Political Space in a Globalizing World* (2009).
21 Albertyn & Goldblatt "Equality" in *CLOSA* 35-13.
22 Fredman (2016) *Int J Const Law* 731-732.
23 Albertyn & Goldblatt (1998) *SAJHR* 273; Fredman (2016) *Int J Const Law* 724-727.
24 Albertyn & B Goldblatt (1998) *SAJHR* 257-260; S Cowen "Can 'Dignity' Guide South Africa's Equality Jurisprudence?" (2001) 17 *SAJHR* 34 51.
25 Fraser & Honneth *Redistribution or Recognition?* 23.
26 Fraser & Honneth *Redistribution or Recognition?* 23-24; Fraser *Scales of Justice* 12-29.

For example, mobilising for economic transformation would require a fight against the "culture-of-poverty"[27] attitudes, which assume that the poor "simply get what they deserve".[28] It thus also entails the struggle for recognition and equal political voice. Fraser argues that, while these distinct dimensions should not be reduced to each other, one should be alive to the ways in which they interact. Moreover, their interactive tensions should not be collapsed but instead embraced.[29] Similarly, legal theorists, have argued for a "complex"[30] version of substantive equality that entails many dimensions.[31] A central tenet of a transformative conception of substantive equality would therefore be that the tension between these dimensions should not be resolved but ultimately embraced to faithfully address the many dimensions of the social exclusion of the poor.[32]

It is imperative to capture the intersecting dimensions of poverty discrimination under a transformative and rights-centric Constitution.[33] Within international human rights discourse, Campbell argues that initially poverty was only understood as the "insufficient income to buy a minimum basket of goods and services."[34] She argues that this definition encapsulates only one aspect of poverty as it focuses on the inability to retrieve economic resources to have access to socio-economic goods.[35] Therefore, in international human rights law, there has been a move to expand the understanding of poverty from mere economic want. The Committee on Economic, Social and Cultural Rights ("CESCR") has formulated an understanding of poverty that emphasises its intersecting conditions. They state that poverty may be defined as:

> "[A] sustained or chronic deprivation of resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights."[36]

Within international human rights law discourse, it is now well established that poverty is a condition that implicates violations of various rights and freedoms, if not undermining

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27 Fraser & Honneth *Redistribution or Recognition?* 24.

28 Fraser & Honneth *Redistribution or Recognition?* 24. Botha referring to these tensions as "complex" equality" in H Botha "Equality, Dignity, and the Politics of Interpretation" (2004) 19 *SA Public Law* 724 736-734; Fredman (2016) *Int J Const Law* 712–738; Albertyn (2018) *SAJHR* 441-468.

29 Fraser *Scales of Justice* 12-29.

30 H Botha "Equality, Dignity, and the Politics of Interpretation" (2004) 19 *SA Public Law* 724 736-734.

31 Fredman (2016) *Int J Const Law* 712–738; Albertyn (2018) *SAJHR* 441-468.

32 Fraser *Scales of Justice* 5-7.

33 M Pieterse "What Do We Mean When We Talk About Transformative Constitutionalism?" (2005) 20 *SA Public Law* 155-166.

34 M Campbell *Women, Poverty, Equality: The Role of CEDAW* (2018) 8.

35 8.

36 United Nations Committee on Economic, Social and Cultural Rights *Statement on the Substantive Issues Arising in the Implementation of ICESCR: Poverty and ICESCR* (2001) UN Doc E/C.12/2001/10 7.

them all.[37] Such a conception of poverty underscores the intersecting structural dimensions of poverty discrimination that impede impoverished people's ability to fully and equally enjoy all of the rights and freedoms to which they are entitled.

The intersecting conditions faced by impoverished people should also be viewed as structural social exclusion.[38] The social exclusion experienced by impoverished people derives from the structural factors that deny them the necessary resources, equal moral worth and political voice that would enable full and equal participation. This is a severe obstruction of parity of participation, as being excluded is considerably more severe than being included but marginalised or included in a subordinate way.[39] Those who are included on subordinate terms can participate in social life but cannot participate as peers. Those who are structurally excluded cannot participate, let alone participate as peers with equal bargaining power.

The intersecting structural dimensions of poverty discrimination are informative for South Africa's discrimination jurisprudence, which distinguishes permissible from impermissible forms of discrimination.[40] If the impugned discrimination deepens impoverished people's disadvantage by creating obstacles to the preconditions for equal participation it will have a severe impact on them.[41] The numerous disadvantages impoverished people face in fulfilling these preconditions are ingrained into the fabric of every sphere of society. Thus, a transformative notion of substantive equality directs its focus towards structural inequalities that give rise to individual instances of discrimination.[42] This moves beyond a fault-based understanding of discrimination and requires structural discrimination and its consequences to be remedied.[43] In this respect, Khaitan argues that the purpose of a prohibited ground of unfair discrimination is to protect, preserve or enable people's well-being by eradicating the stubborn, widespread and relative disadvantage and barriers that members of a specific ground face.[44]

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37 United Nations Special Rapporteur on Extreme Poverty and Human Rights *Final Draft of Guiding Principles on Extreme Poverty and Human Rights* (2012) UN Doc A/HRC/C/21/39.

38 Fraser (2011) *Stell LR* 455.

39 N Fraser "Identity, Exclusion, and Critique: A Response to Four Critics" (2007) 6 *Eur J Political Theory* 305 315.

40 Chapter 4 part 4 3.

41 Chapter 4 part 4 3 2.

42 *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 29. para 29.

43 S Fredman *Human Rights Transformed* (2008) 313-315.

44 T Khaitan *A Theory of Discrimination Law* (2015) 91. Already in 2002, the UN High Commissioner for Human Rights argued that the "defining feature of a poor person is that she has very restricted opportunities to pursue her well-being." United Nations Office of the High Commission for Human Rights *Human Rights and Poverty Reduction: A Conceptual Framework* (2004) UN Doc HR/PUB/04/1 15.

When considered through the lens of these intersecting structural conditions, the recognition of poverty as a ground of unfair discrimination will assist in detecting and responding to different types of injustice. It will act as an anti-misrepresentation device, which would require more or wider participation, in cases where impoverished people's political voice is overlooked or silenced. Further, it could require government to prioritise the duty of non-discrimination towards impoverished people when governmental budgets are planned and allocated. In other instances, poverty as a ground of unfair discrimination would operate as an anti-maldistribution device that requires positive (re)distributive measures to halt, minimise or eliminate material disadvantage. For example, it may require a private company to refrain from displacing the urban poor to improve buildings and attract new business. This would mean that there is a need to prioritise impoverished people's access to quality housing within reach of their socio-economic endeavours by being closer to schools, hospitals, and job opportunities.[45] In other instances, a discrimination claim can be rooted in a misrecognition injustice. For example, this may entail challenging municipal by-laws that treat poor and homeless people as a threat, perceiving them as dirty and a burden that must be removed so that public spaces can be economically more prosperous.[46]

Fraser provides a helpful *praxis* for challenging the institutionalised impediments to impoverished people's full and equal participation and remedying ingrained forms of discrimination. This will be an important consideration when courts determine whether a duty bearer has taken steps to curb or eliminate discrimination,[47] or when they craft relief during the remedial stage of the discrimination claim.[48]

2 2 2 Transformation as "nonreformist reform"

To change entrenched forms of subordination and disadvantage within complex capitalist societies, Fraser proposes that transformation should not be understood within the dichotomy of reform against revolution or between incremental and "apocalyptic"

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[45] See the recent significant case of *Adonisi v Minister for Transport and Public Works Western Cape* 2020 ZAWCHC 87 (WCHC) ("*Tafelberg* judgment") paras 3 and 77 where the Court set aside the sale of the Tafelberg site in Sea Point to a private owner by holding that the sale of the property was legally flawed. The Court held it did not appropriately incorporate the normative content of the right to access to housing that is a significant tool to address spatial segregation that persists. The Court highlighted the legislative provision made in the Housing Act 107 of 1997 providing for the general principle of promoting housing needs of marginalised groups disadvantaged by unfair discrimination.

[46] As is illustrated by the recent by laws of the City of Cape Town that criminalise homelessness in W Holness "eThekwini's Discriminatory By-Laws: Criminalising Homelessness" (2020) 24 *Law Democr Dev* 468-511.

[47] Chapter 4 part 4 4 5 2.

[48] Chapter 5 part 5 4.

change.[49] In a similar vein, Klare, in describing transformative constitutionalism, has "in mind a transformation vast enough to be inadequately captured by the phrase 'reform,' but something short of or different from 'revolution' in any traditional sense of the word."[50] Recently, due to the severity of the Covid-19 pandemic that reinforced the entrenched nature of structural poverty, Bond et al recall the dismay of young activists reprimanding the Constitution as an obstruction for a socio-economic revolution.[51] However, they argue that there is a real and urgent need to combine the two strategies as "revolutionary reforms" to find tactics to both support and oppose the programmes and implementation strategies of the democratically elected branches of government.[52] "Revolutionary reforms" enable contextually designed "reforms" with an "activist base" to put an end to the causes and outcomes of poverty.[53] Within the critical social theory tradition, Fraser proposes the terminology of "nonreformist reforms" to put forth a practical, workable and attainable solution for unjust socio-economic arrangements.[54]

Transformation as "nonreformist reforms" is informative for the structural nature of poverty and perpetual inequality found in post-apartheid South Africa. The redress of the various forms of poverty discrimination would necessitate a long-term process of restructuring and improving production relations and (re)distributive efforts, revaluing impoverished peoples' subordinated status and challenging political barriers that entrench the disadvantages attached to the condition of living in poverty.[55] This long-term process is required as poverty discrimination is a result of four-hundred-odd years of politically calculated spatial ghettoisation, infrastructural neglect, land dispossessions and unequal access to socio-economic goods.[56] This suggests that challenging poverty discrimination requires urgent, prolonged and persistent transformation of the underlying social, economic, legal and political power structures that generate it.[57]

For such a prolonged and urgent transformation, Fraser helpfully distinguishes between affirmative and transformative remedies, and ultimately postulates a

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49 Fraser & Honneth *Redistribution or Recognition?* 74-78.
50 K Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146 150.
51 P Bond, T Zikhali & ET Mdlongwa "South African Food Politics: Human Rights, Security and Sovereignty" in N Bohler-Muller, V Reddy & C Soudien (eds) *Ethics, Politics, Inequality: New Directions – State of the Nation* (2021) 195 200-202.
52 201.
53 201.
54 Fraser & Honneth *Redistribution or Recognition?* 74-78.
55 SBO Gutto *Equality and Non-Discrimination in South Africa* (2001) 233.
56 JM Modiri "Law's Poverty" (2015) 18 *PELJ* 224; T Madlingozi "Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution" (2017) 28 *Stell LR* 123-147.
57 K Klare "Law-Making as Praxis" (1979) 40 *Telos* 123-135.

combination of the two as a transformative "via media".[58] Her "via media" aims to formulate political strategies that could cut across all three conditions of injustice that impoverished people face, which is informative for understanding the limits, potentials, and strategic framing of poverty discrimination claims.

2 2 3 Poverty as a ground of discrimination as a transformative "via media"

Affirmative remedies seek to address the consequences of poverty discrimination such as hunger, thirst, and humiliation without destabilising the underlying unjust social arrangements that produce these consequences. Transformative remedies, on the other hand, seek to strike at the multiple structural sources of poverty discrimination,[59] such as structural socio-economic exclusion, exploitation, unfettered wealth accumulation that reinforces patterns of historic and current privileges, and the purportedly unintended consequences of the market.

Due to the entrenched nature of subordination and disadvantage in capitalist societies, Fraser posits that affirmative and transformative remedies should not be mutually exclusive. An affirmative remedy that is persistently pursued can have transformative effects in the long run.[60] For illustration, social security grants appear to be merely affirmative but if the amounts provided by such grants is set high enough and the grants themselves are persistently provided they can enhance redistributive measures that can put transformative change in motion.[61] Moreover, it should not be viewed as the means for impoverished people to buy other basic quality needs through the market.[62] It will be a transformative strategy if it is coupled with the provision of other quality basic needs.[63] Similarly, an extensive wealth tax might appear to be a transformative strategy, but it

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58 Fraser & Honneth *Redistribution or Recognition?* 78-80.

59 74.

60 78-81.

61 79-80.

62 N Fraser "What Should Socialism Mean in the Twenty-First Century?" (2020) 56 *Socialist Register - Beyond Market Dystopia: New Ways of Living* 294 312-313.

63 See the recent campaign launched by Black Sash that demands that government raise the recent reinstatement of the Covid-19 relief grant to the upper food poverty line of R585 as a matter of urgency and secure a universal basic income grant of R1 268 that meets the upper-bound poverty line for all adults aged 18 to 59, as well as mothers that receive the child support grant without excluding refugees and asylum seekers. Black Sash "Basic Income Support #18to59: Making Human Rights Real" (2021) *Blacksash* <http://www.blacksash.org.za/images/campaigns/basicincomesupport/0547_Blacksash_BIS_A4_Factsheet_-_June2021.pdf> (accessed 08-09-2021)). See further part 2 4 3 at footnote 184 below on the national monetary poverty thresholds.

reveals itself as strictly affirmative if it also does not address the exploitative relations of production and distribution that enables wealth hoarding in the first place.[64]

Affirmative and transformative strategies that are combined and contextually designed, could provide a "via media" for emancipatory change. A “via media” would, for example, initially be an affirmative remedy that is practically achievable but at first transformatively inadequate. However, if the affirmative strategy is rooted in the normative ideal of parity of participation, it can, eventually have emancipatory effects. The difference between affirmative and transformative remedies, also illustrate why the current liberal-egalitarian conception of substantive equality is an inappropriate theoretical framework for conceiving poverty as a ground of unfair discrimination.

The current liberal-egalitarian approach in South Africa can be labelled as an affirmative approach that seeks to address the outcomes of poverty and inequality by somewhat addressing basic need, without addressing the structures that create the basic need. In the South African context, Bilchitz has argued that the liberal-egalitarian approach to poverty alleviation could be a helpful start. In other words, an affirmative approach. In this approach, there is a calculatable level of sufficiency that should set the limits for (re)distribution towards everyone. What happens above that threshold is not a matter for redistribution as it can impede the individual freedom of other people.[65] This view is, however, blind to how poverty and inequality shape and reinforce each other. Moreover, as indicated above, this affirmative approach is highly inclusive, but it creates the veneer of transformative change as it incorporates impoverished people only in a subordinate manner. It also runs the risk of entrenching privileged norms that would render impoverished people to an assimilationist position.[66] In this respect, instances of poverty discrimination should be contextually detected and should focus on the socio-economic structural generators of the impugned discrimination.

Such a focus asks important but uncomfortable questions about the prevailing socio-economic structure that is indisputably capitalist.[67] The equality jurisprudence of the

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64 For the transformative potentials and challenges of an extensive wealth tax in addressing poverty in S Mbewe, I Woolard & D Davis “Wealth Taxation as an Instrument to Reduce Wealth Inequality in South Africa” in C Soudien, V Reddy & I Woolard (eds) *The State of the Nation: Poverty & Inequality: Diagnosis, Prognosis* (2019) 169-186.

65 D Bilchitz “Egalitarian Liberalism: Distributive Justice and the New Constitutionalism (2014) 61 *Theoria* 1 47-69.

66 Fraser & Honneth *Redistribution or Recognition?* 14.

67 Gutto *Equality and Non-Discrimination* 232-233. However, it should be cautioned that in the context of recognising poverty as a prohibited ground, whatever the dominant socio-economic structure underlying poverty and inequality, it would be undesirable to reduce the underlying structure of poverty-based discrimination to a single economic system as poverty can exist within every form of socio-economic ordering. In Fraser’s terms this would amount to “vulgar economism” where the other

Constitutional Court often pronounces that it is necessary to "dismantle"[68] the underlying causes or instances of unfair discrimination.[69] Poverty as a ground of unfair discrimination would not automatically change the inherent structures of a free-market economy and immediately create conducive conditions where everyone can pursue equal freedom and dignity. However, it may provide a link between affirmative and transformative strategies, that if persistently pursued over time, may restructure economic production and (re)distribution. Within the contemporary confluence of complex capitalist and unequal societies, Codou and Manus have suggested that anti-discrimination provisions, notwithstanding their limitations, should be aligned with political, social, and economic emancipation efforts.[70] In addition, Albertyn and Goldblatt argue that different manifestations of inequality are captured in anti-discrimination protections, and their redress is an integral part of the constitutional project of transformation, which is aimed towards structural change.[71]

In concluding this section, the abovementioned discussion indicated that the three conditions for transformative substantive equality should be contextually viewed together if the structural social exclusion of impoverished people is to be effectively redressed through the right to equality and non-discrimination. In addition, the *praxis* that is aimed at remedying the impediments to the realisation of these intersecting conditions, should be contextually crafted to have transformative outcomes. The following sections embark on a deeper consideration of the three interrelated dimensions of poverty discrimination

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intersecting conditions of poverty are overlooked. Fraser (2007) *Eur J Political Theory* 333. Moreover, it would be reductionist to label the South African economy as purely social democratic, purely capitalistic, purely socialist, or purely communist as all these economic systems are prevalent in some form of way. In this respect, South Africa's economy has been defined as a "mixed economy," with a mix of private-sector capitalism, centralised economic planning, and government regulation. However, the current overarching structural economic manoeuvres at the expense of impoverished people's emancipation is the institutionalised and morphing forms of capitalism. For a thorough exposition of the features of the political economy of South Africa from a critical theoretical perspective, see P Bond *Elite Transition: From Apartheid to Neoliberalism in South Africa* (2000) 55-84.

68 *Brink v Kitshoff* 1996 4 SA 197 (CC) para 27.

69 For example, in cases of racial discrimination, the Court often alludes to white supremacy as the underlying cause of racism. See *City Council of Pretoria v Walker* 1998 2 SA 363 (CC) paras 46-47. In instances of gender and sex discrimination, similarly, the underlying cause is labelled as patriarchy. See *Mahlangu* para 18. In cases of discrimination based on sexual orientation the Court refers to "[a] heterosexual norm" that rendered gay men as "deviant". See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 134. In the recent case of *King* at para 205 the concurring minority sheds light on the concept of "patrimonial capitalism" as the driver for the unchecked wealth disinheritance that discriminate against women. The Court, for the concurring minority, trenchantly indicated that "[e]ssentially this is the tendency for wealth to beget wealth and conversely for poverty to beget poverty." In a different context, see the reference to "western capitalism" in *Daniels v Scribante* 2017 4 SA 341 (CC) para 134 concerning the individualistic conception of property rights.

70 AR Coddou & MC Manus "A Fraserian Theory of Anti-Discrimination Law" (2020) 20 *Int J Discrim Law* 89 89-91.

71 Albertyn & Goldblatt "Equality" in *CLOSA* 35-4-35-5.

and the transformative remedial implications for each dimension within a constitutional framework.

2 3 Representation: Addressing the political exclusion of "the poor"

Transformative substantive equality aims to enhance the "political voice"[72] and participation of impoverished people.[73] This is so, as poverty results in a "political death" where the poor are excluded from making justice claims in national and transnational legal and political communities.[74] When the poor are denied platforms to voice their grievances and exclusion, their justice claims are viewed as appeals for "charity" or "benevolence".[75] From a discrimination law perspective, this is where the representation and recognition conditions intersect. Construing struggles against poverty discrimination as a matter of charity diminishes impoverished people's equal moral worth.[76] This would amount to a misrepresentation injustice where poor people are seen as wanting to be poor, and poverty not being viewed as a result of calculated political outcomes.[77] In an effort to counter impoverished people's political marginalisation, Fraser proposes representation strategies that should be incorporated when poverty is recognised as a prohibited ground.

These strategies focus on the "decision-making rules and structures",[78] and ask whose voices are heard in these processes. The decision-making rules and structures relate, *inter alia*, to the electoral system, accountability and oversight mechanisms and public participation in the legislative process. These rules and structures could be skewed against groups such as impoverished people, which would result in their under-representation and the silencing of their voices. Importantly for purposes of this study, decision-making rules and structures also include mechanisms for challenging violations of fundamental rights, and the rules and procedures determining what conditions, prejudices, circumstances, or harms would trigger the anti-discrimination provision. In this context, the addition of poverty as a ground of unfair discrimination could have an

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72 Fraser *Scales of Justice* 146.
73 Fraser (2011) *Stell LR* 455; Fredman (2016) *Int J Const Law* 731–732.
74 Fraser *Scales of Justice* 20.
75 20.
76 Part 2 5 below.
77 For the conception that poverty is an injustice arising out of deliberate political choices, see D Brand, S de Beer & I De Villiers & K Van Marle "Poverty as Injustice" (2013) 17 *Law Democr Dev* 273-297.
78 Fraser *Scales of Justice* 17.

important bearing on "who" and "what" is included or excluded from political contestation, a just distribution of resources, and reciprocal recognition.[79]

The following sections first elaborate on the representation condition to assist courts in coming to terms with the diminished democratic voice of impoverished people. Second, it considers who is bound by the duty of non-discrimination and lastly it examines how poverty as a ground of discrimination could operate as transformative representation within a judicial setting.

2 3 1 Democratic voice and participation under shared power structures

Fraser's theory of justice operates on both substantive and procedural modalities that can assist claims of poverty discrimination in a judicial setting.[80] Under her norm of parity of participation, there is a strong connection between democracy and justice. This is so as determining what amounts to injustice and what would transform it ensues iteratively through democratic participation methods. This translates to representation as having both substantive and procedural dimensions.

In the substantive dimension of representation, courts are one of the important branches of government that must interpret the normative content of impoverished people's right to equality and non-discrimination.[81] This interpretation is important to determine whether and to what extent the impugned discrimination limits impoverished people's equality and non-discrimination right. In the procedural dimension, the normative core also informs the participatory methods to circumvent, amongst others, the violent and oppressive consequences of "apocalyptical" change, especially for marginalised and vulnerable groups.[82] These violent consequences are part of the South African impoverished person's everyday reality that seeks to challenge unjust socio-economic arrangements. These realities include unresponsive representative governmental elites, violent police apparatuses and responses to service delivery protests and the silencing and disregard of impoverished people's voices and lived realities.[83]

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79 Fraser *Scales of Justice* 17.

80 For the implications for transformative remedies, see Chapter 5 part 5 4 1 below.

81 Chapter 3 part 3 2 3 2 and Chapter 5 part 5 2 2 for the conception of a transformative constitutional dialogue between the different branches of government.

82 Fraser & Honneth *Redistribution or Recognition?* 74-78.

83 Mutua (2008) *Buff L Rev* 888-892; J Dugard "Courts and Structural Poverty in South Africa" in B Maldonado (ed) *Constitutionalism of the Global South* (2013) 293 301-303.

As set out earlier, this study is only concerned with the transformative possibilities and limits of poverty as a ground of discrimination within a judicial setting.[84] In this setting, poverty as a ground of discrimination provides impoverished people with a political representation tool to contest their exclusion that was overlooked and silenced in ordinary democratic forums. The following section considers the substantive dimensions of the representation condition that underlie the right to equality and non-discrimination.

2 3 1 1 Democratic voice and participation

Thus far it is trite that impoverished people's grievances and voices are regarded as noise and are often overlooked and silenced by various democratic stakeholders, which has detrimental implications for impoverished people's material well-being and social standing.[85] This is in stark contrast to Fraser's normative ideal of persons as co-participants within constant, open-ended, reflexive, deliberative and participatory social practices that mediate roughly equal political democratic voice.[86] In practical terms, this indicates to what extent impoverished people's interests would be represented and taken seriously in all spheres of social life. Fraser argues that an open-ended reflexive process is mediated by her vision of "radical democracy".[87] Radical democracy is the conviction that democracy necessitates "rough" social, political, and material equality.[88] However, it does not require an absolute equality of these conditions. Nevertheless, by no means can the deepening and unchangeable levels of structural poverty and inequality secure the ability of impoverished people to participate with equal democratic voice.[89] A

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84 Chapter 1 part 1 5.

85 XW Ngiam "Taking Poverty Seriously: What the Poor are Saying and Why it Matters" (19-10-2006) *Abahlali baseMjondolo* <http://abahlali.org/node/27/> (accessed 23-11-2020). From a judicial perspective for the holding that poor people's political say and influence is eroded by their material deprivation, see *South African Transport and Allied Workers Union v Garvas* 2012 8 BCLR (CC) especially at para 61 where the Court held that marginalised and vulnerable groups often only have resort to freedom of assembly to voice their "frustrations".

86 Fraser (2007) *Eur J Political Theory* 334.

87 In the critical theory tradition, there are generally three forms of "radical democracy", namely, the agonistic, the deliberative and the collective strands. Fraser seems to oscillate between various forms and should not be read as advancing one over the other. For a discussion on the various strands of radical democracy and how Fraser's theory of justice applies to it, see M Passerin d'Entrèves "Hannah Arendt and the Idea of Citizenship" in C Mouffe *Dimensions of Radical Democracy: Pluralism, Citizenship, Community* (1992) 145 158-160 and S Wolin "What Revolutionary Action Means Today" in C Mouffe *Dimensions of Radical Democracy: Pluralism, Citizenship, Community* (1992) 240 248-252.

88 N Fraser "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy" (1990) 25 *Social Text* 56 65. In the critical social theory tradition "radical" derives its meaning from the Latin word "radix" which means tracing back to the root or originating source of the problem. Therefore, radical change is intended to be change that is penetrating the roots of the social injustice and replacing it in its totality. The usage of the word "radical" in this study should also be understood in line with the critical social theory tradition.

89 S Friedman *Power in Action: Democracy. Citizenship and Social Justice* (2018) ix.

transformative substantive equality reading of the multifaceted conception of democracy endorsed by the Constitution echoes these sentiments.[90]

The Constitution's conception of democracy serves as a break from a history of legalised political exclusion.[91] In addition, the Constitution marks a significant shift from a strictly liberal conception of democracy.[92] A strictly liberal conception of democracy is the antithesis of a radical conception of democracy as liberal democracy is satisfied with periodic elections and the functioning of a multi-party political system.[93]

The Constitution rather exemplifies a democratic ideal where people should work towards conditions that will enable everyone to determine their own destinies.[94] Persistent poverty is incompatible with the conception of the Constitution as a "postliberal"[95] document that aims to provide the "scaffolding"[96] where the "equal enjoyment of all rights and freedoms"[97] is the "cornerstone" of democratic ideals.[98] This suggests that the equal enjoyment of all rights and freedoms is a precondition for democratic participation.[99] In its preamble, PEPUDA also expresses that the "consolidation of democracy" necessitates eradicating systemic socio-economic inequalities and instances of unfair discrimination. This implies that poverty and the power structures that drive it, stifle democracy as those who have the most resources and secure forms of standing also have the most political influence.[100]

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90 From a textual point of view several connected conceptions of democracy are visible in the constitutional text: representative, participatory, constitutional, and multi-party democracy. See Roux discussing each of the textual forms in T Roux "Democracy" in S Woolman & M Chaskalson (eds) *Constitutional Law* 2 ed (2002) 10-2 culminating in a "deep" or "thick" conception of democracy.

91 *Doctors for Life International v The Speaker of the National Assembly* 2006 6 SA 416 (CC) para 111.

92 *Albutt v Centre for the Study of Violence and Reconciliation* 2010 2 SACR 101 (CC) paras 90-92 where the minority judgment fleshed out the features of South Africa's participatory democracy that aims to support a representative one.

93 Roux "Democracy" in *CLOSA* 10-25-10-26; Friedman *Power in Action* 174, 179, 189-190.

94 Klare (1998) *SAJHR* 153; Friedman *Power in Action* 47-73.

95 Klare (1998) *SAJHR* 151.

96 Albertyn (2019) *Dev South Afr* 1.

97 S 9(2) of the Constitution.

98 S 7(1).

99 Klare (1998) *SAJHR* 154.

100 N Fraser "Legitimation Crisis? On the Political Contradictions of Financialized Capitalism" (2015) *Crit Hist Stud* 167 176. Scholars have indicated that the conditions of poverty and inequality suggest that South Africa somewhat resembles a feudal, oligarchic, or plutocratic state where impoverished people are denied the capacity to self-determine their lot. In a feudal state only those who are wealthy are electable and the hope is that they will advance the interest of impoverished people. In an oligarchic setting, only a few economically elite people rule to maximise their economic, social, and political power at the expense of others. A plutocracy succumbs to moneyed elites as government by the wealthy. See MR Myambo "Capitalism Disguised as Democracy: A Theory of "Belonging," Not Belonging in the New South Africa" (2011) 63 *Comparative Literature* 64-85.

Furthermore, the Constitution's affirmation of deliberative and participatory features of democracy[101] that seek to strengthen a representative form of democracy, could promote a form of democracy that stresses rough equal political, social, and economic conditions. The two features of democracy overlap and serve as a counterweight to the view that in modern representative democracies, citizens' capacity to influence representatives are reduced to periodic elections.[102] A deliberative form of democracy assumes that active public participation can enable people to listen to one another and change their original viewpoints to reach an agreement.[103] A participative conception, in turn, stresses the importance of continuous, often agonistic, participation opportunities and asks for the necessary material, social and political conditions for doing so.[104] However, the quality of impoverished people's participation and deliberation are impeded by systemic and institutionalised material and social disadvantages.[105] Poverty results in structural power asymmetries where disadvantages also eventuate in the denial of political influence and democratic voice.[106]

In the South African discrimination context, the non-discrimination prohibition is a significant political tool for disadvantaged groups to facilitate a "credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of the constitutional framework."[107] Discrimination law seeks to destabilise oppressive economic and social arrangements that generate and sustain entrenched forms of political marginalisation, particularly when it is concentrated within a specific and identifiable group.[108] In addition, the fact that the political marginalisation, social and economic hardship and disadvantage remain disproportionately concentrated within the majority of the poor and black population,[109] places deeper participation duties on all relevant stakeholders to prioritise impoverished people's voices, rights and interests.

The abovementioned substantive preconditions for impoverished people to exert influence in everyday decisions that affect their lives provide a frame for courts to engage with come to terms with the political marginalisation of impoverished people. If one

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[101] *Doctors for Life International v The Speaker of the National Assembly* 2006 6 SA 416 (CC) para 235.
[102] Roux "Democracy" in *CLOSA* 10-15.
[103] 10-15-10-16.
[104] 10-14-10-15.
[105] Botha (2009) *SAJHR* 10-16; Fredman (2016) *Int J Const Law* 712–738.
[106] K Mabasa "Democratic Marxism and the National Question: Race and Class in Post-Apartheid South Africa" in V Satgar (ed) *Racism After Apartheid* (2019) 173-193.
[107] *Minister of Finance v Van Heerden* 2004 6 SA 490 (CC) para 22.
[108] DM Davis & K Klare "Transformative Constitutionalism and the Common and Customary Law" (2010) 26 *SAJHR* 403 410 and 414.
[109] See further below at part 2 5 2 and the need to recognise the intersectional nature of impoverished people's disadvantage.

proceeds from the premise that a claim of poverty discrimination ends up in a court of law as a result of the silencing and disregard of impoverished people's voices, another critical component of transformative substantive equality is the procedural dimensions of democratic voice and participation that warrants investigation.

2 3 1 2 Enhancing democratic voice and participation within a judicial setting

When impoverished people institute discrimination claims, it would require that attention be paid to the procedural challenges of democratic participation theories. The challenges pertain to the inherent power asymmetries in instituting justice claims. One way to break the vicious cycle in which poor people are underrepresented and silenced in decision-making, is by addressing the procedural obstacles they face.[110] The procedural modality of transformative substantive equality, therefore, becomes instructive when a claim of poverty discrimination is instituted.

This suggests that when impoverished people institute a claim of poverty discrimination; the deliberators, operators, mediators, litigators, judges and activists should be aware of the power asymmetries in robust engagements of discrimination claims.[111] Moreover, impoverished people should co-formulate the terms on which the deliberation should ensue, and impediments to participation, such as physical mobility, language barriers, assumptions of impoverished people's needs and realities, information deficits and tokenisation, should be addressed.[112]

Furthermore, the representation condition informs to what extent impoverished people would be able to challenge structural discrimination in claims against powerful elites and state functionaries that have duties to curb or eliminate poverty discrimination. Fraser's "all-subjected-principle" is informative for considering against whom an application of poverty discrimination could be brought.

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[110] O de Schutter "A Human Rights-Based Approach to Measuring Poverty" in M Davis, M Kjaerum & A Lyons (eds) *Research Handbook on Human Rights and Poverty* (2021) 2 10; S Liebenberg "Participatory Justice in Socio-Economic Rights Adjudication" (2018) 18 *Hum Rights Law Rev* 623-649.

[111] See Chapter 5 part 5 2 for the critical role of the justiciability of discrimination norms and the court's oversight role that is sometimes required in transformative participatory remedies.

[112] See further the procedural mechanisms for effective transformative participatory remedies in Chapter 5 part 5 4 3.

2 3 1 3 The application of poverty discrimination claims

To challenge the institutionalised political marginalisation of impoverished people, Fraser proposes the "all-subjected principle" to indicate against whom impoverished people can make a claim of justice.[113] Fraser states that:

> "According to this principle, all those who are subject to a given governance structure have moral standing as subjects of justice in relation to it. On this view, what turns a collection of people into fellow subjects of justice is […] their joint subjection to a structure of governance that sets the ground rules that govern their interaction. For any such governance structure, the all-subjected principle matches the scope of moral concern to that of subjection."[114]

In the context of discrimination, this principle establishes that impoverished people are entitled to contest poverty discrimination as a matter of political concern within shared power structures. The parity of participation norm broadly encompasses all social practices and arenas of interaction for impoverished people.[115] These include social arenas such as labour and credit markets, family and private life, informal and formal political institutions, trade arrangements of public goods and services and civil society organisations.[116] By implication, the “all-subjected-principle” relays against whom impoverished people can bring an application of discrimination when the impugned discrimination impedes the preconditions for their equal participation in any of the aforementioned spheres.

The “all-subjected principle” would also inform to what extent transnational forces that deepen impoverished people’s disadvantages, could be challenged within a discrimination law setting. This is so as, for example, globalised financial capitalist flows disproportionately affect impoverished people and should be an area of critical concern.[117] This study is limited to the application of impoverished people’s right to equality and non-discrimination within a nation state.[118] However, this does not mean that the global financial flows that discriminate against impoverished people could not be challenged within the national setting, insofar as the relevant South African duty bearers did not minimise or eliminate the discrimination that originates outside of South Africa.

In addition, there exists a plethora of evidence that shows that the wealth creation in the private sphere continues to stifle the transformative (re)distribution and structural

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[113] Fraser *Scales of Justice* 65. See further how Fraser distinguishes this principle from the principles of “membership”, “humanism” and the “all affected principle” and their accompanying critiques 48-76.
[114] Fraser *Scales of Justice* 65.
[115] Fraser (2007) *Eur J Political Theory* 332.
[116] 332.
[117] Part 2 4 3 at footnote 218 below of an exploration of the impact of austerity measures, the boom-and-bust cycles of the market and international debt strongholds have on impoverished people’s material disadvantage.
[118] Chapter 1 part 1 5.

change necessary to tackle various forms of poverty discrimination.[119] This suggests that impoverished people's right to equality and non-discrimination should not only bind the state but also the private sphere. Thus, if poverty is politically created under shared power structures, positive duties will be placed on all role players to acknowledge their role in creating and redressing various dimensions of poverty discrimination.[120] This means that poverty, as a recognised ground of discrimination, could operate as representation to challenge unjust socio-economic arrangements that emanate from the same power structures as more well-off people and entities.[121]

Precisely how the representation frame could assist courts in responding to poverty discrimination and how judicial decisions on poverty discrimination could strengthen the democratic voice of impoverished people in a transformative manner, is to which this study now turns.

2 3 2 Poverty as a ground of discrimination as transformative representation

Understandings of poverty as a ground of unfair discrimination as a merely affirmative or tokenistic remedy could further disadvantage impoverished people. The full recognition of poverty as a prohibited ground under the Constitution and PEPUDA can, at first glance, appear to be an affirmative strategy that seeks to challenge the outcomes of disadvantage. However, if it is conceived as a "via media" it can become transformative to the extent that poverty is not merely seen as a matter of addressing a need,[122] but as a political right not to be poor.[123]

Such a transformative "via media" would require various strategic framings to conceptualise poverty as a transformative representation device. The first relates to what extent courts could interpret and emphasise the intersecting dimensions of poverty discrimination and faithfully listen to impoverished people's own articulations of the discrimination they face. The second pertains to whether poverty as a recognised ground could and should be leveraged to realise other entrenched rights and freedoms of impoverished people. The third refers to why poverty, as opposed to broader formulated

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[119] S Mpofu-Walsh *The New Apartheid: Apartheid did not Die; It was Privatised* (2021) 92; B Meyersfeld "Committing the Crime of Poverty: The Next Phase of the Business and Human Rights Debate" in C Rodriguez-Garavito (ed) *Business and Human Rights* (2017) 160-172.

[120] Brand et al (2013) *Law Democr Dev* 275-280.

[121] Gutto *Equality and Non-Discrimination* 232-234.

[122] See part 2 4 2 below on the material dimensions of poverty discrimination and its intersections with the political frame.

[123] De Schutter "A Human Rights-Based Approach to Measuring Poverty" in *Research Handbook on Human Rights and Poverty* 7-9.

grounds such as socio-economic disadvantage, status or condition should be legally recognised, while the fourth relates to the asymmetrical formulation of poverty as a prohibited ground.

In terms of the first framing, a fixed and one-dimensional frame for conceiving poverty discrimination can mask the complexity of the systemic discrimination impoverished people face. Legal formalism tends to formulate rigid, fixed, and finite definitions and conceptions of grounds that could amount to a strictly affirmative representation remedy. This would result in poverty as a prohibited ground of discrimination foreclosing meaning and stifling a contextual and impact-sensitive assessment of discrimination.[124] This suggests that when courts seek to determine the nature of impoverished people's right to equality and non-discrimination, the various possible understandings, meanings, or definitions of poverty discrimination should encapsulate the three, intersecting economic, social, and political disadvantages.

To be sure, poverty discrimination could be triggered by only one of the dimensions and all three do not have to be present to establish the discrimination. However, a more inclusive definition will help promote judicial interpretations that detect the intersecting dimensions of poverty discrimination that will allow the ground to be transformative. Furthermore, each instance of poverty discrimination will often have intersecting dimensions.[125] Moreover, if recognition remains the focal point of poverty, it is doubtful whether the redistributive dimensions could also be addressed.[126] The converse is also true: if the stigma attached to poverty is not addressed, it may reinforce or perpetuate redistributive inequalities.[127] Likewise, if the political disadvantage impoverished people face is not captured, any recognition or redistributive effort may result in political backlash. In addition to acknowledging the three intersecting disadvantages of poverty, the procedural part of transformative substantive equality should not be overlooked as impoverished people themselves should express the nature of their lived inequality. Poverty as a ground of discrimination should therefore be open-textured, wide, and left open for litigators to contextually narrate the impoverished claimants' lived realities.

In terms of the second framing, a formalistic attitude to rights can obscure the interrelated and structural rights violations that occur in cases of poverty discrimination.

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[124] Chapter 3 part 3 6 3.
[125] See the significance of all three dimensions in the impact inquiry to determine the vulnerability of impoverished people Chapter 4 part 4 3 2 below.
[126] S Fredman "The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty" (2011) 3 *Stell LR* 574 584.
[127] 576.

Recall the view that poverty as a recognised ground of discrimination would have little to contribute to litigation as it is said that the entrenched socio-economic rights of the Constitution already provide a legal avenue to contest impoverished people's exclusion from basic needs.[128] This formalistic attitude towards rights has implications for how the various constitutional "decision-making rules and structures" allow for staging and resolving contests of the recognition and redistribution conditions of poverty discrimination. A transformative conception of rights would rather emphasise the interrelationship and interdependence between civil, political and socio-economic rights.[129] The prohibition on unfair discrimination establishes an effective means for people to gain access to or contest the barriers which impede access to other rights.[130] Within South Africa's discrimination jurisprudence, discrimination grounds are often leveraged to find that the impugned discrimination unfairly discriminate against an identifiable group by excluding them from access to fundamental rights such as dignity,[131] social security,[132] citizenship,[133] and freedom and security of the person.[134] Thus, poverty discrimination claims will often be leveraged to contest the structural exclusion and unequal enjoyment of and access to various fundamental rights and freedoms that form the "cornerstone"[135] of impoverished people's democratic voice.

In terms of the third framing, instead of expressly including poverty as a prohibited ground, some scholars have opted for a more neutral and all-encompassing definition such as "socio-economic disadvantage".[136] Undeniably, impoverished people face severe socio-economic disadvantage, but it remains one component of poverty discrimination. A broader ground is affirmative as it addresses broader socio-economic stratifications that could admittedly have some transformative potential for impoverished people. However, it does not create a direct ground for impoverished people as an identifiable group to challenge their structural social exclusion. Moreover, the forms,

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[128] Chapter 1 part 1 5.
[129] S Liebenberg & B Goldblatt "The Interrelationship Between Equality and Socio-Economic Rights Under South Africa's Transformative Constitution" (2007) *SAJHR* 335-361. For one significant judicial pronouncement that all rights are interrelated and interdependent see *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 23.
[130] Albertyn & Goldblatt "Equality" in *CLOSA* 35-1 35-8.
[131] *Mahlangu v Minister of Labour* 2021 2 SA 54 (CC) para 108; *King v De Jager* 2021 SA 4 (CC) para 196; *Sithole v Sithole* 2021 6 BCLR 14 (CC) paras 44-47.
[132] *Khosa v Minister of Social Development* 2004 6 SA 505 (CC); *Mahlangu*.
[133] *Larbi-Odam v Member of the Executive Council for Education North-West Province* 1998 1 SA 745 (CC) para 19; *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) para 71.
[134] *Social Justice Coalition v Minister of Police* 2019 4 SA 82 (WCC).
[135] S 7(1) of the Constitution.
[136] Fredman (2010) *Eur Hum Rights Law Rev* 5.

severity and extent of socio-economic disadvantage impoverished people face, are different from that experienced by other income groups. A broader ground could easily be based on middle-class norms that remain affirmative as it does not seek to address the structures that create poverty. Thus, poverty encapsulates dimensions of socio-economic disadvantage, socio-economic condition, class, and social origin discrimination, but these dimensions manifest differently for impoverished people in concrete cases.[137]

Lastly, for poverty as a prohibited ground to be a transformative representation strategy, and not merely affirmative, it should be formulated asymmetrically. Symmetrical formulations are bound up in a formal notion of equality that favours equal treatment despite different levels of inequality.[138] An asymmetrical formulation, in contrast, is cognisant of different levels of institutionalised inequality and would, depending on the context, for example, protect women instead of men or a poor group instead of a wealthy group. Therefore, the purpose of an asymmetric approach is to redress disadvantage even though it would require more favourable treatment for one group.[139] Whenever courts seek to translate poverty discrimination into a justiciable definition, an asymmetrical and disadvantage-centric formulation is advisable. This will help to prevent well-off people from abusing a ground such as "socio-economic status" to claim that attempts to remedy poverty discrimination will result in "reverse discrimination".[140] In addition, an asymmetrical formulation of poverty discrimination underscores the structural social exclusion of impoverished people.

The abovementioned perspectives on the representation condition and the need to address the political exclusion of impoverished people could assist courts in coming to terms with impoverished people's diminished or silenced democratic voices. It frames poverty discrimination as a political problem that requires participation opportunities for impoverished people when decisions affect their lives. In addition, the representation frame sheds light on the preconditions for impoverished people's voices and participation to be taken seriously. This would mean that the different rights and freedoms the impugned discrimination denies access to, or impedes the equal enjoyment of, should be highlighted. Finally, an asymmetrical formulation of poverty discrimination will

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[137] Whiteman argues that poverty and socio-economic disadvantage are two sides of the same coin but that the differences are imperative. J Whiteman "Tackling Socio-Economic Disadvantage: Making Rights Work" (2014) 12 *Equal Rights Review* 95-108.
[138] Fredman *Discrimination Law* 4-37, 237-240.
[139] 237-240.
[140] 232-237.

reinforce transformative substantive equality that seeks to address impoverished peoples' institutionalised disadvantage and subordination.

While poverty as a recognised ground can provide a significant political avenue for impoverished people to make first-order justice claims against which all other legal measures must be tested and transformed, it can still stay fixed as an affirmative remedy without having a transformative effect. It is for this reason that Fraser also argues for the condition of a just distribution of resources for impoverished people. Poverty for Fraser is the primary example of class injustice,[141] and her theory provides insight to postulate a refined understanding of the relationship between poverty and inequality within a discrimination law setting.

2 4 (Re)distribution: Redressing material disadvantage

As stated in chapter 1, discrimination measures are typically regarded as an anti-misrecognition device and are seen as ill-suited to enter the terrain of redistribution.[142] However, as indicated above, this is a restrictive reading of discrimination measures that must respond to different intersecting forms of disadvantage, prejudice and harm. Fraser's conceptualisation of maldistribution offers insights to facilitate the redistributive potential of discrimination provisions.

This section first turns to the diagnostic character of transformative substantive equality in considering the contentious relationship between poverty and inequality from a discrimination law perspective. Thereafter, it critically discusses the transformative remedial character of impoverished people's right to equality and non-discrimination.

2 4 1 (Re)distribution for equal freedom

The redistribution condition aims to break the cycle of systemic material disadvantage.[143] Under a transformative conception of substantive equality,[144] redistribution aims to eliminate economic formations that cause systemic hardship, glaring disparities in resources, benefits, work, and leisure time.[145] Nonetheless, egalitarian theories are typically criticised for enabling an uncritical goal of sameness.[146] This is a healthy warning

[141] Fraser & Honneth *Redistribution or Recognition?* 22-24.
[142] Chapter 1 part 1 2.
[143] Fraser & Honneth *Redistribution or Recognition?* 7-33.
[144] Fredman (2016) *Int J Const Law* 728–730.
[145] Fraser (2011) *Stell LR* 455.
[146] A Phillips "From Inequality to Difference: A Severe Case of Displacement" in K Olson *Adding Insult to Injury: Nancy Fraser Debates Her Critics* (2008) 112-129.

as an unbridled egalitarianism can easily slip into an "equality of the graveyard"[147] that the Soviet communist bloc incorporated.[148] Despite this, Fraser argues that material equality should not be seen as inimical to plurality and radical differences that are prerequisites for democratic voice and participation.[149] Material equality does not imply that everyone should have equal income or resources. Rather, redistributive efforts should aim for a "rough equality" that would counteract systemically sustained and calculated relationships of dominance and subordination.[150]

The redress of impoverished peoples' material disadvantage requires undoing centuries of exploitation, the looting of peoples' natural resources and the current changing forms of deprivation and inequality. The Constitutional Court indicated that the Constitution is predominantly and unequivocally an egalitarian Constitution.[151] This pronouncement is made against the backdrop of South Africa's rife unequal socio-economic past.[152] PEPUDA also endorses a substantive notion of equality which includes the full and equal enjoyment of all rights and freedoms, *de jure* and *de facto* equality and equality of outcomes.[153] In this light, the redress of poverty should be aimed at transforming the current socio-economic structure in a "participatory, and egalitarian" direction.[154]

The relationship between poverty and inequality is contested, particularly in anti-discrimination law.[155] The first debate pertains to the diagnostic character of egalitarian theories that view inequality and its driving structures as the generator of the material dimensions of poverty discrimination. This debate relates to whether the detection of poverty should have determinable thresholds or whether poverty should be understood in relative terms. The second debate has a material bearing on the first as it relates to what would be required to remedy the material dimensions of poverty discrimination. The one position holds that redressing material disadvantage would require "levelling down"

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147 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 77.
148 Fraser (2020) *Socialist Register* 295.
149 Fraser (1990) *Social Text* 64-65. See further part 2 5 3 2 below.
150 64-66.
151 *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 74.
152 Para 74.
153 S 1. In the recent proposed PEPUDA Amendment Bill of 2021 GN 143 in *GG* 4402 of 26-03-2021 the definition of equality is broadened to "equal rights and access to resources, opportunities, benefits and advantages" in the See the Explanatory Draft Amendment Bill <https://www.justice.gov.za/legislation/notices/2021/20210326-gg44402gen143-Equality-Comments.pdf 26> (accessed 15-07-2021) ("PEPUDA Amendment Bill of 2021").
154 Klare (1998) *SAJHR* 150.
155 See a summary of these debates in Whiteman (2014) *Equal Rights Review* 98-99 and Fredman (2011) *Stell LR* 568-574.

remedies. On this view, equality would be established if the material resources of an advantaged group are removed or reduced and distributed towards disadvantaged groups.[156] The other side of the debate argues that redressing disadvantage would require "levelling up" where material advantages should be extended to a disadvantaged group without necessarily removing the material advantages from an advantaged group.[157]

In coming to terms with the implications of these debates, Fraser and the classcrits provide helpful insights. They indicate that a transformative conception of egalitarian theories should not decouple equality and freedom. They argue for a more substantive version of freedom as "equal freedom".[158] When freedom and equality are viewed together, the focus is on structural arrangements that will enable interlocutors to participate as peers by exposing the structural impediments to equal material participative freedom. Any socio-economic arrangement that enables the freedom of some but constrains the freedoms of others would therefore be unjust.[159] A substantive interpretation of the right to equality and non-discrimination informed by the value of freedom would demand an evaluation of whether deprivation and the structures that underlie it impede the ability of interlocutors to participate freely on an equal material footing.[160]

Freedom is often overlooked as an important value that also underscores the right to equality and non-discrimination.[161] Courts tend to decouple equality and freedom and pose them in opposition to each other by stating that, for example, the freedom of testation of a privileged few "clashes" with substantive equality.[162] This results in freedom being understood in an abstract liberal sense where the state should refrain from interfering in the intimate individual space of autonomy such as the "free" market.[163] This view is blind to poverty's structural and coercive nature, which is difficult to escape without resources and the removal of systemic barriers to individual self-realisation. In responding to the material dimensions of poverty discrimination, courts should endorse a relational concept of equality that views people's ability to participate as equals as

[156] Dixon & Suk (2018) *U Chi L R* 390-393.
[157] S Fredman & B Goldblatt *Gender Equality and Human Rights* (2015) United Nations Women Discussion Paper No 4 5.
[158] Fraser (2007) *Eur J Political Theory* 325; Mutua (2012) *Buff L Rev* 893.
[159] Fraser (2007) *Eur J Political Theory* 325.
[160] Mutua (2012) *Buff L Rev* 893.
[161] Albertyn (2018) 467. The value of freedom informs various entrenched rights and interests the Constitution seek to protect. See *Ferreira v Levin* 1996 1 SA 984 (CC) para 4.
[162] *King v De Jager* 2021 SA 4 (CC) para 91.
[163] Albertyn (2018) 467-468.

deeply dependent on the equal freedom of others. The following sections elaborate on how an interpretation of the right to equality and non-discrimination that stresses a relational concept of equality through equal freedom could assist courts in detecting and remedying the material dimensions of poverty discrimination.

2 4 2 The material dimensions of poverty discrimination and (in)equality

Scholars have not yet explicitly extended the material dimensions of poverty discrimination. This requires some form of conceptualisation of the material dimensions of poverty. Neo-Marxists argue that poverty should be understood as an unstable and slipping concept.[164] However, they also argue that impoverishment should be seen as unfulfilled basic needs[165] that find meaning through contested social articulation.[166] Within this contested terrain, needs roughly relate to the basket of services, resources, or goods needed to secure a dignified human existence that will enable equal participation.[167]

Fraser argues that basic needs relate to, among others, nutritious food, equal and quality education and health care, potable and safe water, housing and infrastructure for transport and mobility.[168] Together, these basic needs would be seen as some of the preconditions for a radical-democratic project. The essential qualification is that poverty should be loosely understood as the inability to meet these basic needs due to the inherent characteristics of the unjust institutionalised socio-economic order.[169] In addition, what counts as basic needs and what the level of their fulfilment must be, should not be fixed and static.[170] Rather, the parity of participation principle would dictate that needs and their level of fulfilment should be informed by the consideration of what would enable equal participation between interlocutors. The egalitarian diagnostic of what constitutes some of the material dimensions and disadvantages of poverty discrimination

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[164] A Chakrabarti, S Cullenberg, KD Anup "Rethinking Poverty: Class and Ethical Dimensions of Poverty Eradication" (2008) 20 *Rethinking Marxism* 676679; J Wolff "Beyond Poverty" in V Beck (eds) *Dimensions of Poverty* (2020) 2; J Wolff "Poverty" (2019) 14 *Philosophy Compass* 1-5.

[165] Neo-Marxists generally use the term "radical needs" as Marx coined it, that refers to basic needs. See generally A Chakrabarti "Class and Social Needs: A Marxist Theory of Poverty" in RJ Das, P Kumar & D Mishra (eds) *"No Poverty" as a Sustainable Development Goal: Understanding Poverty's Causal Mechanisms* (forthcoming 2021) 7.

[166] N Fraser "Talking About Needs: Interpretive Contests as Political Conflicts in Welfare-State Societies" (1989) 99 *Ethics* 291-313.

[167] Chakrabarti et al (2008) *Rethinking Marxism* 679.

[168] Fraser (2020) *Socialist Register* 304-306.

[169] Wolf "Beyond Poverty" in *Dimensions of Poverty* 30.

[170] Fraser (2020) *Socialist Register* 304-306.

should therefore be aware that poverty could occur in the context of both equal and unequal conditions.

In the context of inequality, economic arrangements are class blind in the sense that the condition of poverty is seen in isolation from the comfort and wealth of the middle and upper classes.[171] At the same time, law legitimises the socio-economic *status quo* as the natural outcome of a free market where the abundance of the upper class can be filtered down to the needy.[172] The inverse proposition is that economic policies that place the well-being of the majority of a population at its centre for development are destructive and unsustainable for economic growth.[173] This is reminiscent of the liberal-egalitarian substantive equality approach that does not necessarily appreciate how structural poverty and inequality sustain each other. The problem with seeing higher income groups as unattached to the material conditions of the poor in the South African context, is that it ignores the historically constructed and continued exploitative power asymmetries that have been built on the backs of impoverished people.

Thus, poverty is a matter of low well-being because others have better levels of well-being.[174] What exacerbates low well-being is that it is structural and therefore unavoidable for impoverished people who experience it, despite their best efforts to escape the disadvantage.[175] On this view, poverty is a function of the socio-economic system's intrinsic characteristics whereby the poor's material disadvantage deepens their political and social disadvantage, while the middle and rich class's material, political and social advantages increase.[176] This conception of poverty has been criticised for the inability to address immediate needs as, it is argued, that it only focuses on structural issues related to deprivation.[177] This criticism is misguided when one considers that a class perspective on poverty insists on opening evaluative spaces for how deprivation and inequality shape and reinforce each other. On account of such an evaluative space, Whiteman has argued that there should be a critical balance between the absolute and

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171 Mutua (2012) *Buff L Rev* 880.
172 883.
173 This is a similar pattern South African policies follow to alleviate poverty. Scholars do not suggest that growth is not necessary or that there has not been "enough growth". The problem is that it is the wrong kind of growth. The growth trajectory of the South African economy suggests that growth has taken place within the existing exclusionary economic order that perpetuates calculated axes of advantage and privilege. See C Bundy "Post-Apartheid Inequality and the Long Shadow of History" in C Soudien, V Reddy & I Woolard (eds) *The State of the Nation: Poverty & Inequality: Diagnosis, Prognosis and Responses* (2019) 79 92.
174 J Wolff & A De-Shalit *Disadvantage* (2007) 3-5, 8-10 and 36-63.
175 63-74.
176 EO Wright *Interrogating Inequality: Essays on Class Analysis, Socialism, and Marxism* (1994) 37.
177 Chakrabarti et al (2008) *Rethinking Marxism* 679-670.

relative nature of material disadvantage in a discrimination context.[178] A relative understanding of material disadvantage holds that people are poverty-stricken when their resources, "even if adequate for survival", highlight a clear gap between them and the rest of the community.[179]

Bundy has formulated a helpful understanding of poverty within the historic setting of South Africa where the language of basic needs is harnessed but is not seen in isolation from economic inequality and structural social exclusion.[180] He argues that:

> "Poverty is the *inability* to meet the basic needs of shelter and subsistence; it is multidimensional, involving increased morbidity and mortality, limited access to education and other basic services, and social discrimination and exclusion."[181]

Combined with his understanding of poverty, he argues that inequality is the unequal distribution of wealth, resources, and opportunities.[182]

Conditions that render some poor in the presence of abundance and prosperity would therefore be unjust as they severely impede people's ability to participate on an equal economic, social, and political footing. For this reason, a disadvantage-centric formulation of poverty discrimination implicitly focuses on inequality and has four advantages associated with its recognition. First, a relative understanding of poverty is more attuned to the self-articulated needs of a particular community, instead of universal standards for basic needs that will "lift" people out of poverty.[183] Second, it does not set the standard of poverty too low based on a stereotypical and survivalist understanding of basic needs.[184] Third, setting a standard at a level that does not consider the rise in living standards, disguises deprivation.[185] Fourth, a relative understanding of poverty

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[178] Whiteman (2014) *Equal Rights Review* 96-98.

[179] Fredman (2011) *Stell LR* 569 referring to P Townsend "The Meaning of Poverty" (1962) 13 *Br J Socio* 210 218-219.

[180] Bundy "Post-Apartheid Inequality and the Long Shadow of History" in *The State of the Nation* 79.

[181] 79. Emphasis added.

[182] 79.

[183] Fredman (2011) *Stell LR* 569. In the United Nations Human Rights Council *Report of the Special Rapporteur on Extreme Poverty and Human Rights: The Parlous State of Poverty Eradication* Philip Alston (7 July 2020) UN Doc A/HRC/44/40, Alston criticises the perception that there is a global trend towards eliminating extreme poverty (3-10 and 19 for the adaptation of poverty measurements). The perception is couched in the World Banks' international poverty line of $1.90, which is inadequate, and an inaccurate reflection of the many disadvantages impoverished people face (para 169). South Africa, similarly, has monetarised three official poverty lines. When the upper-poverty line is applied, 55% of the population are poor. Statistics South Africa *National Poverty Lines* (2019) 25. Also see United Nations Committee on Economic, Social and Cultural Rights "Concluding Observations: Initial Report of South Africa" (12 October 2018) UN Doc E/C.12/ZAF/CO/1, recommending that SA develop a composite index to determine the cost of living to set a standard that will ensure an adequate standard of living for all (para 47(a)). Also see Fischer criticising survivalist poverty perceptions in AM Fischer *Poverty as Ideology: Rescuing Social Justice from Global Developmental Agendas* (2018) 74-90.

[184] Fredman (2011) *Stell LR* 569-570.

[185] 570.

places a focus on the institutionalised patterns of economic structures that deepen poverty and inequality.

A relative understanding of poverty also has difficulties attached to it. The relative conception of poverty presents problems in detecting the material dimensions of poverty discrimination. Where basic deprivation is addressed beyond need and subsistence, poverty would remain as there will inevitably be a relative imbalance in material resources.[186] More worrying is that where a vast majority of a community, say a province or town, is poor, there might seem to be no poverty or a level of poverty that is acceptable, as inequality may not necessarily be present.[187] Alternatively, where levels of poverty are enlarged due to disasters or economic collapse, a relative understanding of poverty would neutralise the deprivation.[188]

In response to these difficulties, neo-Marxists contend that where there is severe deprivation in the absence of inequality, poverty would still be unjust.[189] This suggests that a state of affairs, where everyone's basic needs are unfulfilled and rendering everyone as equally poor, would still be unjust as it does not provide for the preconditions for individual and collective self-determination. Thus, poverty in any form, space, and time, irrespective of its relative nature, is unjust as there should be no tolerance for basic needs going unfulfilled. Neo-Marxists therefore see development as the production, distribution and redistribution geared towards fulfilling needs.[190]

In a discrimination context, coupling freedom and equality could be of assistance in overcoming the tensions in the abovementioned *relative* understanding of poverty and inequality. Equal freedom could secure the diagnostic and remedial character of transformative substantive equality to endorse a *relational* understanding of equality.[191] A relational understanding of the right to equality and non-discrimination could serve as a "nonreformist reform" that insists that the tension between inequality and deprivation should not be fixed or determinable but contested through rigorous democratic debate to secure a rough equal material freedom that is always in flux.

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[186] Fredman (2011) *Stell LR* 571.
[187] 571.
[188] 571-572.
[189] Chakrabarti "Class and Social Needs: A Marxist Theory of Poverty" in *"No Poverty" as a Sustainable Development Goal* 22.
[190] 21-25.
[191] Mutua (2012) *Buff L Rev* 902.

Turning to the remedial dimension, Fraser poses significant “via medias” for remedial strategies to reckon with the structural and pervasive unequal material dimensions of poverty discrimination.

2 4 3 Transformative material remedial strategies

In light of the above diagnostic discussion, a transformative conception of substantive equality should aim to redress immediate socio-economic deprivation *and* the structures that maintain or institute the material dimensions of the poverty discrimination. At first, redressing immediate material needs that flow from poverty discrimination could seem like a mere affirmative strategy. However, if such redress is persistently pursued, it can be transformative in the long run if it is also coupled with addressing the structures that create the need for the intervention in the first place.

As a result, the right to equality and non-discrimination would entail a myriad of transformative “in via” duties.[192] Within a traditional liberal-egalitarian understanding of equality, non-discrimination protections traditionally only involved a negative duty of non-interference, which would not necessarily have positive or redistributive dimensions.[193] In this view, equality and non-discrimination merely prescribe a general duty of restraint from the state, private institutions and individuals.[194] The focus of restraint arises from a liberal and formalistic understanding of equality and non-discrimination where a perpetrator of an isolated event of discrimination must be identifiable.[195] The responsibility for the discrimination’s redress only arises from deliberately prejudicial behaviour.[196] The result is that the equality right is reduced to prejudicial behaviour and does not impose positive duties to prevent, halt or “dismantle”[197] unfair discrimination and the structures that generate it. As stated above, a transformative notion of substantive equality seeks to address the structural inequalities that give rise to individual instances of discrimination.

To transform structural inequality, Fraser divides the globalised, neoliberal, and financialised capitalist markets into three distinct tiers to postulate a transformative

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[192] For a conception of the quartet of specific duties attached to the right to equality and non-discrimination in South African law, see Chapter 3 part 3 5 1.
[193] Khaitan *A Theory of Discrimination Law* 86-87.
[194] Fredman *Human Rights Transformed* 313.
[195] See later for the relevance of the intention to discriminate and direct and indirect discrimination in poverty related cases in Chapter 4 part 4 2 1 1 2.
[196] Fredman *Human Rights Transformed* 313-314.
[197] *Brink v Kitshoff* 1996 4 SA 197 (CC) para 27.

strategy to address poverty.[198] She argues that markets at the top and the bottom should deinstitutionalise the capitalist urge for unfettered growth and profit-making.[199] At the top, assuming there is a level of social surplus[200] that secures inequality, it should be disposed of democratically and not left to any private person, corporation or government to dispose of of their own accord.[201] Additionally, markets at the bottom addressing basic needs should be decommodified.[202] Decommodifying basic needs will require establishing them as public goods that are prioritised.[203] Fraser insists that to secure basic needs as public goods would necessitate that they are "provided as a matter of right, and not on the basis of ability to pay."[204] Moreover, as set out above she is adamant that what can be regarded as basic needs and what is required to fulfil them should not be fixed but should be subjected to rigorous democratic processes.[205] Moreover, the persistent provisioning of impoverished people's basic needs will only become

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198 N Fraser "Behind Marx's Hidden Abode: For an Expanded Conception of Capitalism" in P Deutscher & C Lafont (eds) *Critical Theory in Critical Times: Transforming the Global Political and Economic Order* (2017) 117-141; Fraser (2015) *Crit Hist Stud* 167-189. Fraser explains that capitalism is globalised as it transcends national borders where private individuals and powerful entities own the means of production to accumulate more wealth. She states that it is neoliberal as there is an unfettered yearn for growth and profit that ostensibly creates deserving losers and winners that punishes the poor for their insufficiency. It is also financialised as a morphing form of industrial capitalism where financialised capitalism enables exploitative interest rates and debt strongholds. How these forms of capitalism manifests in South Africa that stifles the elimination of poverty and inequality, see P Bond "Who Really 'State-Captured' South Africa? Revealing Silences in Poverty, Inequality and Structurally-Corrupt Capitalism" in E Durojaye & G Mirugi-Mukindi *Exploring the Link Between Poverty and Human Rights in Africa* (2020) 59-94.

199 Fraser (2020) *Socialist Register* 304-307.

200 Social surplus is the Marxist term that refers to the amount of revenue that is available after workers' basic needs are met that is appropriated by the capitalist class for more profit and wealth extraction. Wright *Interrogating Inequality* 51.

201 Fraser (2020) *Socialist Register* 307.

202 306.

203 304-306.

204 306. The Constitution guarantees the right of everyone to "have access to" "sufficient food and water", "adequate housing", "health care services" and "social security". See ss 28(1)(c), 26 and 27 of the Constitution. This formulation provides a significant opening for poverty as a ground of unfair discrimination to contest the institutionalised systemic barriers to "have access to" these fundamental rights. See C Heyns & D Brand "Introduction to Socio-Economic Rights in the South African Constitution" in D Brand & C Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 153 159 on the meaning of the words "to have access to". However, see the sceptical account of the overreliance on only socio-economic rights for poverty elimination in U Kistner, QI Sooliman & K Van Marle "Poverty and Rights: Philosophical, Historical and Jurisprudential Perspectives" in C Soudien, V Reddy & I Woolard (eds) *The State of the Nation: Poverty & Inequality: Diagnosis, Prognosis and Responses* (2019) 97-110.

205 Fraser (2020) *Socialist Register* 304-306. For example, the United Nations Committee on Economic, Social and Cultural Rights "Concluding Observations: Initial Report of South Africa" (12 October 2018) UN Doc E/C.12/ZAF/CO/1 paras 4 and 5 where the CESCR recommended that the rights to work and an adequate standard of living should be included within the textual provisions of South Africa's domestic law. At the very least, poverty as a ground of unfair discrimination secures a significant political tool for impoverished people to challenge the discriminatory barriers to accessing socio-economic goods such as clothing and internet connectivity encapsulated in the right to an adequate standard of living. For the barriers of impoverished people in accessing internet connectivity due to the "digital divide", see R Adams (ed) *Human Rights and the Fourth Industrial Revolution* (2021) 58-72.

transformative if the capitalist urge for growth is turned upside down. This could be done by prioritising and internalising impoverished people's basic needs in all political and economic endeavours.[206]

However, in postulating a transformative egalitarian approach that resists the goal of absolute equality, Fraser argues that there is a place for markets in the middle that would not necessarily obstruct her normative core of justice.[207] In the in-between space, when the economic crises of the top and the bottom are erased, a myriad of possibilities exist that will enhance entrepreneurship, human creativity, and equal freedom. The Constitutional Court has stated that substantive equality requires "equality of the vineyard" and not "equality of the graveyard" or "equality of vengeance".[208]

In this regard, addressing material deprivation through "levelling up" and pervasive material inequality through "levelling down" should be guided by its transformative mandate.[209] This is so, as "levelling up" remedies could remain affirmative if they do not also seek to stimulate and secure production and (re)distribution relations that will fulfil people's socially contested needs beyond sufficiency thresholds.[210] "Levelling down" redistribution that does not seek to redress the structures that create disparate ownership and access to resources and wealth can also reveal itself as a strictly affirmative "equality of the graveyard"[211] approach.[212]

Due to the structural levels of poverty, the lack of recognition given to developmental deficits and the vast failure to account for basic needs, large programmes of "levelling up" will be required to create equal participation conditions. "Levelling down" and redistributive efforts are also required to combat South Africa's past and present entrenched and unchanging social stratification fault lines. Centuries of domestic and global resource exploitation and unequal distribution has resulted in structures that reinforce impoverished people's unequal access to basic needs. This requires various

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[206] M Heywood "Threading the Budget Through the Eye of the Constitutional Needle" (20-10-2020) *Daily Maverick* <https://www.dailymaverick.co.za/article/2020-10-20-threading-the-budget-through-the-eye-of-the-constitutional-needle/> (accessed 22-10-2020); see specifically s 153(a) of the Constitution that places the constitutional duty on local governments to give priority to the "basic needs of the community" through budgeting, planning and administrative processes to ensure social and economic development.

[207] Fraser (2020) *Socialist Register* 306.

[208] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 77.

[209] Part 2 4 3 above describing the difference between the two levelling remedies.

[210] See the reference made to a basic income grant as an affirmative "via media" that if set high enough and persistently pursued could yield transformative results at part 64 above. It will however remain strictly affirmative if it mirrors the liberal egalitarian approach to substantive equality wherein there is only provisioning for impoverished people's basic needs that resembles survivalist thresholds.

[211] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 77.

[212] See the reference made to an extensive wealth tax at footnote 65 above.

levelling approaches for a constitutional regime that must enable the provisioning of impoverished people's basic goods for transformative change.[213] For these reasons, every levelling strategy should ask whether it will remove the discriminatory impediments for impoverished people to participate on an equal footing.

In terms of discrimination law, Fredman argues that the breaking of the cycle of identifiable groups' material disadvantage should not hesitate to challenge market and business logic within an egalitarian levelling strategy.[214] She states that often the argument is that the state or the market cannot, as in the case of the material dimensions of poverty discrimination, bear the cost of fulfilling needs.[215] However, this should not be the determining factor, as redressing disadvantage flowing from discrimination, will inevitably come at a cost. The appropriate consideration is not how much to spend but who will bear the cost of the discrimination.[216] In the case of poverty discrimination, without legal intervention, impoverished people bear the brunt of the cost of, for example, boom-and-bust cycles, stock market crashes, bankruptcy, austerity measures, mass liquidations, international debt crises and rising unemployment.[217] This suggests that there is a real need to identify impoverished people as an identifiable group with particular challenges.[218]

The abovementioned discussion illustrates that poverty as a ground of discrimination has significant redistributive potential. As a start, the material dimensions of poverty discrimination should emphasise the barriers in accessing basic needs that will enable impoverished people's equal participation. The section highlighted that the coupling of the values of equality and freedom could advocate for a relational understanding of impoverished people's right to equality and non-discrimination. Such an interpretation will allow courts to detect the material disadvantage of impoverished people in the context of unequal or equal material dimensions. In addition, this interpretation will be

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[213] G Budlender "20 Years of Democracy: The State of Human Rights in South Africa" (2014) 25 *Stell LR* 439 441.

[214] Fredman *Discrimination Law* 31-34.

[215] 31-34.

[216] 32-34.

[217] E Sekyere, S Gordon, G Pienaar & M Bohler-Muller "Is South Africa Winning the War on Poverty and Inequality? What do the Available Statistics Tell Us?" in E Durojaye & G Mirugi-Mukindi *Exploring the Link Between Poverty and Human Rights in Africa* (2020) 48-51, 54; M Harding, M Baduza & J Chaskalson "Socio-Economic Rights and Austerity" (August 2020) *Section 27: Catalyst for Social Justice* <http://section27.org.za/wp-content/uploads/2020/08/S27-final-austerity-report-2020-13082020.pdf> (accessed 05-09-2020); D Chirwa "Privatization and Freedom from Poverty" in G Van Bueren (ed) *Freedom from Poverty as a Human Right: Law's Duty to the Poor* (2010) 299-319.

[218] In the seminal socio-economic rights case of *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 para 36 the Court states that "the poor are particularly vulnerable, and their needs require special attention."

transformative as it will find innovative levelling remedies that will not amount to "equality of the graveyard" but will rather enable the material conditions for equal participation.

The protracted transformation of socio-economic production and (re)distribution systems that prioritise and internalise the provisioning of impoverished people's needs, would also soften the sharp boundaries between the three conditions of justice.[219] For example, innovative, equal, and quality education can enable rigorous political participation, thereby strengthening the representation condition.[220] Moreover, it is inconceivable that the absence of nutritious food, safe and potable water and quality health care services will enable impoverished people's recognition as having equal moral worth.[221] In addition, securing impoverished people's equal moral worth will allow society to prioritise their voices and internalise their socially contested needs. Thus, the pervasive misrecognition that impoverished people's experiences, should also form a critical component of the right to equality and non-discrimination.

2 5 Recognition: Addressing "the poor's" denial of equal moral worth

As stated in chapter 1, anti-discrimination protections are typically regarded as challenging the pervasive stigma, stereotyping and prejudices of an identifiable group.[222] In contrast, the misrecognition aspects of poverty discrimination are underexplored or hardly ever mentioned in legal discourse in South Africa. In addition, there is a continued insistence that grounds of discrimination are only included when they seek to protect the misrecognition that flows from immutable characteristics. The immutability requirement stipulates that "attributes or characteristics" are immutable because of their biological nature and, therefore, in need of legal protection to combat arbitrary and bigoted discrimination.[223] As stated under the transformative representation condition, the socio-cultural misrecognition of impoverished people in South Africa should not go unnoticed and warrants further investigation.[224] Fraser's diagnostic and remedial transformative

[219] Fraser (2020) *Socialist Register* 303.
[220] For the recent significant transformative interpretation of ss 29(1)(a) of the Constitution on "basic education" and s 29(1)(b) for further education, where the Court held that education opens doors for future economic opportunities, see *Moko v Acting Principal of Malusi Secondary School* 2021 3 SA 323 (CC).
[221] This is illustrated by Bilchitz arguing in the context of socio-economic rights and poverty that the realisation of socio-economic rights is valuable in "correcting a flaw" in representative democracies in that they provide important conditions for people to participate on an equal footing. D Bilchitz "Are Socio-Economic Rights a Form of Political Rights?" (2015) 31 *SAJHR* 86-111.
[221] Fraser *Scales of Justice* 17.
[222] Chapter 1 part 1 2.
[223] Fredman *Discrimination Law* 131-134.
[224] Part 2 3 2 above.

egalitarian theory offers compelling insights to elaborate on the social-cultural dimensions of poverty discrimination.

Fraser's recognition condition refers to the interpersonal affirmative conditions and cultural value patterns that systematically contribute to misrecognition.[225] Fraser base her recognition dimension on Hegel's understanding of individual subjectivity where an individual only attains subjectivity when they recognise others and when others recognise them.[226] Recognition aims to secure equal opportunities to achieve social respect.[227] It aims to overcome and combat harmful and unhelpful stereotypes, prejudices, stigmas, and violence towards certain groups.[228] The recognition dimension of poverty is expressed by transformative substantive equality that promotes equal dignity and worth.[229] Fraser's radical-democratic construal of the egalitarian precept of equal moral worth highlights this aim.[230] The moral misrecognition of impoverished people is in stark contrast to the value of human dignity underlying a transformative notion of substantive equality.[231]

There are several levels on which poverty as a misrecognition injustice ensues. The first relates to the pervasive misrecognition impoverished people face due to their living conditions and the perception that these conditions are a result of the personal moral failure of the poor or an issue that creates an opportunity for charitable intervention.[232] There are two other respects in which the status order intersects with the political marginalisation and material disadvantage in a transformative conception of substantive equality that is crucial for a South African setting. This relates to the gendered and racialised nature of poverty discrimination. Fraser argues that egalitarian theories need to move beyond vulgar economism of maldistribution and understand the "non-economic" misrecognitions that enable and intersect with deprivation in complicated ways without foregrounding the one over the other. She labels the “non-economic condition” of "social reproduction", as gender misrecognition. Fraser also labels the "looted wealth from racialised peoples" as racial misrecognition.[233]

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[225] Fraser & Honneth *Redistribution or Recognition?* 36.
[226] 7-33.
[227] Fraser (2011) *Stell LR* 455.
[228] Fredman (2016) *Int J Const Law* 730–731.
[229] Fredman *Discrimination Law* 155.
[230] Fraser *Scales of Justice* 16.
[231] See the significance of human dignity under a transformative constitution in *S v Makwanyane* 1995 3 SA 391 (CC) para 329.
[232] Campbell *Women, Poverty, Equality* 16-17.
[233] Fraser (2020) *Socialist Register* 296-297.

This section introduces the concept of “povertyism”. Following this, the section advocates for an intersectional awareness of disadvantage when poverty as a ground of discrimination is invoked. Lastly, this section argues for a radical understanding of difference.

2 5 1 "Povertyism"

The pervasive misrecognition of impoverished people has been described as "povertyism".[234] This refers to the entrenched prejudices, stereotypes and humiliating and abhorrent conscious and subconscious beliefs attached to impoverished people, which hold that their lives "cannot fit any dominant frame for human."[235] Moreover, within the capitalist logic of attributing moral worth to individuals and groups based on their productive value, the impoverished person does not count as human. Madlingozi argues that these stereotypes cast black impoverished people as subhuman or "not-yet-beings".[236] This situates impoverished people outside the scope of equal moral worth and becomes a severe obstruction to their ability to participate with equal standing.

Thornton has indicated that “povertyism” is an ingrained and silent prejudice as a result of classism.[237] "Povertyism" can be described as misrecognition based solely on a person or group's perceived socio-economic status or background.[238] Thus, impoverished people are relegated to the status of "others" and do not enjoy interrelationship equality that promotes self-worth and respect.[239]

This highlights the interaction of the misrepresentation and misrecognition conditions. When poverty is not seen as a systemically calculated and sustained economic and political enterprise, it is perceived as arising from the inherent failures and attributes of the individual.[240] This view pathologises poor people by holding that they are poor because they lack the necessary intelligence, are lazy, do not want to work, do not have values, are morally flawed, and are only concerned with instant gratification.[241] On this

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[234] D Roman "Guaranteeing Human Rights in Situations of Poverty" in *Redefining and Combating Poverty: Human Rights, Democracy and Common Assets in Today’s Europe* (2012) 90.
[235] Modiri (2015) *PELJ* 245. Modiri draws from the work of Butler in J Butler *Precarious Life: The Powers of Mourning and Violence* (2006).
[236] Madlingozi (2017) *Stell LR* 124.
[237] Thornton (2019) *Anti-Discrim Law Rev* 2; Mutua (2012) *Buff L Rev* 56.
[238] Roman “Guaranteeing Human Rights in Situations of Poverty" in *Redefining and Combating Poverty* 90.
[239] Fredman (2011) *Stell LR* 579.
[240] Wright *Interrogating Inequality* 33.
[241] 32-35.

view, the solution is to change poor persons' skill levels and save them from their cultural moorings to fit the norm for a capitalist logic of growth and profit.[242]

Other commonplace attitudes label impoverished people as either "deserving" or "undeserving", morally contaminated, and an economic burden to better-off people.[243] These peculiar prejudices and stigmas amount to the harmful and unhelpful disdain of impoverished people's dependency on grants.[244] In some instances, the type of subordination impoverished people face is blatant, for example, in brutal evictions,[245] incarcerations,[246] and arbitrary police brutality[247] towards poor communities. In other instances, it is less explicit, and the misrecognition cannot be ascribed to a specific action or perpetrator. For example, assuming that all poor people have bad teeth because they are unhygienic and should on that basis be denied access to jobs or training as they will disgust customers.[248] Thus, the moral recognition of impoverished people would disrupt the mainstream understanding that impoverished people are not "merely hungry, vulnerable and sick bodies, but real people demanding full protection and respect of their dignity."[249] This is a helpful dimension of one aspect of the interpersonal discrimination impoverished people face, but it is incompletely theorised in the South African context.

2 5 2 Intersectional disadvantage: Gendered and racialised poverty

Another important aspect of recognition is to evaluate poverty's relationship with status grounds such as race and gender. Some scholars have expressed concern that the inclusion of poverty could "overshadow" established status grounds.[250] In contrast, a transformative understanding of substantive equality would argue for an intersectional

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[242] Chakrabarti "Class and Social Needs: A Marxist Theory of Poverty" in *"No Poverty" as a Sustainable Development Goal* 7.
[243] Fredman (2011) *Stell LR* 579.
[244] Modiri (2015) *PELJ* 234.
[245] See the case of Bulelani Qolani that was brutally and violently ejected from his shack by metro police officers in *South African Human Rights Commission v City of Cape Town* 2021 2 SA 565 (WCC).
[246] See the recent by-laws of the City of Cape Town that criminalises homelessness in Holness (2020) *Law Democr Dev* 468-511.
[247] W Shoki "The Class Character of Police Violence in South Africa" (23-07-2020) *Verso* <https://www.versobooks.com/blogs/4795-the-class-character-of-police-violence-in-south-africa> (accessed 30-11-2020). See also the recent judgment where the High Court of Pretoria ordered for the suspension of South African National Defence Force soldiers who beat Collins Khosa to death to enforce lockdown restrictions *Khosa v Minister of Defence* 2020 3 SA 190 (GP).
[248] DE Peterman "Socio-Economic Status Discrimination" (2018) 104 *Va Law Rev* 1283-1359.
[249] Modiri (2015) *PELJ* 242.
[250] S Kilcommins, E McClean, M McDonagh, S Mullally & D Whelan *Extending the Scope of Employment Equality Legislation: Comparative Perspectives on the Prohibited Grounds of* Discrimination (2004) 86-87.

understanding of disadvantage. Intersectionality examines the multiple and intersecting systems of power and domination that bring a specific disadvantage to the fore.[251]

Crenshaw famously argued that discrimination law only protected black men from race discrimination and white women from gender and sex discrimination, erasing black women from anti-discrimination protections.[252] Crenshaw criticised discrimination law for understanding disadvantage as unidirectional instead of intersectional. In a similar vein, discrimination law can be said to be class blind if it does not take into account the material disadvantage black impoverished women, for example, face.[253] Critical South African theorists have cautioned that analyses of poverty should not be reduced to an orthodox Marxist class consideration.[254] They argue that socio-economic class considerations should not replace or be more prominent than critical questions of systemic racism when poverty is sought to be redressed.[255]

In the same way, Fraser argues that poor women suffer both maldistribution and misrecognition, "where neither of these injustices is an indirect effect of the other, but where both are primary."[256] Fraser argues that "social reproduction" or the misrecognition of women is an enabling condition for maldistribution injustices.[257] Social reproduction refers to the unwaged labour of housework, childbirth, child-rearing, and the nurturing and care of the elderly.[258] It manifests in the practice of "people making", which is a requirement for capitalism's profit-making aim to continue. Unfortunately, although not exclusively, women bear the brunt of this responsibility as capitalism refuses to compensate them, although life would be impossible without them.[259] As a result, this gendered division in social reproduction entrenches a fundamental gender asymmetry inherent in the capitalist order, which leads to women's subordination that entrenches

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[251] S Atrey “The Intersectional Case of Poverty in Discrimination Law” (2018) 18 *Hum Rights Law Rev* 411-440.

[252] K Crenshaw “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” (1989) 1 *U Chi LR* 139 139-140.

[253] The classcrits argue that critical race and feminist theorists indicate the material dimensions of gender and racial injustices, but they do so with foregrounding the misrecognition claim without analysing how a phenomenon such as racial capitalism has both misrecognition and maldistribution injustices that intersect. This can be viewed as “class blind”. Mutua (2012) *Buff L Rev* 870-887. Although race remains an important and entrenched category of inequality, the current class stratification in South Africa complicates an exclusive reliance on race to understand socio-economic disadvantage. Since the fall of apartheid, inter-racial inequalities slightly improved, but intra-racial inequality is surging. J Seekings & N Nattrass *Policy, Politics and Poverty* (2015) 106-133.

[254] Modiri (2015) *PELJ* 225; Madlingozi (2017) *Stell LR* 123-147.

[255] Modiri (2015) *PELJ* 225.

[256] Fraser & Honneth *Redistribution or Recognition?* 19.

[257] Fraser (2020) *Socialist Register* 298.

[258] N Fraser “Contradictions of Capital and Care” (2016) *New Left Rev* 116.

[259] Fraser (2020) *Socialist Register* 304.

gender binaries and heteropatriarchal norms. South African women living in poverty carry significant extra burdens. Sometimes, because of entrenched socio-cultural patriarchal norms and expectations, women have unequal access or compensation to and in the labour market that stifles upward mobility. In other instances, because of "people-making" expectations, women have less time to secure the conditions for their well-being.

Another “non-economic” enabling condition for profit-making is the wealth that is historically and currently expropriated from subjugated peoples along racialised fault lines.[260] Not only does expropriation provide a jumpstart for capital accumulation, but it also morphs into complex and oppressive versions of racialised exploitation in unfree and underwaged working conditions or underemployment.[261] Many have indicated that the historical injustices of slavery, colonialism and apartheid were not merely the misrecognition of difference based on race, ethnicity or colour.[262] Apartheid was a distinct moment of institutionalised racial capitalism where white supremacist institutions exploited cheap black labour to acquire social and economic value for their benefit and accumulated wealth at the expense of the well-being of black people. Moreover, in South Africa primitive accumulation has a historical racial dimension that goes back centuries.[263] Therefore, critical scholars have indicated that poverty should be understood within a history of racial inequality and prejudiced citizenship.[264]

This suggests that when a poverty discrimination claim is instituted, there is a real need to understand how it relates to various other misrecognition injustices. This will be particularly important in the South African setting as poverty remains disproportionately concentrated within the identifiable groups of black people and women. Fraser therefore advocates for evaluating how various injustices intersect as a form of "structural intersectionality"[265] concerning the institutionalised value patterns of subordination and denigration.[266]

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[260] N Fraser “Expropriation and Exploitation in Racialised Capitalism: A Reply to Michael Dawson” (2016) *Crit Hist Stud* 163 165.

[261] 166-172.

[262] Modiri (2015) *PELJ* 224; S Terreblanche *A History of Inequality in South Africa 1652-2002* (2002) 297-353.

[263] Specific racial moments of capitalist primitive accumulation are documented that remains important to showcase that the racial-coded capitalist expansions of these eras continue to have an impact on the intersecting injustices impoverished people face today. Bundy “Post-Apartheid Inequality and the Long Shadow of History” in *The State of the Nation: Poverty and Inequality*; part I of “dispossession” in T Ngcukaitobi *Land Matters: South Africa’s Failed Land Reforms and the Road Ahead* (2021) 38-149.

[264] Modiri (2015) *PELJ* 224; Madlingozi (2017) *Stell LR* 123-147.

[265] M Verloo “Multiple Inequalities, Intersectionality and the European Union” (2006) 12 *Eur J Women’s Stud* 211-228.

[266] Fraser (2011) *Stell LR* 457. See to what extent discrimination law within the South African setting can respond to intersectional poverty discrimination in Chapter 4 part 4 2 1 3 3.

Thus, the intersecting injustices illustrated above suggest a real need to recognise impoverished people as an identifiable group subjected to institutional patterns of misrecognition. This has a bearing on the mechanisms used to establish poverty discrimination either through a comparator or through a more contextual approach where the discrimination is a result of the institutionalised patterns of socio-economic disadvantage.[267] There are, however, difficulties in conceptualising poor people as a group that share characteristics as an identifiable group, that warrant careful consideration in a discrimination law context, if the recognition is to be a transformative strategy. This issue is considered next.

2 5 3 "The poor" as an identifiable group

The first difficulty in recognising impoverished people as an identifiable group would be to challenge the perception that there is an absolute requirement of immutability to recognise impoverished people as a group befitting protection from discrimination. Another difficulty would arise if poverty as a recognised ground is invoked as an affirmative strategy in attempting to revalue impoverished people's subverted group status. These difficulties are rooted in a liberal legalism that seeks to postulate a narrow and formalistic application of discrimination provisions. From a transformative conception of discrimination measures, these difficulties can be challenged on various levels.

2 5 3 1 The immutability challenge

The requirement that an identifiable group should be protected because of its immutability is not an absolute requirement.[268] Clear examples of the immutability of "race", "sex", "ethnic or social origin", "colour", "age" and "disability" are presented as examples of such immutable characteristics.[269] However, other grounds such as "pregnancy", "HIV status" and "citizenship", and the possibility that individuals may change their "gender" and "sexual orientation" expressions, indicate that even traditionally understood characteristics can, in reality, be mutable, changing or fluid. Other grounds that are also mutable are "religion", "belief" or "culture". A transformative understanding of substantive equality would rather focus on the systemic nature of

[267] Chapter 4 part 4 2 1 2.

[268] *Harksen v Lane* 1998 1 SA 300 (CC) para 46 holds that human dignity must be impaired based on attributes or characteristics "or" the discrimination must affect the group in a comparably serious manner.

[269] In the recent judgment of *King v De Jager* 2021 SA 4 (CC), the majority per Mhlantla J held that the impugned discrimination should be based on the immutable characteristics of female descendants (paras 1 and 36).

structural inequality that makes a condition or group membership likely to be more disadvantaged.

Another counterargument to the immutability challenge is that poverty is in many respects immutable because it is intergenerational,[270] and social mobility for impoverished people is impossible because of the "cycles of generational poverty".[271] Therefore, a transformative conception of discrimination measures would understand immutability as a systemically and politically calculated structural exclusion over time. In view hereof, other jurisdictions have altered the immutability qualification for the inclusion of a recognised ground to acknowledge that anti-discrimination grounds do not only protect immutable characteristics but focus on the structural disadvantages attached to the relevant immutable characteristics.[272] Immutability now rather indicates that a condition or attribute is beyond a person or group's control or only changeable at a severe personal cost.[273] The concern that poverty should not be recognised, relates to the difficulty of conceiving poor people as a homogenous group with similarly situated needs and discriminatory experiences. It invites a transformative recognition strategy.

2 5 3 2 Deconstructing "the poor" as an identifiable group

The recognition of poor people as an identifiable group in relation to an institutionalised status order of subordination could be a helpful affirmative start. It can be beneficial to showcase that impoverished people have intrinsic moral worth and their worth is not dependent on the value they add to economic productivity. However, an uncritical affirmative recognition of impoverished people would not remedy the institutionalised status norms, maldistribution and political disadvantage that underlie impoverished people's subordination. Affirmative remedies that aim to redress maldistribution can also incite a backlash of misrecognition injustice. Moreover, liberal egalitarians recognise differences, in an affirmative and formalist manner, with the effect of reproducing norms and structures that are seen as the dominant standard.[274] The pitfall of an affirmative approach is therefore that it reifies group characteristics or identities.[275] The valorisation of group characteristics along a single axis oversimplifies people's self-identification, delegitimises complexity and dislodges the potential of various affiliations and

[270] Chapter 1 part 1 1.
[271] *Mahlangu v Minister of Labour* 2021 2 SA 54 (CC) para 23.
[272] Fredman *Discrimination Law* 131-134.
[273] 131-134.
[274] Albertyn (2018) *SAJHR* 463.
[275] Fraser & Honneth *Redistribution or Recognition?* 76.

experiences.[276] In essence, this would be to patronisingly tell people what lived reality would qualify as being poor. For example, such an affirmative strategy would seek to tame poverty in definitions to prioritise certain levels of poverty over others as either the "absolute", "relative", "working", "chronic", "transient", "deserving" or "undeserving" poor.[277] Moreover, this affirmative approach would postulate impoverished people as the "have nots" and the rest as "the haves". This would create a dichotomous status of subordination that would suggest that people are poor because they do not have what rich people have.

Fraser advocates for a deconstructive conception of status as a "via media" that is informative for recognising that poor people are an identifiable group that share characteristics and experiences.[278] This approach would deconstruct and problematise the current institutionalised social and symbolic patterns of privilege. A deconstructive recognition strategy would seek to destabilise the liberal-egalitarian position of binaries between black and white, male and female, able-bodied and disabled, rich and poor, and substitute binaries with a shifting landscape of multiple and radical differences.[279] However, deconstructive transformative recognition remedies have practical difficulties. For example, a recognition remedy that destabilises dichotomies between groups would not provide impoverished people standing in comparing the lack of their basic needs to better-off people.

As a response to this danger, one of the central tenets of a transformative understanding of substantive equality is that treating "likes alike" is steeped in formal equality that can reinforce disadvantage.[280] Instead, transformative substantive equality endorses a radical understanding of difference, which queries and seeks to uncover structures of domination and find innovative ways to disrupt and upend them.[281] Therefore, a poor person should not be recognised as a "not-yet-being" as they fit the opposite of the binary of a well-off person.

However, a radical embrace of the differences of poverty is different from other status grounds. For example, the differences between status groups are understood, as per O'Regan J's minority in *MEC for Education: Kwazulu-Natal v Pillay* ("*Pillay*"), as

[276] Fraser & Honneth *Redistribution or Recognition?* 76.
[277] These different stratification levels of poverty are illustrated in S Schotte, R Zizzamia & M Leibbrandt "A Poverty Dynamics Approach to Social Stratification: The South African Case" (2018) 110 *World Dev* 88 89-90.
[278] 82.
[279] 98.
[280] Fredman *Discrimination Law* 8-14.
[281] Botha (2009) *SAJHR* 5.

"pluralistic solidarity" where the Constitution "does not envisage a society of atomised communities circling in the shared space that is our country."[282] The impugned discrimination in such instances seeks to detect the harm that is attached to the difference. Therefore, the issue is not with the individual's or group's immutable characteristics, but with the unjust socio-economic structures and relationships that make these disparities significant. In relation to the ground of sexual orientation, Sachs J has held that "equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference."[283] In cases of poverty discrimination, the embrace of difference is rather to detect different levels and experiences of poverty. The embrace of these different experiences should not be celebrated but rather invoked as a mechanism to foster cross-class solidarity.

On the other hand, with an ongoing engagement with socio-economic stratifications, the application of a ground such as "socio-economic status" will have to embrace radical differences in economic positions to guard against "equality of the graveyard" that can impede human creativity and equal freedom.[284] The extent to which these levels of economic differences should be evaluated as permissible or impermissible should be examined in the context of whether the economic arrangements impede the ability of people to participate as peers with others. Thus, a transformative approach would seek to identify impoverished people as an identifiable group to rearrange or prioritise (re)distribution, labour conditions and ensure need satisfaction by reducing inequality without stigmatising classes of vulnerable people.

A good illustration of a "via media" that recognises impoverished people as an identifiable group yet guards against fixed and paternalistic understandings can be found in certain constructions of the complex patterns of "sameness and difference" inherent in status.[285] Van Marle deepens the equal moral worth aim of anti-discrimination measures by advocating for asymmetrical contextual reciprocal recognition.[286] She argues that symmetrical reciprocal recognition obscures difference, unhelpfully aims to reverse positions and is politically paternalistic by prescribing a dominant norm.[287] She advocates for asymmetrical reciprocal recognition as it would acknowledge that "there

[282] 2008 1 SA 474 (CC) at para 155.
[283] *Minister of Home Affairs v Fourie* 2006 910 SA 524 (CC) para 60.
[284] Part 2 4 3 above.
[285] S Atrey *Intersectional Discrimination* (2019) 83-88.
[286] K Van Marle "'The Capabilities Approach', 'the Imaginary Domain', and 'Asymmetrical Reciprocity': Feminist Perspectives on Equality and Justice" (2003) 11 *Fem Leg Stud* 255.
[287] 264-265.

may be many similarities and points of contact between subjects"; however, "each position and perspective transcends the others and goes beyond their possibility to share or imagine."[288] Thus, there should be a constant awareness of the sameness in the points of contact of impoverished people's experiences. However, this awareness should extend to, and be informed by, the prevailing differences between these experiences particularly those that have taken place in different contexts.

Such an understanding of "sameness and difference" also relate to "patterns of group disadvantage and harm" or, in Fraser's terms, institutionalised value patterns.[289] The "patterns of disadvantage" metaphor conceives misrecognition and deprivation not as isolated events but as systemic historical events stretched over time.[290] These understandings are critical to the conceptualisation of poverty as a recognised ground, as they seek to deconstruct and transform the cultural values that inform prejudices and stereotypical views about impoverished people, and ignore the differences among poor people by treating them as a homogeneous group.

2 6 Conclusion

This chapter argued that a transformative conception of substantive equality is an appropriate theoretical framework to inform the recognition of poverty as a ground of prohibited discrimination. Such a conception of substantive equality provides an appropriate interpretative framework for litigants and courts to detect the three intersecting dimensions of poverty discrimination, namely misrepresentation, maldistribution, and misrecognition. In addition, it provides an optimal framework for remedying the various dimensions of the discrimination in a transformative manner. Drawing from Fraser's theory of justice, the chapter argued that poverty as a ground of discrimination should emphasise the three intersecting dimensions of political marginalisation, material deprivation and social harm encountered by impoverished people.

The chapter illustrated extensively how each dimension of poverty discrimination could be captured and remedied within a transformative constitutional discrimination law framework. First, it was argued that poverty as a ground of prohibited discrimination constitutes a powerful anti-misrepresentation device that can help counter the political marginalisation impoverished people face in all spheres of society. It highlighted that

[288] Van Marle (2003) *Fem Leg Stud* 265.
[289] *Brink v Kitshoff* 1996 4 SA 197 (CC) para 44; Atrey *Intersectional Discrimination* 86.
[290] Atrey *Intersectional Discrimination* 86.

poverty discrimination as an anti-misrepresentation device stresses impoverished persons' right to participate in a variety of processes in both the public and private spheres that have a bearing on their rights and opportunities. Furthermore, it is argued that poverty, as opposed to broader discrimination grounds such as socio-economic status or disadvantage, would secure a transformative representation tool for impoverished people. This is so as poverty discrimination as a recognised ground shows greater potential to focus on how the various dimensions of their disadvantage manifest in concrete cases. Drawing from this, poverty discrimination claims should accentuate a qualitative representation dimension where impoverished people must explain the realities of their discrimination and exclusion themselves. In addition, litigators and adjudicators should pay attention to the context of the claimants to effectively capture the various rights and freedoms that are infringed by the impugned discrimination. Moreover, poverty discrimination should be formulated asymmetrically to challenge the institutionalised marginalisation that impoverished people face.

It was argued that if poverty is to be a powerful anti-discrimination measure, it will have to engage structural economic inequalities to redress the material inequality affecting impoverished people. This chapter also identified the difficulties and advantages of a relative understanding of poverty in discrimination law. It argued that a relational understanding of equality could alleviate the tensions in a relative understanding of how poverty discrimination is generated and could be challenged. From this argument, the chapter indicated that the remedial orientation of transformative substantive equality provides evaluative criteria for choosing levelling up and down measures for addressing poverty discrimination. In this regard, the chapter identified that a combination of each remedial approach would be able to enhance equal freedom to challenge the possibility of "equality of the graveyard" but at the same time oppose overly individualistic notions of freedom

Finally, this chapter identified the misrecognition injustices faced by impoverished people as an important reason for recognising poverty as a prohibited ground of discrimination. This would require an awareness of poverty as a discrete ground giving rise to stigma and stereotypes and how poverty intersects with other grounds of disadvantage such as race and gender. It would also require applying a radical understanding of difference and the recognition of the agency of the poor to avoid condescending and paternalistic engagements with impoverished groups.

The subsequent chapters proceed to analyse and evaluate to what extent South Africa's anti-discrimination law recognises poverty as a prohibited ground of discrimination in the light of the theoretical insights developed in this chapter.

CHAPTER 3: POVERTY AS A GROUND OF DISCRIMINATION UNDER THE CONSTITUTION AND PEPUDA

3 1 Introduction

In interpreting and applying section 9 of the Constitution, the Constitutional Court has identified a number of questions that must be considered under distinct stages when determining whether there has been unfair discrimination. Similarly, PEPUDA divides an unfair discrimination inquiry into different stages. These processes and the various stages that they entail have been the subject of extensive academic discussion and criticism.

In deciding claims of unfair discrimination, courts must also consider preliminary issues. Courts must decide when it is appropriate to apply section 9 of the Constitution directly, and when to apply legislation that gives effect to section 9, or the common law. They must also specify who is bound by the prohibition of unfair discrimination under section 9 of the Constitution and PEPUDA. Furthermore, they have to consider what types of duties section 9 of the Constitution and PEPUDA impose, on both the state and private actors, in order to give effect to the right to equality and non-discrimination.

This chapter will focus primarily on these preliminary issues within the context of poverty discrimination. It aims to examine which approaches to these questions are most conducive to a transformative substantive jurisprudence on equality and poverty discrimination. The chapter also briefly examines the different stages of an unfair discrimination inquiry under section 9 and PEPUDA. A detailed and critical examination of these stages for a claim of poverty discrimination falls beyond the scope of this chapter, as the determination of unfairness will be considered in detail in chapter 4. However, the present chapter will examine the meaning of poverty within the context of poverty discrimination.

3 2 The general approach to a discrimination claim

It is necessary to set out the general approach to a discrimination claim in the Constitution and PEPUDA to understand how this approach influences the mode of interpretation, the specific review standard and judicial scrutiny, and the remedy deployed by the court. The following sections explore the general approach of a discrimination claim in terms of sections 9(1), (3), (4) and (5) of the Constitution and various sections in PEPUDA as it is

currently applied by South African courts. Thereafter it proposes a transformative substantive equality approach for when a claim of poverty discrimination is instituted.

3 2 1 Section 9 of the Constitution

The constitutional equality guarantee contains interrelated substantive provisions that could serve as a basis to challenge laws or conduct that deepens impoverished people's disadvantage, marginalisation, or denial of equal moral worth.[1] The first, section 9(1), provides a substantive basis to challenge laws that impede the right of equality before the law and equal protection and benefit of the law. Jurisprudence suggests that section 9(1) provides protection from any irrational or arbitrary "differentiation" made between individuals or groups by the state.[2] Courts would deem it as arbitrary and irrational where there is no legitimate and rational connection between the differentiation and its purpose.[3] In principle, if the differentiation is deemed arbitrary, it would be the end of the equality inquiry and there would be no need to determine whether the differentiation amounts to unfair discrimination.

As an expression of substantive equality, the equality right also has a robust discrimination prohibition to protect and prioritise the interests of certain identifiable groups that, because of their historic and continued disadvantage, are more likely to be adversely affected by everyday decisions.[4] Thus, even if differentiation on the grounds of poverty passes the section 9(1) test, it could nonetheless amount to unfair discrimination in terms of sections 9(3), (4) and (5) of the Constitution. The Constitution lists several discrimination grounds where any "differentiation" based on "one or more" of these grounds will be suspect.[5]

Emanating from the seminal discrimination law case of *Harksen v Lane* ("*Harksen*"), South African discrimination law has separated the unfair discrimination analysis into two distinct inquiries: the discrimination inquiry;[6] and the unfairness inquiry, which entails considering the impact of the impugned discrimination on the claimants weighed against

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1 The Constitutional Court established the general inquiry to the equality right in *Harksen v Lane* 1998 1 SA 300 (CC) para 53. S 38 of the Constitution deals with standing to establish whether the claimant has "sufficient interests" to vindicate their rights that are either violated or threatened to be violated. See *Ferreira v Levin* 1996 1 SA 984 (CC) para 44.

2 See the seminal case of *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC); *Harksen v Lane* 1998 1 SA 300 (CC) para 53(a).

3 *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) paras 25 and 26.

4 *Brink v Kitshoff* 1996 4 SA 197 (CC) para 4.

5 P de Vos "Equality for All: A Critical Analysis of the Equality Jurisprudence of the Constitutional Court" (2000) 63 *THRHR* 62 70.

6 1998 1 SA 300 (CC) para 53.

any justifications for such discrimination put forward by the respondents.[7] Finally, if the discrimination is found to be unfair in terms of the unfair discrimination analysis, then a court must consider whether the discrimination can be justified in terms of the general limitations clause.[8] If the discrimination is on a listed ground, the discrimination will be presumed to be unfair. This presumption shifts the onus to the respondent to "establish" that the discrimination is fair or did not occur as the applicants allege.[9]

However, poverty is not a listed ground in section 9(3) of the Constitution. When a ground is not included in the list of prohibited grounds, discrimination could still be shown when it is proved to be analogous to the listed grounds. This is so as the Constitution does not contain an exhaustive list of prohibited grounds.[10] The condition of being disadvantaged by poverty can be found to be a ground of discrimination when the complainants "establish" that it meets the test for analogous grounds stipulated in the *Harksen* test.[11] If a court finds that poverty discrimination is an analogous ground, it moves to the second overarching discrimination inquiry, namely whether the discrimination is unfair. The fairness inquiry is exercised through an impact-sensitive consideration. In *Harksen*, the Court indicated that the impact the discrimination has on the complainant and their identifiable group will be the determining factor regarding fairness.[12]

If the court finds that the discrimination does indeed amount to an unfair impact on the identifiable group, it must then focus on the extent to which the unfair discrimination can be justified.[13] The unfairness inquiry deviates from the general approach to Bill of Rights litigation in that the right to equality and non-discrimination is said to have an "internal modifier" as it adds the word "unfair" to discrimination.[14] With regard to the general approach of Bill of Rights litigation, when a court finds that a law or conduct impairs a right, it must also consider if the impairment is a justifiable limitation.[15] The onus is then on the respondent to prove that the infringement of the right is justifiable in terms of the

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7 *Harksen v Lane* 1998 1 SA 300 (CC) para 53.
8 Para 53. The general limitation clause is stipulated in s 36 of the Constitution.
9 S 9(5) of the Constitution.
10 The non-exhaustive list of discrimination prohibitions is captured in s 9(3) stipulating that the state may not unfairly discriminate "on one or more grounds, *including* […]" Emphasis added.
11 The complainants therefore have an onus to *prove* that the discrimination is analogous to listed grounds.
12 Para 50.
13 C Albertyn & B Goldblatt "Equality" in S Woolman & M Chaskalson (eds) *Constitutional Law of South Africa* 2 ed (2002) 35-1 35-80.
14 S Woolman & H Botha "Limitations" in S Woolman & M Chaskalson (eds) *Constitutional Law of South Africa* 2 ed (2002) 34-1 34-31.
15 S 36 of the Constitution.

limitation clause.[16] The inclusion of the internal modifier in section 9(3) raises difficult questions about the relationship between the unfair discrimination analysis and the limitation analysis.[17] Academic commentators seem to agree that a finding of unfairness will exhaust all possible justifications that might be offered under a limitation inquiry.[18] Discrimination jurisprudence also suggests that courts will not easily consider a limitation inquiry as the Constitutional Court has stated that the discrimination will be unjustifiable for the same reasons that it will be unfair.[19] The result is that impact and justification factors are merged, which may result in giving a too restrictive scope to the applicant's rights.

When a court finds that poverty discrimination is unfair and unjustifiable, it must provide relief that will effectively remedy the violation.[20] The following section briefly traces a discrimination claim instituted in terms of PEPUDA before proceeding to provide an optimal transformative substantive equality framework for the various stages of a discrimination claim based on poverty in terms of the Constitution and PEPUDA.

3 2 2 The Promotion of Equality and Prevention of Unfair Discrimination Act

In terms of PEPUDA, the general approach is to allege discrimination on a *prima facie* basis on one or more of the listed grounds of discrimination.[21] Poverty's legal status as a listed ground in the definition of "prohibited grounds" in terms of section 1(1)(xxiii)(a) is uncertain. This is due to the recent judgment of *Social Justice Coalition v Minister of Police* ("*SJC*") where the Court found poverty to meet the test of prohibited ground in terms of section 1(1)(xxiii)(b)(i)-(iii) of PEPUDA.[22] The case was decided by a High Court, and the judgment has immediate binding effect only in the Western Cape. Although it might have persuasive force in other South African provincial or higher courts, it is unclear whether it will be followed in those courts.[23] Furthermore, as set out in chapter 1, the directive principle of "socio-economic status" that encapsulates poverty "as a disadvantageous condition" creates the possibility that a court of law can determine

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16 *Ferreira v Levin* 1996 1 SA 984 (CC) para 44.
17 Albertyn & Goldblatt "Equality" in *CLOSA* 35-80-35-82 for a summary of the academic debates.
18 Woolman & Botha "Limitations" in *CLOSA* 34-6; Albertyn & Goldblatt "Equality" *CLOSA* 35-26.
19 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 56; *Mahlangu v Minister of Labour* 2021 2 SA 54 (CC) paras 117-120.
20 See the discussion of the court's remedial powers in Chapter 5 part 5 4.
21 S 13 of PEPUDA. In s 20(1) PEPUDA mirrors the standing provision of the Constitution with the addition of explicitly indicating that the South African Human Rights Commission and the Commission for Gender Equality has standing in s 20(1)(f).
22 2019 4 SA 82 (WCC) para 65.
23 On the binding and persuasive nature of lower courts in appellate divisions and other provincial jurisdictions, see *Turnbull-Jackson v Hibiscus Court Municipality* 2014 5 SA 592 (CC).

whether socio-economic status should be established as a recognised ground of unfair discrimination.[24] After discrimination is shown to be present, the next inquiry considers whether the discrimination is unfair.

Scholars have argued that the fairness inquiry of the original *Harksen* test is codified in three categories of factors that "must" be taken into consideration.[25] The first refers to the "context" and the second to various factors that will determine the impact of the discrimination on the identifiable group.[26] The third category of factors of an unfair discrimination analysis in PEPUDA focuses on the extent to which the unfair discrimination can be justified.[27] Here the onus of proof falls on the respondent(s) to "prove" that the discrimination did not take place as alleged or that the impugned discrimination is not based on one or more of the listed grounds.[28] Where discrimination did take place it is presumed to be unfair unless the respondent proves the fairness thereof.[29]

Unfortunately, PEPUDA lumps several of these limitation factors together with the impact factors. The ramification of this drafting is that the inquiry would be skewed towards the justifications of the discrimination and elide an appropriate engagement with the context and impact of the discrimination on impoverished people. The Constitutional Court has recently confirmed that:

> "the fairness inquiry in section 14 [of PEPUDA] is a hybrid test which incorporates elements of the fairness enquiry from *Harksen* whilst also incorporating elements of proportionality that resemble a limitation analysis."[30]

This pronouncement does not however clarify the relationship between the different inquiries. During the last stage of a discrimination claim, if a court finds that the poverty discrimination is unfair, PEPUDA empowers courts with far-reaching and novel remedial powers to vindicate rights.[31] The following section briefly proposes how a transformative substantive equality approach to unfair discrimination claims under the Constitution and PEPUDA could apply to poverty discrimination.

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24 Chapter 1 part 1 2 at footnotes 52-55. S 34(2)(c) of PEPUDA.
25 C Albertyn, B Goldblatt & C Roederer (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act (2001)* 41-48. Ss 14(2) and (3) of PEPUDA.
26 S 14(2)(b) read with s 14(2)(3) of PEPUDA.
27 Albertyn & Goldblatt "Equality" in *CLOSA* 35-80.
28 S 13(1)(a)-(b) of PEPUDA.
29 S 13(b)(i).
30 *King v De Jager* 2021 SA 4 (CC) para 233; *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) para 70.
31 Chapter 5 part 5 4 1.

3 2 3 A transformative substantive equality paradigm

The transformative substantive equality paradigm that is proposed in this section is extracted from a transformative interpretation of the discrimination provisions under the Constitution and PEPUDA. It will be substantiated in more detail throughout the rest of this study why this paradigm could yield transformative results. Such a paradigm is necessary as a claim that emphasises the intersecting structural conditions of poverty discrimination within a transformative constitutional paradigm is yet to be considered in a South African court.

3 2 3 1 Stage one: Procedural and preliminary substantive issues

The first stage of a poverty discrimination inquiry concerns procedural and preliminary substantive issues. The first pertains as to whether the application must be brought in terms of the Constitution or PEPUDA. Secondly, it must be determined who is bound by the non-discrimination prohibition. In other words, who bears the duty to address poverty discrimination? In order to answer this question, a third issue must be investigated, pertaining to the specific duties of different actors as imposed by the Constitution and PEPUDA respectively.

Furthermore, the meaning of poverty discrimination within a constitutional framework remains elusive. A definition is not necessarily an obstacle to the institution of a discrimination inquiry. However, as case law and legal literature are silent on a possible definition that could serve as a gateway to the unfair discrimination inquiry, it will be imperative to provide a working definition of poverty for courts. Such a definition would assist them in detecting the various forms of discrimination that manifest for impoverished people as a group. PEPUDA provides a definition of “socio-economic status”, whereas a possible definition of poverty must be distilled or developed from the court’s jurisprudence for a claim instituted in terms of section 9(3). The duties imposed on various actors by the Constitution and PEPUDA and a working definition are related to the substantive interpretation of impoverished people’s right to equality and non-discrimination that is extensively considered in the next stage. It will, however, be considered separately in this study to critically consider the various factors of an unfair discrimination inquiry.

3 2 3 2 Stage two: A transformative substantive equality approach to poverty discrimination

Drawing from the duties that flow from the non-prohibition based on poverty and the definition of poverty, the second stage of a poverty discrimination claim must determine the normative content of the right.[32] To determine the normative content of impoverished people's right to equality and non-discrimination, courts should follow a combination of a purposive, contextual and generous interpretative approaches. A purposive approach seeks to determine what the purposes of the right in question are in order to determine the scope of the interests it seeks to enhance and protect.[33] A generous approach favours an interpretation that broadens the interests the rights seek to protect, rather than restricting the right in question.[34]

Intertwined with the purposive and generous approaches are the contextual approach that seeks to interpret the right in question in its historic and contemporary context.[35] The focus on the context in which the claim occurs is to guide the specific impact on the identifiable group.[36] The context-sensitive approach is a particular expression of transformative substantive equality that should highlight the underlying social, economic, political and legal arrangements that drive the claim of discrimination.[37] Context in this regard is constructive in prescribing a method of adjudication that engages the lived reality of the claimants but which, at the same time, seeks to uncover the underlying systemic causes of the specific deprivation.[38] The aforementioned interpretation is imperative before a court can consider whether the discrimination can be fair or justified. Otherwise there is a risk that the justifications posed would not be properly assessed against the transformative dimensions underpinning impoverished people's right to equality and non-discrimination.

Courts must start with an interpretation of the interests the right seeks to protect through a discrimination inquiry. The discrimination inquiry serves as a means to detect the various manifestations of poverty discrimination in everyday interactions, policy

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32 S 39 of the Constitution.

33 For a recent explicit elucidation of the purposive approach that aims to give effect to the value of substantive equality, see *Mahlangu v Minister of Labour* 2021 2 SA 54 (CC) para 55.

34 Para 55.

35 For the transformative aims of a contextual interpretative approach for impoverished people's rights, see *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 22.

36 Currie & De Waal *Bill of Rights Handbook* 223.

37 C Albertyn "Substantive Equality and Transformation in South Africa" (2007) 23 *SAJHR* 253 259; DM Davis & K Klare "Transformative Constitutionalism and the Common and Customary Law" (2010) 26 *SAJHR* 403 412 and 494.

38 Albertyn & Goldblatt "Equality" in *CLOSA* 35-42.

measures or inactions that adversely affect impoverished people's political voice, material well-being and social standing.

When poverty discrimination is shown, the inquiry should turn to the impact of the poverty discrimination on the impoverished claimant and the identifiable group of poor people that is determinative of its fairness. As the discussion above indicates, there is uncertainty about how the impact and justifications factors could be disentangled to provide an optimal framework for realising impoverished people's right to equality and non-discrimination. From a transformative substantive equality perspective, the following disentanglement is proposed.[39] The impact inquiry should focus solely on whether the discrimination deepens impoverished people's intersecting material disadvantage, political marginalisation, and social prejudice. Put differently, the inquiry should focus on whether the discrimination has a disproportionate impact on impoverished people's ability to participate on an equal footing in political, economic, and social terms.

Thereafter, the justification inquiry should be undertaken. This inquiry shifts the onus to the duty bearer of the right to prove why the discrimination can be fair or justified against transformative substantive equality commitments. Generally, the most robust level of scrutiny that enables optimal rights' protection is a proportionality assessment.[40] A proportionality assessment, in short, warrants a judicial interrogation of whether the justifications provided for the discrimination are proportional to the impact it has on impoverished people in light of the transformative values of openness, democracy, equality, human dignity and freedom.[41] A proportionality assessment requires that "the graver the impact of the decision upon the individual affected by it, the more substantial the justification that will be required."[42] If a court finds that the discrimination is unfair and/or unjustifiable, it must move to the third stage of the litigation process.

3 2 3 3 Stage three: Transformative remedies

The third stage of a claim of poverty discrimination must craft responsive remedies that will effectively vindicate impoverished people's right to equality and non-discrimination.

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[39] A deeper elucidation of the questions these disentangled inquiries raise in light of a transformative conception of substantive equality is discussed in the subsequent Chapter.

[40] K Möller "Proportionality: Challenging the Critics" (2012) 10 *Int J Const Law* 709 710-712.

[41] As enumerated in s 36 of the Constitution.

[42] KG Young "Proportionality, Reasonableness, and Economic and Social Rights" in VC Jackson & M Tushnet (eds) *Proportionality: New Frontiers, New Challenges* (2017) 248 250; *S v Manamela* 2000 3 SA 1 (CC) para 32.

This raises issues of institutional legitimacy and competency that must be examined within a transformative conception of substantive equality.

In the subsequent chapters of this study, chapter 4 focuses on the substantive stages of the discrimination claim and postulates a transformative structure that disentangles the various inquiries. Chapter 5 extensively evaluates the institutional problems that arise during the adjudication of a discrimination claim and turn to the remedial stage of the litigation proceedings.[43] This chapter continues to focus on procedural and preliminary issues that will facilitate a transformative substantive equality approach to a claim of poverty discrimination.

3 3 A transformative reading of the subsidiary principle

One of the main preliminary issues to consider, is the different causes of action in terms of which a case of poverty discrimination can be brought. Litigators and adjudicators have to carefully consider whether a claim of poverty discrimination should be instituted in terms of section 9(3) of the Constitution or whether the claim should be brought within "the four corners of the Act".[44] This consideration emanates from the implications of the constitutional principle of subsidiarity. The principle of subsidiarity denotes a fundamental constitutional norm that a claimant cannot directly invoke a constitutional right without first considering or attacking the constitutionality of legislation enacted to give effect to the right.[45] Importantly, the principle of subsidiarity does not only apply to the appropriate subsidiary relationships between the Constitution and PEPUDA but also between the Constitution, PEPUDA and the common law.[46] It should therefore be examined what insights a transformative reading, as opposed to a fixed interpretation of the principle of subsidiarity, poses for an application of poverty discrimination. This raises the important question of which legal avenue will provide a favourable transformative representation for impoverished people.[47] The next sections first consider the transformative relationship between the Constitution and PEPUDA. Thereafter, it considers the relationship between the Constitution, PEPUDA and the common law.

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43 It should be stated that the justiciability and, by implication, the adjudication of poverty discrimination also entails procedural issues that have a bearing on whether a claim of poverty discrimination could be instituted and to what extent the courts could question instances of poverty discrimination. This is discussed in Chapter 5.

44 *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) para 40.

45 *My Vote Counts v Minister of Justice* 2018 2 SA 380 (CC) para 46. As cited in the context of discrimination law in the concurring minority of *King* para 182.

46 Ss 8 and 39(2) of the Constitution and for the seminal academic debates thereof in S Woolman "The Amazing, Vanishing Bill of Rights" (2007) 124 *S Afr Law J* 762.

47 Chapter 2 part 2 3.

3 3 1 The relationship between the Constitution and PEPUDA

A transformative reading of the subsidiary principle would caution against "hard and fast rules" in applying the principle.[48] This is so as the Constitution cannot be ignored when a claim of poverty discrimination in terms of PEPUDA is instituted. PEPUDA was enacted to give effect to the constitutional right to equality in section 9, as required by section 9(4) of the Constitution. It is one[49] of the primary legal mechanisms that aim to further the right to equality and non-discrimination.[50]

Thus, the principle of subsidiarity does not imply that the constitutional meaning and significance of a right becomes irrelevant when a claim is brought in terms of legislation giving effect to a right.[51] On the contrary, the principle of subsidiarity is an expression of a transformative democracy that accords due respect to the legislature and ensures a constitutional dialogue within the bounds of an integrated and consistent rights-centric transformative framework.[52] This is bolstered by the interpretation clause of PEPUDA that stipulates that the Act should be interpreted in line with the constitutional text and jurisprudence.[53] This suggests that PEPUDA cannot provide less protection than the Constitution, but it can offer more protection, for example, when a claim of poverty discrimination is instituted.[54]

In choosing whether a claim of poverty discrimination should be instituted in terms of the Constitution or PEPUDA, the application section of PEPUDA provides some guidance. Section 5(2) of PEPUDA states:

> "If any conflict relating to a matter dealt with in this Act arises between this Act and the provisions of any other law, other than the Constitution or an Act of Parliament expressly amending this Act, the provisions of this Act must prevail."

According to this section, the principle of subsidiarity dictates that there should be reliance on PEPUDA for an unfair discrimination claim based on poverty, except where provisions of the Act itself are constitutionally challenged.[55] This application section creates the impression that PEPUDA immediately takes precedence when a provision of

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48 *King v De Jager* 2021 SA 4 (CC) para 182.
49 There are several other statutes that give expression to substantive equality in the constitutional dispensation such as the Employment Equity Act 55 of 1998 and the Broad-Based Black Economic Empowerment Act 53 of 2003.
50 *King v De Jager* 2021 SA 4 (CC) para 183.
51 AJ van der Walt "Normative Pluralism and Anarchy: Reflections on the 2007 Term" (2008) 1 *Const Court Rev* 77-128; K Klare "Legal Subsidiarity and Constitutional Rights: A Reply to AJ van der Walt" (2008) 1 *Const Court Rev* 129 135-138.
52 Chapter 5 parts 5 2 and 5 3.
53 S 3 of PEPUDA.
54 SBO Gutto *Equality and Non-Discrimination in South Africa* (2001) 7.
55 *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) para 40.

other legislation is challenged for unfairly discriminating against impoverished people, except where any provision of PEPUDA itself is challenged.[56] Currie and De Waal argue that this is an overriding provision of PEPUDA that diminishes the option for a direct constitutional challenge of other legislation.[57] On the other hand, Kok argues that the overriding provision of PEPUDA is desirable in light of the Constitutional Court's endorsement of the Constitution as having a primary egalitarian ethos.[58] Kok also argues that PEPUDA gives effect to the Constitution and should therefore reflect its supremacy that must inform all other legislative enactments of the Constitution. In addition, equality is an important value that must be promoted when any provision of the Bill of Rights is interpreted.[59] For these reasons, Kok argues that PEPUDA justifiably diminishes the direct application of section 9 of the Constitution.

However, the overriding nature of section 5(2) of PEPUDA is subject to interpretation and specific circumstances will influence the extent of conflict between legislation. Moreover, the possibility remains that a legislative amendment to PEPUDA or an existing provision in PEPUDA[60] could be challenged for unfairly discriminating against impoverished people.[61] Such a challenge should be brought through a direct application of section 9.

3 3 2 The relationship between the Constitution, PEPUDA and the common law

It also remains a possibility that litigators and adjudicators will side-step section 9(3) and PEPUDA and rather opt to develop the common law when relevant principles of private law such as freedom of testation and contract are implicated in discriminating against impoverished people. Thus far it is trite that the common law sustains individualistic notions of freedom and human dignity that are often decoupled from equality.[62] Moreover, public policy considerations in the principles of freedom of contract, testation and the law of delict, have morphed into fully fledged justiciable privacy and dignity rights

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56 A Kok "The Promotion of Equality and Prevention of Unfair Discrimination Act: Why the Controversy?" (2001) 2 *S Afr Law J* 294 296.

57 Currie & De Waal *Bill of Rights Handbook* 245

58 Kok (2001) *S Afr Law J* 286; *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 73; *Brink v Kitshoff* 1996 4 SA 197 (CC) para 33.

59 As demanded by s 39(2) of the Constitution.

60 In the recent judgment of *Qwelane v South African Human Rights Commission* 2021 ZACC 22 (CC) the Constitutional Court found a provision in PEPUDA to be unconstitutional.

61 See Chapter 4 part 4 4 4 that questions the constitutionality of s 14(2)(c) of PEPUDA.

62 DM Davis & K Klare "Transformative Constitutionalism and the Common and Customary Law" (2010) 26 *SAJHR* 412, 449 and 479; M Madlanga "The Human Rights Duties of Companies and other Private Actors in South Africa (2018) 29 *Stell LR* 359, 364-368.

that are stubbornly resistant to egalitarian concerns.[63] Thus, it remains uncertain whether poverty discrimination will be considered in terms of PEPUDA, or whether a Bill of Rights inflected interpretation of the common law will be preferred when a claim of poverty discrimination does not challenge PEPUDA or other legislation. However, the Constitutional Court has stated on numerous occasions, that there is only one system of law and accordingly all law must be brought into conformity with the Bill of Rights.[64]

As the common law is often an expression of judicial law-making,[65] PEPUDA is therefore preferred as the principle of subsidiarity expresses comity to the other branches of government.[66] This is also consistent with section 8(3)(a) of the Constitution, which provides that a court is only obligated to develop the common law where legislation is not giving effect to the right in question. Furthermore, as indicated above, section 5(2) of PEPUDA indicates that where a dispute arises in "any other law", PEPUDA must prevail. In addition, the factors of an unfair discrimination analysis afford optimal protection to impoverished people wherein the discrimination must be justified within the framework of transformative substantive equality.[67]

In conclusion, the discussion above illustrates that litigators and adjudicators must critically consider the implications and consequences for impoverished people's right to equality and non-discrimination when considering which legal avenue will provide transformative representation for impoverished people. It also needs to be considered who would be bound by the duties flowing from the right of non-discrimination based on poverty. This is examined in the following section.

3 4 Vertical and horizontal application

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63 *King v De Jager* 2021 SA 4 (CC) paras 202-206.

64 See the recent significant developments where the common law has been developed to directly bind private parties under certain circumstances: *Daniels v Scribante* 2017 4 SA 341 (CC); *AB v Pridwin Preparatory School* 2020 5 SA 327; *Beadica 231 v Trustees* 2020 5 SA 246 (CC) para 71.

65 Currie & De Waal *Bill of Rights Handbook* 60-63.

66 Chapter 5 part 5 2

67 Chapter 4 part 4 4. This is not to say that it is not possible that the development of the common law by infusing it with the constitutional norm of a recognised prohibition of non-discrimination would not amount to important and possible noteworthy transformative results. See the majority judgment in *King v De Jager* 2021 SA 4 (CC) that developed common law public policy considerations in conformity with substantive equality and non-discrimination norms in terms of (para 30). However, in terms of strategic litigation implications, the unfair discrimination analysis provides a more optimal framework for fundamental rights' realisation while at the same time being aware of the practical realities of transformative change. In addition, an unfair discrimination analysis will not negate the private interests of people, but it will be an important consideration in evaluating competing claims.

As chapter 2 highlights, Fraser's "all-subjected principle" determines the reach of democratic rights and duties.[68] The "all-subjected principle" is therefore an informative guiding principle to determine on whom the duty for redressing poverty discrimination should rest. According to this principle, impoverished people can make claims of justice against powerful interlocutors or individuals that generate or entrench the intersecting disadvantages they face. This bolsters a relational conception of equality where there is a collective responsibility of people under shared power structures to ensure that everyone's basic needs are met in order to achieve equal freedom.[69] This means that impoverished people's right to equality and non-discrimination should bind everyone who is subjected to the same power structures. Gutto argues that the prohibition of non-discrimination is transformative as it extends to "interpersonal relationships" that encompasses both the private sphere and the state.[70]

As set out below, textually, the right to equality and non-discrimination in terms of the Constitution and PEPUDA has a wide reach as it applies to both public and private actors. This wide reach raises contested constitutional debates, especially as non-discrimination prohibitions bind cross-cutting cultural, religious, ethnic, or gendered groups, and juristic persons. Thus far the non-discrimination prohibition has penetrated various private and public relationships in protecting and advancing the rights of, for example, women,[71] queer people,[72] people with disabilities[73] and black people.[74] However, the implications of this wide reach have not been considered within the context of poverty discrimination.

As a start, caution should be raised against strict demarcations between the public and private sphere as it invites a liberal and legalistic view of the underlying legal generators that sustain poverty discrimination.[75] Moreover, the increasingly neoliberal form of the state means that the distinction between public and private actors is increasingly porous.[76] However, the demarcation of the private and public spheres remains relevant, especially as it concerns redistributive duties. The state is seen as the primary driver of positive and redistributive efforts to ensure that rigorous democratic

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68 Chapter 2 part 2 3 1 3.
69 Chapter 2 part 2 4.
70 Gutto *Equality and Non-Discrimination* 125.
71 For mere one example, see *Hassam v Jacobs* 2009 5 SA 527 (CC).
72 For a recent example, see *Qwelane v South African Human Rights Commission* 2021 ZACC 22 (CC).
73 *Singh v Minister of Justice* 2013 3 SA 66 (EqC).
74 For mere one recent example, see *Nelson Mandela Foundation Trust v Afriforum* 2019 6 SA 327 (EqC).
75 For a similar remark in the context of socio-economic rights, see S Liebenberg "Socio-Economic Rights Beyond the Public-Private Divide" in M Langford, B Cousins, J Dugard & T Madlingozi (eds) *Socio-Economic Rights in South Africa: Symbols or Substance?* (2013) 63 63.
76 Chapter 2 part 2 4 3.

procedures are adhered to.[77] Nevertheless, scholars increasingly argue that, subject to certain qualifications, rights can also impose positive duties on private parties towards marginalised groups, especially within South Africa's liberal free-market economy.[78] As is illustrated below in the discussion of transformative duties, the specific duties attached to the state, a private party or both should be contextually evaluated against the duties attached to the non-discrimination prohibition.[79]

Developments in both the Promotion of Equality and Prevention of Unfair Discrimination Amendment Bill ("PEPUDA Amendment Bill 2021")[80] and recent case law suggest that the prohibition of non-discrimination based on poverty could infiltrate a diverse range of social and economic spheres. The following part analyses and evaluates whether and to what extent the current textual stipulations and jurisprudence on the prohibition of non-discrimination have a transformative reach into all spheres of social life.

3 4 1 Textual stipulations of the non-discrimination prohibition

Section 9(3) of the Constitution and section 6 of PEPUDA express that the state may not discriminate "against anyone" on listed and analogous grounds.[81] Section 9(4) of the Constitution extends the non-discrimination prohibition to the private sphere in stipulating that "no person" may unfairly discriminate on listed grounds. Section 6 of PEPUDA also extends the prohibition of non-discrimination to the private sphere and suggests a wide reach into the private sphere by inserting that it binds "all persons".

The PEPUDA Amendment Bill of 2021 clarifies that the obligation to prevent and combat unfair discrimination and promote equality rests on both the state and private parties.[82] State and private parties are obliged to take positive steps to remove

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77 This is evident from s 7 of the Constitution that says the "state must respect, protect, promote and fulfil the rights in the Bill of Rights" whereas s 8(2) is open for interpretation by stating that private persons have duties considering the "nature of the right and the nature of *any* duty imposed by the right."

78 B Meyersfeld "The South African Constitution and the Human-Rights Obligations of Juristic Persons" (2020) 137 *S Afr Law J* 439 4 6 2; S Liebenberg & R Kolabhai "Private Power, Socio-Economic Transformation, and the Bill of Rights" forthcoming in Z Boggenpoel (ed) *Law Justice and Transformation* 1 2-15.

79 Part 3 5 1 below.

80 GN 143 in *GG* 4402 of 26-03-2021.

81 In terms of s 5(1) of PEPUDA as the application section read with s 6 describes that describes the general duty that no one may discriminate against any person.

82 For example, governmental institutions are required to conduct awareness initiatives about the Constitution and PEPUDA's non-discrimination protections. See the Explanatory Draft Amendment Bill <https://www.justice.gov.za/legislation/notices/2021/20210326-gg44402gen143-Equality-Comments.pdf 26> (accessed 15-07-2021) ("PEPUDA Amendment Bill 2021").

discrimination.[83] Additionally, the PEPUDA Amendment Bill of 2021 imposes a duty on state and private institutions to disclose the economic measures devoted to eliminating discrimination and promoting equality.[84] It indicates that private parties also have a particular responsibility to proactively combat and prioritise eradicating unfair discrimination on specified grounds.[85]

The reach of the non-discrimination principle and the strong language stating that the state and private sphere must take positive measures to address discrimination is compelling. Discrimination can emanate from both the private and public spheres, causing or contributing to poverty, or constituting barriers to challenge it effectively. The wide textual reach of both the Constitution and PEPUDA suggests that all spheres of social and economic life must calibrate their endeavours not only to halt impoverished people's intersecting disadvantages but also to take positive steps to eliminate them.[86]

The Constitution and PEPUDA's expansive textual reach into all aspects of social and economic life echoes Fraser's "all-subjected principle" that justice claims such as poverty discrimination should be made against broad categories of actors that are subject to the same power structures. However, as chapter 2 argues, the duty to redress the axes of privilege and advantage that have historically contributed to and normalised poverty discrimination can easily be dismissed in the name of individualistic and class-blind notions of freedom and conceptions of rights.[87] This calls for an examination of courts' interpretation of the extent to which the prohibition of non-discrimination against impoverished people binds the private sphere.

3 4 2 Towards a transformative application of the non-discrimination principle

It is clear that all rights in the Constitution place extensive duties on the state to realise the rights.[88] However, as set out above, case law remains ambivalent as to the extent to which the private sphere will also have positive or redistributive duties in relation to all rights. Two recent Constitutional Court cases show promising interpretations of anti-discrimination provisions in the Constitution and PEPUDA in the specific context of the private sphere's duties to redress the material disadvantage of identifiable groups.

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83 PEPUDA Amendment Bill of 2021 paras 24(1) and (2).
84 Para 24(4). This bolsters the burden of justification that rests on the respondent in the justification leg of the unfairness inquiry as argued for in Chapter 4 part 4 4 2.
85 Para 28.
86 A deeper discussion of the type of duties that flow from the prohibition of discrimination follows in part 3 5 below.
87 Chapter 2 part 2 4 1.
88 S 7 of the Constitution.

The case of *Mahlangu v Minister of Labour* ("*Mahlangu*") considered the constitutionality of the exclusion of domestic workers within the definition of an employee under the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ("COIDA"). The judgment affirmed a transformative conception of the prohibition of unfair discrimination by holding that it should apply also to private households.[89] The Court specifically reiterated that domestic workers, who disproportionately remain black women, are in a precarious position because of the so-called "private" nature of their jobs.[90] The Court held that there is often an abusive and exploitative relationship between domestic workers and their employers precisely because the domestic work takes place in private.[91]

The case of *King v De Jager* ("*King*") considered whether a will unfairly discriminated against women.[92] The majority and concurring judgments of Mhlantla J and Victor AJ respectively lay the foundations for the transformative interpretation of the prohibition of unfair discrimination into the private sphere. Both judgments highlighted the distributive consequences that flow from private legal arrangements.[93] Victor AJ argued that legal arrangements should "not be regarded as a neutral set of principles that [have] no bearing on power dynamics in society".[94] She stressed that all spheres of social and economic life should be tested against the non-discrimination prohibition otherwise, the existing economic power structures and privileges will remain entrenched. Thus, Victor AJ states:

> "By ensuring that the right to equality can be invoked against private persons, the Constitution acknowledges that colonialism and apartheid were not only facilitated by a repressive state apparatus but also through the complicity of individuals who benefitted directly from an unjust status quo. [PEPUDA] is an acknowledgement that to those on the receiving end of discrimination, the source of the discrimination (be it public or private) matters not."[95]

This pronouncement aligns with Fraser's view that deprivation is sustained by legal rules and frameworks that prevent people from participating in society on an equal footing. Significantly, Victor AJ held that an overly "individualist, libertarian and neo-liberal" understanding of the principle of freedom of testation informed by the rights to privacy, dignity and property entrenches the current wealth inequality based on the grounds of

89 2021 2 SA 54 (CC) paras 113, 169 and 184.
90 Para 194.
91 Para 113.
92 2021 SA 4 (CC).
93 Paras 85 and 198.
94 Para 198.
95 Para 201.

gender and class.[96] Victor AJ indicated that the present unfettered accumulation of wealth, which is sustained by overly individualistic conceptions of freedom, should be "recalibrated" and informed by a "constitutional framework based on equality."[97]

To summarise, a transformative interpretation of the non-discrimination prohibition that stresses equal freedom would require that the duty not to discriminate against impoverished people bind non-state actors and extend into all spheres of life. The nature of the specific duties imposed on various state and private actors within a transformative conception of substantive equality also depends on the specific duties that flow from the prohibition of non-discrimination. The specific duties are now considered in evaluating their transformative potential.

3 5 Transformative duties

As indicated in chapter 2, originally the right to non-discrimination only referred to a duty of restraint. It was argued that this reflects a classic liberal conception of equality that could stifle the transformative potential of discrimination provisions.[98] From a classic liberal conception, the equality right is reduced to a general restraint on discriminatory conduct, as opposed to generating positive duties to prevent, halt or eliminate unfair discrimination and the inequalities that generate it. Considering the Constitution's transformative aims, a classic liberal understanding of a general duty of restraint in relation to human rights realisation is not convincing in two respects. These are elaborated on in the following sections.

3 5 1 The quartet of transformative duties

The Constitution expresses that the state "must respect, protect, promote and fulfil the rights in the Bill of Rights".[99] The language of these duties attached to the non-discrimination right is reminiscent of Fraser's postulations of affirmative and transformative strategies that should be crafted as "via medias" to be transformative.[100] The quartet of duties attached to rights, should therefore be grasped within such a transformative mandate.

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96 *King* para 205.
97 Para 204.
98 Chapter 2 part 2 4 3.
99 S 7(2) of the Constitution. PEPUDA does not cluster these duties together but is found numerous times in the text in the preamble and ss 2(b)(iv), 3(1)(a) 4, Chapter 5 in its totality and 14(1).
100 Chapter 2 part 2 2 3.

Such a conception of these duties suggests that the equality right will not only entail a traditional negative duty where the state must "respect" equality by way of non-interference.[101] The duty to respect could be viewed as a strictly affirmative duty whereby the state and private actors should not interfere with impoverished people's lives. However, depending on the context, if the duty to respect is conceived as a "via media", it will for example, require powerful interlocutors not to arbitrarily deprive poor people of their right to access to housing.[102]

In addition, if impoverished people are prioritised as a recognised group that continue to experience spatial apartheid, the duty to respect will mean that state and private actors should not interfere with redistributive efforts or further deepen impoverished people's disadvantage in accessing basic needs.[103] Furthermore, the duties to "fulfil" and "promote" necessitate the (re)allocation or provisioning of resources to enhance democratic participation.[104] "Protect" can entail both negative and positive duties, depending on the specific right involved.[105] To protect impoverished people's right to equality and non-discrimination will require challenging engrained socio-economic structures that deepen their disadvantage.

Importantly, each duty flowing from impoverished people's right to equality and non-discrimination should be contextually understood where different powerful actors will have different transformative "via media" duties. For example, if hunger is viewed as one of the basic material deprivations that constitute poverty, demanding that a private restaurant has a duty to immediately fulfil impoverished people's food requirements could seem like a transformative strategy. However, this strategy reveals itself as a mere affirmative remedy where the underlying structures that cause hunger, are not

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[101] S Fredman *Human Rights Transformed* (2008) 145-149.

[102] S 26(3) of the Constitution. Flowing from this right, South Africa has an extensively developed legal framework for eviction proceedings, which consists of legislation such as the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998 ("PIE") and the Extension of Security of Tenure Act 62 of 1999 and jurisprudentially developed factors and circumstances that must be considered in eviction proceedings. For the seminal case that laid the foundations for interpreting PIE against South Africa's racist and economically exclusionary history especially as it contemplates the implications of evictions for poor people, see *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 26-27. However, thus far, poverty as a ground of discrimination has not been considered within the eviction processes. Significantly, in the context of this study, the South African Human Rights Commission has advised that "eviction processes should not discriminate against an individual or group of people" at South African Human Rights Commission *Evictions* (available at: https://www.sahrc.org.za/home/21/files/FINAL%20Evictions%20Educational%20Booklet.pdf) 5.

[103] See the reference to the significant *Tafelberg* judgment, Chapter 2 part 2 2 1 at footnote 46.

[104] Fredman *Human Rights Transformed* 156-167.

[105] 149-156.

addressed. It is therefore imperative that every instance of poverty discrimination and the duties attached to it should be contextually evaluated.

Thus, the quartet of duties attached to the non-discrimination prohibition in the context of poverty would sometimes require a negative duty, such as the duty of police officers to refrain from using brutal force or violence towards poorer communities merely because they are poor. In other instances, it will require educational resources to "promote" non-discrimination on the ground of poverty by providing information on the duties imposed by this right to various administrative sectors. In some other cases, it will require more positive or redistributive measures such as reprioritising budgets or finding other economic solutions than austerity measures that disproportionately impede the fulfilment of impoverished people's socio-economic rights.[106] Some cases of poverty discrimination will require a complex combination of transformative duties to be placed upon the state and private parties.[107]

Furthermore, for a claim based on poverty discrimination to be transformative and not merely inclusive, a deeper conceptual awareness of the overlap between restitutionary equality and the prohibition of discrimination is required. Such a conceptual awareness will also bolster the transformative mandate of the quartet of duties attached to the right. The next section examines how a deeper conceptual link between restitutionary equality and discrimination provisions elicit positive and redistributive duties on the state and powerful entities.

3 5 2 Transformative restitutionary duties

Chapter 2 identified a wide range of positive "levelling" duties to address the material deprivation and disadvantage of impoverished people.[108] In addition, in the levelling strategies, be that enhancing production and distribution relations or (re)distributive measures, it is postulated that impoverished people's rights and interests should be prioritised as a matter of justice and urgency.[109] This emanates from the view that poverty is a sustained political, economic and social enterprise where inequality is dependent on poverty.[110] As indicated in chapter 1, the constitutional equality right and PEPUDA's text and objectives illustrate the relationship between the need to redress systemic

[106] Chapter 2 part 2 4 3 at footnote 218.
[107] Chapter 5 part 5 4 3 3 mentioning the relevance of the law of joinder in transformative participatory remedies.
[108] Chapter 2 part 2 4 3.
[109] Chapter 2 part 2 4 3.
[110] Chapter 2 part 2 4 2.

inequalities to halt or minimise instances of unfair discrimination.[111] However, it is not immediately clear that anti-discrimination provisions also trigger positive and redistributive duties to challenge systemic inequalities. There are, however, various judicial pronouncements and textual indicators in the Constitution, PEPUDA and the PEPUDA Amendment Bill of 2021 that the restitutionary duties flowing from the equality right could be triggered by a finding of unfair discrimination.

In *Minister of Finance v Van Heerden* ("*Van Heerden*"), the Court held that the achievement of substantive equality requires a "positive commitment progressively to eradicate socially constructed barriers to equality and to root out systemic or institutionalised under-privilege."[112] The Court also held that a substantive version of equality would require "a harmonious reading of the provisions of section 9."[113] Unfortunately, the "cumulative, interrelated and indivisible"[114] holistic nature of the equality right is not visible in the Constitutional Court's jurisprudence.[115] This is largely because the restitutionary equality clause of section 9(2) of the Constitution is mainly litigated and interpreted to be a defence for positive measures that discriminate against certain groups.[116] Such a restrictive interpretation suggests that the absence of positive measures that deepen impoverished people's material disadvantage would not necessarily be interpreted as discrimination. This interpretation is inconsistent with the "cumulative, interrelated and indivisible" textual stipulations in the Constitution and PEPUDA in the following ways.

Section 9(2) of the Constitution states that "to promote the achievement of equality", positive measures "may" be taken to "protect or advance persons, or categories of persons, *disadvantaged by unfair discrimination*."[117] The restitutionary equality clause in PEPUDA further states that positive measures are needed to eradicate "past" and "present" unfair discrimination.[118] It would be undesirable to deduce that the Constitution does not envisage the same temporal awareness of discrimination as it does not refer to "past" or "present". This is so as discrimination is conceived as patterns of group

[111] Chapter 1 part 1 1.
[112] 2004 6 SA 121 (CC) para 25 and 31.
[113] Para 28.
[114] Para 136.
[115] This is the argument that runs through the chapter of Albertyn & Goldblatt "Equality" in *CLOSA* 35-1-35-84.
[116] 35-13-35-16.
[117] Emphasis added. S 9(2) of the Constitution.
[118] S 3(1)(a).

disadvantage and harm that is rooted in historical and cumulative structural barriers to full participation on social, economic, and political terms.[119]

The objects of PEPUDA also recognise the need for positive measures to "facilitate the eradication of unfair discrimination."[120] In its guiding principles, PEPUDA advocates for "corrective or restorative measures in conjunction with measures of a deterrent nature."[121] Significantly, chapter 5 of PEPUDA, which contains specific positive duties[122] to promote equality, also shows a synergistic relationship between restitutionary equality and discrimination provisions. Unfortunately, this chapter of PEPUDA is not yet in operation due to the extensive regulatory burdens that are placed on the state and private parties.[123] Currently, the PEPUDA Amendment Bill of 2021 seeks to bring chapter 5 into operation by addressing these difficulties.[124] Section 25(1)(c)(i) of PEPUDA indicates that the state, "where necessary or appropriate", "must" "develop action plans to address any unfair discrimination." Section 25(4) also stipulates on whom the onus for the redress of the relationship between unfair discrimination and inequality rests:

> "All Ministers must implement measures within the available resources which are aimed at the achievement of equality in their areas of responsibility by – (a) *Eliminating any form of unfair discrimination or the perpetuation of inequalit*y in any law, policy or practice for which those Ministers are responsible […]"[125]

The amendments to PEPUDA also clarify that there is a duty on "all persons" to promote equality and "eliminate discrimination".[126]

South Africa's jurisprudence also recognises that the conceptual overlap between restitutionary measures and discrimination measures could help provide an avenue for substantive equality to be achieved.[127] For example, in *Khosa v Minister of Social Development* ("*Khosa*"), the Court found that the unequal enjoyment of the right to social assistance under section 27 of the Constitution could found a claim of unfair discrimination.[128] Another example includes the judgment of *Equal Education v Minister of Basic Educatio*n where the Court ordered the Department to immediately provide food

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[119] Ackermann J held that past unfair discrimination impacts current unfair discrimination of certain groups in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1991 1 SA 6 (CC) para 60.
[120] S 2(c) of PEPUDA.
[121] S 4(1)(d).
[122] See the commentary in the Amendment Bill Section B Background note at para 2.3.
[123] PEPUDA Amendment Bill Section B Background note at para 2.3.
[124] Para 2.3. See also United Nations Committee on Economic, Social and Cultural Rights "Concluding Observations: Initial Report of South Africa" (12 October 2018) UN Doc E/C.12/ZAF/CO/1 paras 4 and 5 that recommends that government should speedily bring this section into force.
[125] Emphasis added.
[126] PEPUDA Draft Amendment Bill of 2021 para 24(2).
[127] See the Court's recognition of this overlap in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) paras 61-62.
[128] 2004 6 SA 505 (CC) para 44.

to all qualifying learners of the National School Nutrition Programme ("NSNP").[129] The Court stated that the NSNP "has a historical context and was implemented to achieve substantive equality and to protect and advance children disadvantaged by unfair discrimination in terms of s 9(2) of the Constitution."[130]

The abovementioned textual stipulations and judicial pronouncements indicate that unfair discrimination based on poverty would, depending on the context, necessitate a complex matrix of duties and accompanying measures. This suggests that the restitutionary nature of the equality right would require removing discriminatory barriers to equal participation through (re)distributive means. The remedial process would require a complex matrix of measures and duties to transform economic structures and social relationships that will allow for equal participation and equal access to various rights and freedoms. The nature of the specific duties that a finding of poverty discrimination will trigger also depends on how poverty itself could be defined or understood within a discrimination law context.

3 6 Defining poverty within a discrimination law context

As chapter 2 proposed, poverty as a prohibited ground of discrimination should reflect the intersecting misrepresentation, maldistribution, and misrecognition conditions of living in poverty if it is to be a transformative representation within a rights framework. Currently, two listed grounds provide a legal grounding for poverty to be recognised as a prohibited ground of discrimination. The first is recognised in the Constitution and PEPUDA as "social origin" and the second is enumerated in PEPUDA as "socio-economic status". The following section critically discusses the current understandings of these grounds by evaluating whether they sufficiently give expression to the dimensions of poverty discrimination as developed in chapter 2. It conceptualises what poverty as a prohibited ground of discrimination under South Africa's discrimination law could entail.

3 6 1 Misrecognition and maldistribution conditions

Social origin is sometimes invoked in South African litigation and jurisprudence.[131] Social origin relates to the disadvantageous historical position of a specific social group and

[129] 2021 1 SA 198 (GP).
[130] Para 35.
[131] *Applicants' Heads of Argument* in *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) (23-07-2009) <https://www.escr-net.org/sites/default/files/Applicant_Submission_-_Con_Court_0.pdf> (accessed 12-05-2020) ("*Mazibuko Applicants' Heads of Argument*") paras 312-314; *Social Justice Coalition v*

relates closely to ethnic origin and the grounds of race.[132] Albertyn and Goldblatt argue that social origin relates closely to "socio-economic status" and introduces ingrained and historical patterns of class stratification.[133]

However, MacKay and Kim argue that social origin is insufficient as it exclusively refers to one's class origin, background or history but does not consider that poverty can also relate to a present socio-economic situation.[134] This is an important reflection as poverty can be intergenerational or people could fall in and out of poverty due to, for example, the boom-and-bust cycles of the market, austerity measures in relation to social needs provisioning or deepening levels of unemployment.[135] The listed ground of social origin in section 9 of the Constitution and part (a) of the definition of "prohibited grounds" in section 1 of PEPUDA is helpful insofar as it indicates the historical and systemic nature of poverty discrimination. However, it is not clear whether it only refers to the social, political, economic, or intersecting disadvantages of poverty discrimination.

In this regard, the definition of "socio-economic status" in PEPUDA is more promising. "Socio-economic status" is defined as:

> "[including] a social or economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status or lack of or low-level educational qualifications."[136]

The definition successfully captures the disadvantage-centric orientation of discrimination law as it highlights that poverty is a disadvantageous condition.[137] It therefore sheds light on the institutionalised structures that create and reinforce the disadvantages associated with poverty. The definition is also open-ended as it indicates that socio-economic status "includes" the specified disadvantageous conditions. This is a welcome construction as it leaves space for impoverished people to articulate the specific dimensions of the discrimination they face.

In addition, PEPUDA captures the misrecognition condition of poverty by referring to the perceptions attached to someone's poverty and the possible consequences that may flow from these perceptions.[138] The reference to "low employment status or lack of or

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Minister of Police 2019 4 SA 82 (WCC) para 62; *Mahlangu v Minister of Labour* 2021 2 SA 54 (CC) para 44.

[132] Albertyn & Goldblatt "Equality" in *CLOSA* 35-64-35-65.

[133] 35-35-35-37.

[134] W MacKay & B Kim *Adding Social Condition to the Canadian Human Rights Act* (2009), Canadian Human Rights Commission 23-24.

[135] Chapter 2 part 2 4 3 at footnote 218.

[136] S 1(1)(xxvii).

[137] Chapter 2 part 2 4 2.

[138] S Liebenberg & M O'Sullivan "South Africa's New Equality Legislation – A Tool for Advancing Women's Socio-Economic Equality" (2001) *Acta Juridica* 70 93.

low-level education qualification" pivot more to the misrecognition aspect of poverty where employment status or lack of education serves as a stigmatising barrier to opportunities. It does not seem to suggest that having no employment or a low-level education constitutes discrimination.

Albertyn et al have argued that it is doubtful whether the inclusion of socio-economic status as a ground of discrimination under PEPUDA would address economic policies that influence access to economic resources.[139] They argue that socio-economic status as a prohibited ground would only combat social exclusion that arises from unreasonable stereotypes of the poor.[140] This suggests that poverty as a recognised ground would only address the stigmatising effects of poverty discrimination (that is the misrecognition dimension). This argument is plausible as the ground refers to socio-economic "status". However, it is not plausible when other parts of the definition are also considered. Moreover, it allows for a restrictive interpretation of discrimination provisions as such a reading would render discrimination law unable to detect and respond to the intersecting disadvantages of poverty. It is therefore necessary that poverty as a prohibited ground of discrimination should be formulated and interpreted to encompass not only its misrecognition dimension but also the maldistribution and misrepresentation dimensions.

PEPUDA significantly captures poverty's maldistribution dimensions by indicating that poverty is a disadvantageous economic condition. Moreover, this formulation leaves the possibility open that the material disadvantages of poverty could ensue under conditions of equality and inequality.[141] Additionally, the definition signals a strong legislative expression that discrimination provisions would also seek to detect and remedy the maldistribution that flows from impoverished people's group membership. However, the definition lacks an element that captures the political marginalisation of impoverished groups, the misrepresentation condition. The following section considers how this condition could be integrated into a definition of poverty.

3 6 2 Integrating the misrepresentation condition

South African discrimination jurisprudence acknowledges that some groups' political marginalisation is a source of discrimination. In *Khosa*, the Court found that excluding permanent residents from social security benefits constitutes unfair discrimination.[142] The

[139] Albertyn et al *Introduction* 84.
[140] 84.
[141] Chapter 2 part 2 4 2.
[142] 2004 6 SA 505 (CC) para 71.

Court held that foreign nationals have "little political muscle" to influence decisions that affect their rights and well-being.[143] The Court also indicated how the misrepresentation injustice faced by permanent residents intersects with the misrecognition and maldistribution conditions by stating that, "decisions about the allocation of public benefits *represent* the extent to which poor people are treated as equal members of society."[144]

South African discrimination jurisprudence therefore reveals that disadvantaged groups have reduced political voice. However, thus far the jurisprudence does not go far enough as it does not indicate that the condition of living in poverty impedes impoverished people's equal political voice. This suggests that impoverished people's political disadvantage should encapsulate the marginalisation they face because of their group membership. It should also encapsulate the political marginalisation they face as a result of the fact that they do not have the necessary material and social preconditions to influence democratic processes which affect the full and equal enjoyment of all rights and freedoms.

The above analysis reveals that the current grounds of social origin and socio-economic status, while helpful in combatting forms of poverty discrimination, do not fully capture the intersecting disadvantages impoverished people face. A limited definition can prevent discrimination law from being responsive to the complexity of poverty discrimination. The following section indicates how the intersecting conditions of poverty discrimination could be inserted into a possible definition.

3 6 3 A possible definition of poverty discrimination

This section proposes an inclusive definition that could assist litigators and adjudicators to detect and interpret the intersecting dimensions of poverty discrimination when such a claim is instituted within a judicial setting.

As a start, the definition must recognise the three conditions of poverty. The three intersecting conditions of poverty should be looked at together without skewing the understanding of poverty to only one dimension. It is true that poverty discrimination could be triggered by only one of the dimensions and that all three do not have to be present to show discrimination. Nevertheless, each instance of discrimination will often

[143] The Court drew from the case of *Larbi-Odam v MEC for Education* 1998 1 SA 745 (CC) para 19.
[144] *Khosa v Minister of Defence* 2020 3 SA 190 (GP) para 4. Emphasis added.

have intersecting dimensions.[145] These intersecting conditions should be open-ended and subject to continuous re-interpretation, and courts should resist fixed and final interpretations of poverty discrimination definitions. Every claim of poverty discrimination should also be contextually interpreted to detect the intersecting conditions, and impoverished people themselves should articulate the nature of their exclusion.

Drawing from the transformative substantive equality interpretative and adjudicatory framework developed in chapter 2 and the analyses of the current formulations of poverty discrimination, the following working definition of poverty within the South African discrimination law context, that can assist courts, is proposed as:

> "Poverty is a condition with intersecting and structural dimensions that include political marginalisation, diminished democratic voice, material deprivation and disadvantage, and social stigma, prejudice and violence that adversely affect impoverished people's full and equal enjoyment of all rights and freedoms."

In terms of a claim that is instituted in terms of section 9(3), this definition serves as an important guideline for when a claim of poverty discrimination is instituted. This is the case as thus far there is no judicial interpretation of what a possible definition could entail. In terms of PEPUDA, a court should interpret the definition to include the political marginalisation, the intersections between the different dimensions and the recognition that these intersecting conditions adversely affect the full and equal enjoyment of all rights and freedoms.

3 7 Conclusion

This chapter distinguished between three stages in cases in which unfair discrimination on the ground of poverty is alleged in terms of section 9 of the Constitution and PEPUDA. The first stage concerns issues related to application, and the question who is bound by the right of non-discrimination. The second stage relates to the question whether there has been unfair discrimination. Here the court must embark on interrelated inquiries. First, it must ask whether there has been discrimination, with reference to the harm, prejudice, or disadvantage for impoverished people. Then the inquiry must move to a consideration of the fairness of the discrimination, with reference to the context and the impact of the discrimination on the impoverished claimants and impoverished people as a group. The last inquiry of the second stage should shift the focus to the justifications

[145] See the significance of all three dimensions in the impact inquiry to determine the vulnerability of impoverished people Chapter 4 part 4 3 2.

put forward by the respondents. Thereafter, the court should consider what would constitute a transformative remedy to vindicate impoverished people's rights.

The chapter considered the issues that arise in the first stage of litigation. It found that a transformative conception of the subsidiarity principle should consider which form of application would provide optimal transformative results for impoverished people. Furthermore, the chapter illustrated that the application of the non-discrimination principle against a wide range of interlocutors has far-reaching implications for the state and a wide range of private persons. This is to be welcomed as the redress of poverty discrimination will require structural transformation in both the public and private spheres. The chapter further examined the duties that flow from the prohibition of non-discrimination based on poverty. It stressed that the quartet of duties to respect, fulfil, promote, and protect all rights in the Constitution should be understood within their transformative mandate. In enhancing these transformative duties attached to non-discrimination, this chapter also found a strong conceptual overlap between discrimination provisions and restitutionary equality duties which indicated that positive steps are needed to eliminate poverty discrimination. The chapter highlighted that where there are structural barriers that impede impoverished groups from participating equally in society, a positive duty should rest on the state and, in certain circumstances, private actors to dismantle these barriers.

The chapter then considered the various formulations of grounds akin to poverty in PEPUDA and the Constitution. It found that poverty's social and economic harms and disadvantages are delineated in the definition of "socio-economic status" in PEPUDA. However, the definition of PEPUDA fails to refer to the intersecting social, economic, and political disadvantages of misrepresentation, maldistribution and misrecognition. Moreover, the definition fails to acknowledge that the political disadvantage impoverished people encounter could also amount to a source of discrimination. The chapter then introduced a possible definition of poverty discrimination that could provide a basis for claiming discrimination in terms of PEPUDA and the Constitution. The definition highlights the three structural intersecting conditions of misrepresentation, maldistribution and misrecognition that should be considered open-endedly when courts conceptualise and interpret instances of poverty discrimination. The next chapter considers how the three inquiries of the discrimination claim introduced in this chapter could give effect to a transformative conception of substantive equality developed in chapter 2.

CHAPTER 4: A TRANSFORMATIVE SUBSTANTIVE EQUALITY APPROACH TO POVERTY DISCRIMINATION

4 1 Introduction

This chapter aims to analyse and evaluate to what extent the stages of an unfair discrimination inquiry, considering discrimination, fairness, and justifications, give effect to a transformative conception of substantive equality. The chapter also aims to make recommendations for reforming some parts of the inquiries in the Constitution and PEPUDA to reflect the transformative mandate of the right to equality and non-discrimination based on poverty. In doing so, it aims to develop a transformative substantive equality interpretative framework for an unfair discrimination analysis based on poverty in terms of the Constitution and PEPUDA.

This chapter first considers the discrimination inquiry, then the impact inquiry, and lastly the justification inquiry. It draws on a wide range of discrimination jurisprudence and academic commentary on the current legal framework governing discrimination in South Africa, particularly in the context of its potential and drawbacks in responding to poverty discrimination. To avoid repetition, these inquiries will be considered interchangeably in terms of PEPUDA and the Constitution. Where there are significant deviances between the two, it will be indicated throughout the assessments.

4 2 The discrimination inquiry

This section elaborates on the various constitutive parts of a discrimination inquiry. It starts with considering whether the concept of discrimination in the Constitutional Court's jurisprudence and the definition provided by PEPUDA could detect instances of poverty discrimination. Thereafter it distils three components of the discrimination inquiry and critically discusses how the jurisprudence related to poverty discrimination could be interpreted to detect instances of poverty-based discrimination within a transformative substantive equality paradigm.

4 2 1 Detecting poverty discrimination

Equality before the law and the equal protection and benefit from the law as enumerated in section 9(1) of the Constitution is the starting point of an allegation that the equality right is breached in terms of the Constitution. However, if a differentiation relates to a

listed ground, the discrimination inquiry could start with a discrimination claim.[1] This is not the case in PEPUDA as the discrimination inquiry is the entry point.[2] However, it is submitted that when the equality right is read as an interrelated whole,[3] equality before the law and equal protection and benefit from the law is an imperative "cumulative, interrelated and indivisible" part of impoverished people's right to equality and non-discrimination.[4] In addition, a transformative reading of PEPUDA indicates that the right to equality before the law and equal protection of the law are subsumed in various parts of the prohibition of non-discrimination.[5]

Unfortunately, the Constitutional Court has sought to make a formalistic conceptual distinction between equality before the law and unfair discrimination to navigate separation of powers concerns.[6] The Court has expressed that in modern societies, "mere differentiation" is necessary to enable effective governance.[7] In navigating separation of powers concerns it has confined its level of scrutiny to rationality. Therefore, section 9(1) provides a low level of protection in the form of a rationality test that the respondent can easily meet in cases concerning impoverished people.[8] For example, a municipality can argue that it seeks to establish equality before the law by charging a flat rate on all citizens for water consumption, with the purpose being to recover costs.[9] This will indeed amount to equality of consistency for middle- and higher-income groups but could be disadvantageous for impoverished people. Equality before the law and equal protection and benefit from the law should also be substantively interpreted to give expression to the transformative egalitarian ethos of the Constitution.[10] Such an interpretation would suggest that the court should query the legitimacy of the respondent's tabled purpose for the differentiation made between impoverished and more well-off people. Thus, even if differentiation on the grounds of poverty passes the

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1 C Albertyn & B Goldblatt "Equality" in S Woolman & M Chaskalson (eds) *Constitutional Law of South Africa* 2 ed (2002) 35-1 35-16.
2 Ss 1(1)(viii) and 1(1)(xxiii)(a)-(b) read with ss 13 and 14 of PEPUDA.
3 *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 28.
4 Para 136.
5 See the preamble and the objects of PEPUDA as stipulated in s 2(a), (b)(i) and (b)(iv).
6 *Bel Porto School Governing Body v Premier of the Province, Western Cape* 2000 3 SA 265 (CC) para 46.
7 Para 23.
8 For a deeper discussion of this in terms of the burden of justification, see part 4 4 2 below.
9 Chirwa indicates that these measures of basic need provisioning erode the realities of impoverished people. At its most severe impact these models exploit and benefit from impoverished people's predicament. D Chriwa "Privatisation of Water in Southern Africa: A Human Rights Perspective" (2004) 4 *AJHR* 218 221, 227-228.
10 Albertyn & Goldblatt "Equality" in *CLOSA* 35-26-35-29.

section 9(1) rationality test, it could nonetheless amount to unfair discrimination in terms of sections 9(3) and 9(4) of the Constitution.

In terms of the first step of the *Harksen v Lane* ("*Harksen*") test for unfair discrimination, one must ask whether the differentiation made towards impoverished people amounts to discrimination.[11] Despite this exposition of the first step, the Court misses an imperative step as it conflates differentiation with discrimination.[12] This means that the claimant does not have to show some form of harm, prejudice, or disadvantage. The result is that the concept of discrimination is being equated with differentiation.

However, prior jurisprudence suggests that discrimination is distinct from differentiation as it has a "particular pejorative meaning" against the institutionalised discrimination of South Africa's past and present.[13] PEPUDA codifies and clarifies the concept of discrimination as enumerated in the Constitutional Court's jurisprudence and could be divided in three components. In terms of the first component of section 1(vii)(a) of PEPUDA, a complainant must allege a *prima facie* case of discrimination in showing a direct or indirect act or omission, "including a policy, law, rule, practice, condition". The second component is that the impugned act or failure to act must cause or "impose burdens" or "disadvantage" or withhold "benefits", "opportunities" or "advantages". And third, the impugned discrimination must be shown to induce prejudice or harm on any person or group "on one or more prohibited grounds". The following sections consider each of these components in relation to their ability to respond to the intersecting dimensions of poverty discrimination within the framework of transformative substantive equality. As the definition of discrimination in PEPUDA codifies the Constitutional Court's jurisprudence, these three components are considered for both poverty discrimination claims brought in terms of the Constitution and PEPUDA.

4 2 1 1 Component one: Showing poverty discrimination

The following subsections analyse the implications of a transformative substantive equality reading of the first discrimination component. The first subsection considers whether the stipulation that discrimination can arise from an act or omission could challenge structural poverty. The second subsection analyses the wide range of omissions and actions in laws and policies, and the conditions, methods and situations

[11] 1998 1 SA 300 (CC) para 53.
[12] C Albertyn & B Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" (1998) 14 *SAJHR* 248 269.
[13] *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) para 31; *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) paras 33 and 39.

attached thereto that have been marked as discriminatory in some selected cases related to poverty discrimination. The third subsection then examines the capacity of the concept of indirect discrimination to capture the less visible and structurally discriminatory consequences of some policies, conditions, and omissions.

4 2 1 1 1 Discriminatory actions or omissions

The first component of discrimination has far-reaching implications for discrimination law. A discernible discriminatory action would arise, for example, from banks refusing poor people access to mortgage bonds because they are deemed a credit risk.[14] Importantly, the acknowledgement that discrimination can arise from a failure to act is significant for structural poverty on various levels.

In the presence of current unequal conditions in South Africa, the failure of positive (re)distributive measures, when circumstances arise that deepen impoverished people's disadvantage, would satisfy the meaning of an omission. This is so as positive measures such as "levelling up" would be required through securing production and distribution relations that are geared to fulfil[15] and prioritise people's socially contested needs.[16] This would imply that, for example, where poor people have unequal access to, or experience problems relating to the availability, quality or affordability of basic services, the state's duty to address poverty discrimination would require it to take positive measures to deliver social services where there are none.[17] For example, impoverished people are forced to buy their basic needs through a market economy.[18] It is well known that impoverished people are unable to buy quality goods through market mechanisms as they lack sufficient income.[19] The absence of measures to address exclusionary market

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14 C Albertyn, B Goldblatt & C Roederer (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act (2001)* 112.

15 Chapter 3 part 3 5 for the transformative duties attached to the prohibition of non-discrimination based on poverty.

16 Chapter 2 part 2 4 3.

17 For the debates on whether equality would require the provisioning of services where none exists, see S Fredman "Providing Equality: Substantive Equality and the Positive Duty to Provide" (2005) 21 *SAJHR* 163-190. See generally that socio-economic rights should be available, accessible, acceptable and of good quality in their provisioning. This is often referred to as the "AAAQ framework" that emanates from various general comments of the Committee on Economic, Social and Cultural Rights pertaining to the normative content of specific rights. In this respect, the Court "must" take international law into account when the Bill of Rights is interpreted in terms of s 39(1)(b) of the Constitution.

18 A noteworthy and welcome exception is the current roll out of free sanitary product to address period poverty. See Department of Women, Youth and Persons with Disabilities "Menstrual Hygiene Day Seeks to End More than Just Period Poverty" (28 May 2019) *South African Government* <https://www.gov.za/speeches/department-women-menstrual-hygiene-day-28-may-2019-0000> (accessed 07-05-2021).

19 S Liebenberg "The New Equality Legislation: Can It Advance Socio-Economic Rights?" (2000) 2 *ESR Review* 11 14.

mechanisms would amount to a discriminatory barrier on the basis of poverty.[20] The acknowledgement that discrimination can arise out of omissions, also implies that where, for example, significant disparities in wealth and resources exist the absence of redistributive or "levelling down" measures are discriminatory based on poverty.[21]

Other instances would include the failure to provide assistance or information for impoverished people to understand the terms of funeral or mortgage agreements where there is a potential for impoverished people to contract their rights away. This could happen as illiteracy levels in impoverished communities are a magnet for insurance companies to conclude contracts with impoverished people on disadvantageous terms.[22]

Thus, the recognition that poverty discrimination could arise out of discriminatory acts or omissions could challenge the various barriers that deny impoverished people full enjoyment of all rights and freedoms or where there is unequal provisioning of all rights and freedoms. As poverty discrimination is structural, it will sometimes be necessary to detect not only the actions or omissions that constitute discrimination but also the less visible and discriminatory consequences or effects of some policies, conditions, and omissions. The next section considers how the recognition of direct and indirect manifestations of discrimination could capture the structural nature of poverty discrimination.

4 2 1 1 2 Direct and indirect poverty discrimination

The Constitution and PEPUDA aim to detect direct or indirect instances of unfair discrimination.[23] Direct discrimination is established when there is an overt link between a prohibited ground and the disadvantage that flows from the discrimination. It is, however, not necessary to show an intention to discriminate. It is sufficient to merely show a relationship between "one or more" prohibited grounds and the discriminatory act

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[20] See the implications of reasonable accommodation in Chapter 4 part 4 4 5 2.

[21] However, see the difficulty of such far reaching redistributive measures in the judicial setting in terms of the justification section in Chapter 4 part 4 4 and the issues it presents for separation of powers concerns in Chapter 5.

[22] See the case of *University Stellenbosch Law Clinic v National Credit Regulators* 2020 3 SA 307 (WCHC) where the Court held that consumers are being taken advantage of when they default on payments and the interest rates double up in terms of the National Credit Act 34 of 2005 *in duplum* rule. Such an application could have disproportionate implications for impoverished lenders.

[23] S 9(3) of the Constitution as confirmed in *City Council of Pretoria v Walker* 1998 2 SA 363 (CC) para 43 and s 1(1)(xxiii)(a)(viii) of PEPUDA.

or omission.[24] This bolsters a transformative notion of substantive equality that directs the focus to structural inequalities that generate discrimination.[25]

The focus on the structural causes of discrimination is also captured by recognising that discrimination can operate indirectly. This means that any discriminatory omission, practice, or law needs only to have a discriminatory effect or consequence even when it appears facially neutral.[26] The legal recognition that poverty discrimination can ensue indirectly, will be essential to challenge entrenched practices, situations or conditions that appear facially neutral, but nonetheless enlarge the disadvantage of impoverished people.

In the seminal case of *City Council of Pretoria v Walker* ("*Walker*"), the Court confirmed the principle that discrimination could be indirect.[27] In this case, Mr Walker, a white man living in the wealthier area of Constantia Park ("old Pretoria") that is "overwhelmingly white", first argued that the Council unfairly discriminated against him based on his race as his municipal water and electricity tariffs were based on a consumption rate.[28] In contrast, the communities of Mamelodi and Atteridgeville who were black were levied at a flat rate.[29] The respondent alleged that this resulted in indirect racial discrimination as the wealthier area in effect subsidised the poorer areas for water and electricity.[30]

Mr Walker also alleged that the differentiation in enforcement mechanism unfairly discriminated against him based on his race. There was differentiation in the enforcement mechanism as in old Pretoria, steps were being taken to enforce payment by those users who were in arrears by suspending services and issuing summons. In contrast, according to Mr Walker, no legal action was instituted against the township residents, despite the vast number that were in arrears.

In terms of the differentiation in tariffs, the majority held that:

> "It is not necessary in the present case to formulate a precise definition of indirect discrimination. […] The fact that the differential treatment was made applicable to geographical areas rather than to persons of a particular race may mean that the discrimination was not direct, but it does not in my view alter the fact that in the circumstances of the present case it constituted discrimination, albeit indirect, on the grounds of race."[31]

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[24] *City Council of Pretoria v Walker* 1998 2 SA 363 (CC) para 43; PEPUDA Amendment Bill of 2021 also seeks to codify the position that there need not be an intention to discriminate by including it in the definition of "discrimination" at para 1(a).

[25] S Fredman *Human Rights Transformed* (2009) 313-315.

[26] *City Council of Pretoria v Walker* 1998 2 SA 363 (CC) para 31.

[27] 1998 2 SA 363 (CC).

[28] Paras 4 and 5.

[29] Para 5. The Council was still in process to install meters at the time of instituting the claim (para 54).

[30] Para 22.

[31] Para 32. See Sachs J's dissent at para 105 where he opined that the differentiation did not amount to direct or indirect discrimination based on race, but rather geographical area.

Unfortunately, the Court used a symmetric understanding of discrimination as it found that differentiation based on race was present.[32] This means that discrimination law was utilised to work in favour of the advantaged white community. Although the Court recognised that indirect discrimination based on race was present, it held that it was not unfair as the differentiation did not have a disproportionate material impact on the wealthier suburb.[33] It should be stated that the differentiation in levies was not a result of positive redistributive measures to improve the infrastructure of the township areas but rather still a remnant of the apartheid legacy as the residents of Atteridgeville and Mamelodi would have been charged with a consumption metric if they had meters installed.[34] The differentiation in the mechanism used to recover arrears was found to be unfair and indirectly discriminatory towards the old Pretoria white community as the Court held that it was an impermissible invasion of the dignity of white people.[35] This is a questionable holding as the Council argued that the discriminatory policy was not an impermissible invasion of the dignity of white people because it had the legitimate purpose of facilitating a transition from inequality to equality. This illustrates the need that the complainants must show that the differentiation leads to some form of harm or prejudice for it to be deemed as discriminatory.[36]

Besides *Walker's* symmetric understanding of discrimination, its recognition of indirect discrimination is significant in detecting indirect burdens imposed on poor people, especially as the disadvantages impoverished people face are structurally ingrained. The case illustrates that on its face, the council's policy was neutral based on race as there was no explicit differentiation made between white and black ratepayers. However, it had the consequence of imposing more onerous tariff structures on the suburbs of old Pretoria than on the townships.

The facts of *Mazibuko v City of Johannesburg* ("*Mazibuko*") illustrate the important distinction between direct and indirect discrimination in cases concerning poverty.[37] The case considered the differentiation made in water tariffs and policy measures between a wealthier white group and an impoverished black group.[38] The applicants averred that the decision to only subject the low-income and deemed consumption area with the pre-

[32] This is a feature of the *Harksen* test that has been criticised in Goldblatt & Albertyn (1998) *SAJHR* 268.
[33] *City Council of Pretoria v Walker* 1998 2 SA 363 (CC) para 68.
[34] Para 5.
[35] *Walker* para 81.
[36] Part 4 2 1 2 below.
[37] 2010 4 SA 1 (CC).
[38] For a more detailed discussion of the facts of the case, see the next part of 4 2 1 1 3.

paid meter mechanism indirectly discriminated against Phiri's poor and black community.[39] The City conceded that due to structural inequality any type of differential treatment of townships amounts to indirect discrimination, but as seen below, the Court rubberstamped the legitimacy of the governmental policy.[40]

This type of indirect effect of an ostensibly neutral policy is vividly demonstrated in the case of *Social Justice Coalition v Minister of Police* ("*SJC*").[41] In this case the Western Cape Equality Court was tasked to adjudicate whether the methods that informed the policy for the allocation of police human resources, unfairly discriminated against impoverished and black people of Khayelitsha.[42] The Court found that the methods employed to determine the distribution of police human resources led to the insufficient allocation to the Khayelitsha police station, thereby undermining effective policing.[43] The respondents argued that the allocation of resources did not indirectly discriminate against impoverished people. Instead, the respondents argued that it indirectly favoured disadvantaged communities such as Khayelitsha as the method to determine the allocation considers socio-economic considerations that is weighted in favour of disadvantaged communities.[44] However, as is set out in the following section, the Court held that the failure to comprehend the nature of the reporting of crimes in poor areas and the ostensibly neutral socio-economic considerations resulted in a skewed allocation of police resources which had a burdensome indirect impact on the poor community of Khayelitsha.

The consideration of indirect discrimination is also significant in establishing the relationship between different grounds.[45] For example, any discriminatory conduct or omission that, either directly or indirectly, deepens the disadvantage of poor people as a group could also have an indirect discriminatory effect on other grounds. This is particularly illustrated in the *SJC* and *Mahlangu* cases. Drawing from *Walker*, Dolamo J in *SJC* held that the allocation of police human resources and the specific method used to determine the distribution also indirectly discriminated against the poverty-stricken predominantly black community of Khayelitsha on the ground of race.[46] In *Mahlangu,* the

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[39] *Applicants' Heads of Argument* in *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) (23-07-2009) <https://www.escr-net.org/sites/default/files/Applicant_Submission_-_Con_Court_0.pdf> (accessed 12-05-2020) ("*Mazibuko Applicants' Heads of Argument*") para 312.
[40] Part 4 4 5 3.
[41] 2019 4 SA 82 (WCC).
[42] For a more detailed discussion of the facts of the case, see the next part 4 2 1 1 3.
[43] *SJC* para 41.
[44] Paras 23 and 44-47.
[45] See a deeper analysis of poverty as intersectional discrimination in part 4 2 1 3 2 below.
[46] Paras 36-40.

majority found that the exclusion of domestic workers from the definition of employee in COIDA discriminated indirectly against domestic workers as a class of workers on the grounds of their race and gender. The Court expressly indicated that it is indirect discrimination on the grounds of race and gender or sex as the vast majority of domestic workers remain black women.[47] Thus, even if poverty discrimination on its face seems neutral towards different groups, it can result in discriminatory consequences for status groups. The next section considers the practical manifestations of discriminatory measures.

4 2 1 1 3 Discriminatory policies, rules, practices, conditions, and situations

Discrimination extends to specific discriminatory actions or omissions, including policies, rules, practices, conditions, or situations that directly or indirectly discriminate that should be reviewable. This extension activates an awareness that there are often invisible and unrecorded social, political, or economic barriers that entrench impoverished people's disadvantage. To date, four cases have dealt with a form of poverty discrimination either directly or in combination with other recognised grounds or rights, that illustrate a diverse range of omissions, actions, policies, conditions, or situations that the applicants argued to be discriminatory.[48] The following paragraphs briefly set out the facts of the cases to the extent that it showcases a wide range of discrimination.

In *Khosa v Minister of Social Development* ("*Khosa*"), the applicants argued that the exclusion of permanent residents from social benefits constituted discrimination on the ground of citizenship status.[49] This case illustrates that citizenship was the condition that enabled access to social security benefits that were necessary to address the destitution of the permanent residents.

The first allegation of discrimination in the *Mazibuko* case related to a specific discriminatory policy measure and the exclusionary conditions attached to it. The applicants asserted that the City's water policy discriminated against Phiri's impoverished and black community on the listed grounds of race and social origin in two respects.[50] First, the applicants argued that the City's policy of a pre-paid water meter system

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47 Para 18.

48 There are two other cases where a claim of discrimination was instituted together with a specific socio-economic right, but it is not clear in terms of what grounds these cases were challenged. See *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 4 BCLR 312 (CC) and *Minister of Basic Education v Basic Education for All* 2016 4 SA 63 (SCA).

49 2004 6 SA 505 (CC) para 74.

50 *Mazibuko Applicants' Heads of Argument* paras 312-314.

("PPWMS") discriminated against poor black people as they were not offered the same option as the wealthier white areas of a credit meter water system ("CMWS") that offered a grace period for payment coupled with procedural safeguards to halt water cut-offs.[51] The policy only provided impoverished people with 25 free litres per person per day, and when 25 litres were exhausted, the water supply was automatically cut-off subject to further payments for more water.[52] Moreover, in terms of the policy, residents of the Phiri community were only given the guarantee of water supply if they accepted the instalment of a pre-paid water meter.[53] If they did not install the water meter, they could only get water services through a yard standpipe.[54]

The second impugned discrimination related to the City's indigent register. This register is an illustration of a discriminatory condition attached to a specific policy. The indigent register provided that if impoverished people were appropriately registered, an additional free ten kilolitres per household per month will be provided.[55] The applicants in the Constitutional Court challenged the indigent register on two fronts. First, they demonstrated that the indigent register was a discriminatory condition as impoverished people are mostly unable to respond to calls for registration due to various structural barriers.[56] Second, the applicants indicated that the indigent register system demeans impoverished people as they have to present and prove their impoverishment.[57] The third impugned discriminatory action related to the PPWMS that patronisingly attempted to manage impoverished people's affairs on their behalf as it is assumed that they are credit risks and squandering consumers.[58]

The *SJC* case illustrates that a policy and the specific methods and conditions stipulated in the policy framework could be marked as discriminatory towards impoverished people. The applicants indicated that the policy discriminated against the poor and black inhabitants in two respects. First, the policy allocated resources on a sliding scale in accordance with reported crimes. This was said to be a discriminatory condition, as the policy effectively excluded the reality of crimes being underreported in

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51 Para 304.
52 *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 69.
53 *Mazibuko Applicants' Heads of Argument* para 93.
54 Para 93.
55 *Mazibuko* para 81.
56 *Mazibuko Applicants' Heads of Argument* para 222.
57 Para 146.2.
58 Paras 308.3-308.4.

impoverished communities.[59] Second, the applicants indicated that in the policy rules, only 15 out of the 56 socio-economic factors used for the resource allocation were present in informal and poorer areas. In contrast, most of the 56 considerations are present in wealthier areas.[60] This meant that the factors used to calculate resource allocation resulted in more than double the weighting in favour of wealthier areas. The applicants also led evidence to show that the standard ratios used to calculate how many police officers are necessary per type of crime were discriminatory conditions as the nature and extent of the violence differ in wealthier and poorer communities.[61]

Mahlangu v Minister of Labour ("*Mahlangu*") showcases that a legislative provision or omission could be discriminatory towards impoverished people.[62] The applicants argued that the legislative omission of domestic workers from the definition of employee in the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ("COIDA") discriminated against black female domestic workers on the grounds of race, gender, and class.[63]

The abovementioned cases illustrate a wide range of omissions and actions in policies, laws and the conditions, methods and situations attached thereto that should be considered discriminatory. In addition, the above analysis indicates that the first component of discrimination should provide impoverished people with ample room to voice the various forms of discrimination emanating from structural causes. Moreover, to show poverty discrimination, attention should be paid to both the direct and indirect consequences of discriminatory practices and omissions to effectively respond to transformative substantive equality's aim to unmask the causes of the discrimination. After detecting the specific manifestation of poverty discrimination, the next component's focus is to determine whether the discrimination leads to some form of harm, prejudice, or disadvantage for impoverished people. The approaches to such a determination will now be considered.

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59 *SJC Applicants' Heads of Argument* in *Social Justice Coalition v Minister of Police* 2019 4 SA 82 (WCC) <*https://sjc.org.za/wp-content/uploads/2018/11/SJC_Heads.pdf*> (accessed 10-09-2020) ("*SJC Applicants' Heads of Argument*").

60 *SJC* para 51.

61 Para 45.

62 2021 2 SA 54 (CC) paras 75 and 191.

63 Para 18.

4 2 1 2 Component two: Discrimination leading to disadvantage, harm or prejudice

As stated above, a differentiating act or omission will only be discriminatory if it involves some sort of harm, prejudice or disadvantage.[64] The second component of discrimination therefore pertains to the causal link that must be shown on a *prima facie* basis between the discriminatory provision or omission and the disadvantage that flows from it.[65] It is not yet necessary to consider whether and to what extent the discrimination has an unfair impact in so far is at entrenches the disadvantage of impoverished complainants or their group.[66] This means that in this component there is merely a requirement to show that the poverty discrimination leads to some form of harm, prejudice or disadvantage.

It is not clear what type of harm, prejudice or disadvantage the discrimination must lead to. This will have to be determined through interpretation. In terms of the transformative substantive equality approach developed in chapter 2, harm, prejudice, or disadvantage could be based on maldistribution, misrecognition, or misrepresentation, depending on the angle at which the discrimination is understood. Ordinarily, prejudice and stigma would refer to impeding the equal moral worth of impoverished people. Disadvantage usually refers to material dimensions, and harm could relate to all three intersecting possibilities. However, the combinations and intersections of different forms and types of harm should be contextually evaluated and considered. In South African discrimination law, showing that the differentiation leads to discrimination that involves harm, prejudice or disadvantage can be done either by an appropriate fictional or real comparator or by a more contextual approach.[67]

In some instances, a comparator may be appropriate to establish discrimination based on poverty and may be starkly visible, especially in the context of deep structural levels of poverty and inequality. This highlights Fraser's affirmative recognition strategy of sometimes invoking status dichotomies to establish a subordinate group's immediate standing.[68] With the current deep stratification fault lines in South Africa, it might be

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64 For examples see the facts of the *Harksen* and *Hugo* cases and Albertyn & Goldblatt "Equality" in *CLOSA* 35-46; for PEPUDA, see Albertyn et al *Introduction* 34-35.

65 There is thus an initial burden of proof to *show* that the differentiation leads to some form of harm, prejudice, or disadvantage in order for the impugned differentiation to be deemed as discrimination in terms of the Constitution and PEPUDA. For a s 9(3) claim, Albertyn and Goldblatt have argued that the original *Harksen* test should be reformed to indicate that the differentiation is indeed harmful or prejudicial and therefore discriminatory on a *prima facie* basis (Albertyn & Goldblatt (1998) *SAJHR* 268-270). In terms of PEPUDA the complainant has a tenuous link to show that the prejudicial differentiation leads to discrimination on a *prima facie* basis (s 13(1) of the PEPUDA).

66 Part 4 3 2 below.

67 Albertyn et al *Introduction* 35.

68 Chapter 2 part 2 5 3.

appropriate to invoke more well-off people as a comparator. In addition, a comparator could strengthen a relational understanding of equality in determining whether the impugned discrimination will either obstruct or enable impoverished people's ability to participate on an equal political, economic, and social basis with others.[69]

However, utilising a comparator to show discrimination can remain affirmative if it does not seek to detect how the underlying cause of discrimination generates the status dichotomies. In addition, when determining that there was a differentiation between identifiable groups through a comparator, such an approach can result in a symmetric and formalistic evaluation of disadvantage and harm that decontextualises the impugned discrimination.[70] It is for this reason that South Africa's discrimination jurisprudence has shown caution in using a comparator as it is mired in complex and contested value-judgments[71] that can limit the scope of anti-discrimination protections that seek to address structural issues.[72] Taking a comparator to a logical extreme can also perpetuate entrenched privileged norms as the standard, thereby diminishing a transformative approach that seeks to destabilise status dichotomies.

Thus, the use of a comparator should not preclude contesting the historical and contextual causes of discrimination.[73] The absence of a suitable comparator should also not be fatal as the contextual approach to establish discrimination is also available. The focus will then be on the structural generator that enables the deprivation rather than the relative nature of the harm.

The contextual approach in this component of discrimination should shed light on the broader structural inequalities of poverty discrimination. This component of the discrimination inquiry provides an appropriate opening in discrimination provisions to appreciate the "sameness and difference" of vulnerable groups, without reifying their group identity or foreclosing the complexity in their different lived realities.[74] During this component, the contextual approach must seek to understand the institutionalised discrimination impoverished people as a group face. The unfairness contextual inquiry, in turn, should seek to move closer to the specific "different" lived reality of the impoverished group or person in question.[75] The following paragraphs critically discus

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69 Chapter 2 part 2 4 2.
70 S Jagwanth "What is the Difference? Group Categorization in Pretoria City Council v Walker" (1999) 15 *SAJHR* 200 204.
71 *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) paras 44 and 164.
72 Albertyn et al *Introduction* 35.
73 Albertyn & Goldblatt "Equality" in *CLOSA* 35-45.
74 Chapter 2 part 2 5 3 2.
75 Part 4 3 1 below.

the approaches employed in poverty discrimination cases, to show whether discrimination leads to some form of harm, prejudice, or disadvantage.

A good example where the use of comparators in the context of poverty was taken to an illogical extreme at the expense of contextually interrogating the inequality in which the claim was embedded arises in *Mazibuko*. In the High Court judgment of *Mazibuko v City of Johannesburg* ("*Mazibuko High Court*"), the City argued that the applicants are unfortunate "jammergevalle" as they are an unfortunate minority "in the greater scheme of things" in the sense that their hardship will be to the benefit "of everyone in the City".[76] Tsoka J dismissed this comparison by stating that:

> "The recent past history of inequality, want, poverty, indignity, [an] uncaring and unresponsive State are still too fresh in peoples' mind to treat the applicants as 'jammergevalle'. In my view, the applicants and all those residents of Phiri who found themselves in the same situation as the applicants, cannot be 'jammergevalle'."[77]

Conversely, the Constitutional Court marked the Phiri residents as unfortunate pity cases.[78] O'Regan J relied on subordinated hierarchies between different poverty levels to justify her reasoning that the policy did not disadvantage the Phiri community. She indicated that around a fifth of Johannesburg's households have access to sanitary services and a tenth does not have access to potable water within 200 meters of their home.[79] The Constitutional Court further reinforced subordinated hierarchies by noting that housing density varies, but stated that to allow all stands the same amount of water that will cover the largest amount of people per household "would be expensive and inequitable, for it would disproportionately benefit stands with fewer residents."[80]

O'Regan also utilised unhelpful symmetric comparisons between rich and poor groups by indicating that the indigent register of the City provided impoverished people with a means to pay less for more water when compared to wealthier credit meter users.[81] Moreover, the Constitutional Court used a symmetric comparison in comparing the water tariffs charged to the wealthier consumers and indicated that the advantaged areas are subjected to even higher tariffs and could be charged with high interest rates for arrears and be listed at the credit bureau.[82] The Court therefore held that the PPWMS was preferable for impoverished people as they could circumvent such "worrying

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[76] 2008 4 SA 471 (W) para 165. In English "jammergevalle" means the unfortunate pity cases.
[77] *Mazibuko High Court* para 166. Emphasis in original text omitted.
[78] *Mazibuko Applicants' Heads of Argument* para 309.2.
[79] *Mazibuko* paras 7 and 14.
[80] Para 88.
[81] See further part 4 4 5 3 below.
[82] *Mazibuko* para 153.

measures".[83] Another symmetric comparison the Court made was that the credit meter payers were also not provided with the choice to use the PPWMS that has advantageous price implications.[84] These symmetric comparisons are based on middle-class norms that create the impression that the higher income group is even more disadvantaged. Her reasoning also creates the impression that the deprivation of the applicants does not lead to disadvantage as there are more disadvantaged impoverished people.

In contrast, on a closer inspection of the *SJC* and *Mahlangu* judgments, a comparator seems to be a helpful indication of discrimination in combination with the deeper contextual awareness of structures that generate status hierarchies. In the *SJC* judgment, the Court explicitly stated that a comparator is not necessary but used the wealthier areas to illustrate the disadvantages of inefficient policing in poorer areas.[85] The Court cast the net wide to establish a broader structural picture of the intersections between race and poverty by stating:

> "25 years into our democracy people, Black people in particular, still live under conditions which existed during the apartheid system of government. The dawn of democracy has not changed the lot of the people of Khayelitsha. They continue to live in informal settlements where the provisions of services are non-existent or at a minimum. *This is more glaring where a comparison is made with the more affluent areas, mainly occupied by the privileged minority. Such a comparison brings to the fore the stark reality of abject poverty*. The unfortunate reality is that the residents of Khayelitsha, who are predominantly Black, continue to receive inferior services, including services from the SAPS. The SAPS discriminates against this impoverished community by using a system of human resources allocation."[86]

The Court thus highlights the significant connection between the impoverished reality of black people and Khayelitsha inhabitants generally and relates it to the historical structural dimensions of the apartheid system. The Court notes the applicants' submission that poverty is a systemic problem resulting from "our history and economic system" that renders impoverished people vulnerable and marginalised.[87] However, the Court interchangeably refers to how the vulnerability and marginalisation of impoverished people, compared to more affluent neighbourhoods occupied mainly by the privileged minority, makes the discrimination more pronounced.

In *Mahlangu*, the Court also uses several comparators but ultimately highlights that it is the structural causes of the discrimination that create the dichotomies of privilege and vulnerability. The Court engages with the precarious position of black women in the formal and informal working sector by stating that their profession "enables all active

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[83] *Mazibuko* para 153.
[84] Para 155.
[85] Albertyn & Goldblatt "Equality" in *CLOSA* 35-44-33-45.
[86] *SJC* para 90. Emphasis added.
[87] *SJC* para 63.

members of society to prosper and pursue their careers" at the expense of their own well-being.[88] The Court rejected the dissenting minority's argument that the exclusion of members of the South African National Defence Force ("SANDF") and the South African Police Services ("SAPS") from the definition of "employee" in COIDA rendered the exclusion of domestic workers not discriminatory.[89] The majority of the Court observed that there are already legislative protections for members of SANDF and SAPS to be compensated for death or injury during the course of their work.[90] Black female domestic workers, on the other hand, were the only identifiable group "who are in a legislative vacuum without any coverage whatsoever."[91]

More strikingly, the Court dismissed the comparison made by the dissenting minority by analysing the historical socio-economic exclusion domestic workers have faced, whereas members of SAPS and SANDF did not necessarily face historical disadvantage.[92] The Court indicated that "much like their apartheid counterparts, domestic workers today remain in an unenviable position" as their work is driven by a lack of other work opportunities where they are forced into underwaged or undervalued working relationships.[93]

The concurring minority judgment of Mhlantla J established a significant link between the historical and systemic nature of the disadvantage black female domestic workers face, without invoking patronising or stigmatising dichotomies or generalisations. Mhlantla J indicates that:

> "[domestic workers] are labelled as a ghost; invisible; plagued with historical silence; and rendered powerless. But, why is this so? The reasons originate from the grinding together of the tectonic plates of racism, sexism, and social class, which are all exacerbated by the private nature of their place of work – the household."[94]

According to Mhlantla J black female domestic workers encounter pervasive intersectional axes of discrimination and are not "invisible" or "powerless" and therefore in need of protection. Instead, they are "brave, creative, strong and smart" as they are "committed mothers and caretakers and have the ability to perform work in conditions that are challenging both psychologically and physically."[95] Mhlantla J directs attention to

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88 *Mahlangu* para 1.
89 Dissenting minority comparison per Jafta J at paras 150 and 162-167; majority counterargument para 94.
90 Para 94.
91 Para 94.
92 Para 94.
93 Para 104.
94 Paras 186-187. Footnotes from original text omitted.
95 Para 195.

the fact that their marginalisation and vulnerability emerges because of "a system that contains remnants of our colonial and apartheid past."[96] Moreover, "they have a voice", but the systemic undercurrents of their disadvantage render their voices silent.[97]

Thus, in showing whether impugned discriminatory conduct or omission imposes some form of harm, disadvantage, or prejudice towards impoverished people, it will sometimes be necessary to introduce comparators to show the current deep stratification levels. However, the comparisons should be made to expose the structural causes of the discrimination to guard against condescending and unhelpful generalisations against poor people. The next section examines the last component to sufficiently show poverty discrimination.

4 2 1 3 Component three: Listed and unlisted grounds and intersectional discrimination

The third component of the first stage of the discrimination inquiry is to establish that the discriminatory act or failure to act imposes disadvantages on "any person"[98] or "anyone"[99] "on one or more"[100] of the "prohibited"[101] or listed[102] grounds. This component highlights two significant questions relevant to conceptualising poverty as a ground of unfair discrimination. The first is whether and to what extent the test for prohibited grounds can elevate poverty from its current legal status of a directive principle in PEPUDA so that it can possibly become an entrenched prohibited ground in PEPUDA. Similarly, can the test for analogous grounds under section 9(3) of the Constitution sufficiently capture poverty to list it as an entrenched constitutional norm and right? The second question is whether the phrase, "on one or more grounds" in the Constitution and PEPUDA has the potential to grasp the intersectional nature of poverty discrimination. The following sections first consider poverty within the test for unlisted grounds and thereafter consider the intersectional nature of poverty discrimination cases.

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96 *Mahlangu* para 195.
97 Para 195.
98 S 1(1)(viii) of PEPUDA.
99 S 9(3) of the Constitution.
100 PEPUDA and the Constitution.
101 S 1(1)(viii) of PEPUDA.
102 The list of grounds in s 9(3) of the Constitution.

4 2 1 3 1 Listed and unlisted grounds: Recognising poverty as a prohibited ground

Recall, the Constitution and PEPUDA do not contain an exhaustive list of prohibited grounds.[103] The advantage of a non-exhaustive non-discrimination clause is that courts and parliament must recognise and respond to changing socio-economic and political factors and update grounds to respond to new forms of disadvantage.[104] As poverty is not included in the presumptive listed or "prohibited" grounds, discrimination will only be established when it is proved to be analogous to them.[105] The test for prohibited and listed grounds is not cumulative. Accordingly, poverty as a listed or prohibited ground would be established if impoverished people can demonstrate that any of the following factors are present.

The condition of being disadvantaged by poverty can be found to be a ground of discrimination when the complainants establish that poverty "causes or perpetuates systemic disadvantage" in terms of PEPUDA.[106] The complainants can also establish that poverty "undermines human dignity"[107] in terms of PEPUDA and "impair[s] the fundamental human dignity"[108] in terms of section 9(3) of the Constitution. "Or" the complainants can show that poverty "adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination"[109] in terms of PEPUDA and "affect[s] them adversely"[110] in terms of section 9(3) of the Constitution.

The test resonates with the three intersecting dimensions attached to the condition of living in poverty developed in chapter 2. The inference that could be made is that the test is designed to include forms of discrimination that erode the rights and interests that the Constitution seeks to protect as the "cornerstone" of democracy in South Africa.[111] This suggests that a ground of discrimination is a necessary tool of representation as a gateway to all the rights and interests it adversely affects.[112] The inclusion of the "causes

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[103] Chapter 3 part 3 2 1 and 3 2 2.
[104] Fredman *Discrimination Law* 12-13.
[105] *Harksen* para 54; s 1(1)(xxiii) of PEPUDA as expressed through "prohibited grounds" and its subsequent subsections (a) and (b)(i)(iii).
[106] The test set out in s 1(1)(xxiii)(b)(i) of PEPUDA is slightly wider than the Constitutional Court's postulated test in explicitly recognising systemic disadvantage, but this difference should be insignificant for any practical outcomes as the Court's jurisprudence has been responsive to the systemic nature of disadvantage. The specific stipulation in s 1(1)(xxiii)(b) of PEPUDA seems to be formulated from "patterns of disadvantage" stipulated in the Court's test for analogous grounds in *Harksen* para 50 and 53(b)(1) and *Brink v Kitshoff* 1996 4 SA 197 (CC).
[107] S 1(1)(xxiii)(b)(ii) of PEPUDA.
[108] *Harksen* para 53(b)(1).
[109] S 1(1)(xxiii)(b)(iii) of PEPUDA.
[110] *Harksen* para 53(b)(1).
[111] S 7(1) of the Constitution.
[112] Chapter 2 part 2 3 2.

or perpetuates systemic disadvantage" or entrenched "patterns of group disadvantage and harm" as factors also resonate with Fraser's conception that injustices arise in relation to institutionalised patterns of status and political and economic subordination.[113] This also conceives impoverished people as a group facing patterns of disadvantages and harm, rather than a merely individualistic or linear identification of non-discrimination guarantees. In this respect, the Court in *SJC* held that poverty is a systemic issue that results from the "economic system" that perpetuates impoverished people's disadvantage and enlarges their vulnerability and marginalisation.[114]

The factor of "the potential to impair human dignity" and "undermining dignity" captures the impediment to equal moral worth (misrecognition) as a precondition for participation.[115] The Court in *SJC* held that poverty meets this criterion as poverty is an "immutable characteristic". In the alternative, the differential treatment attached to the condition of poverty is inconsistent with equal concern and respect.[116]

The factor of whether the condition of living in poverty "affect[s] them adversely"[117] or "adversely affects the equal enjoyment of all rights and freedoms"[118] substantially captures the intersecting injustices of, especially misrepresentation and maldistribution. This reinforces the idea that poverty conceptions should be extended to include more than mere economic need, as it is also a substantial impediment to autonomy and a barrier to the equal enjoyment of all rights and freedoms.[119] The *SJC* judgment reiterated that poverty is a condition that significantly impacts the equal enjoyment of all rights and freedoms, especially the realisation of the socio-economic rights of impoverished people. Hence, the Court concluded that it was comparable to discrimination on a prohibited ground.[120] The *SJC* judgment, therefore, recognised poverty as a prohibited ground of unfair discrimination.[121] As set out in the previous chapter, the legal status of poverty discrimination is uncertain.[122] Despite this, there are several advantages to recognising poverty as a listed ground.

First, the presumption of unfairness will be triggered, and impoverished people will not have to prove that the discriminatory action discriminated unfairly against them. The

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[113] Chapter 2 part 2 2 1.
[114] *SJC* para 63.
[115] Chapter 2 part 2 5.
[116] Para 64. On immutable characteristics in discrimination law, see Chapter 2 part 2 5 3 1.
[117] *Harksen* para 53.
[118] S 1(1)(xxiii)(b)(iii) of PEPUDA.
[119] Chapter 2 part 2 2 1.
[120] *SJC* para 65.
[121] Para 65.
[122] Chapter 3 part 3 2 2.

burden of proof will shift to the duty bearer of the non-discrimination prohibition to indicate that the impugned discrimination is not unfair.[123] This is significant in cases of poverty discrimination as the information needed to show unfairness is seldomly ascertainable or in possession of the vulnerable group, but rather in the hands of the bearer of the duty not to discriminate.[124]

Second, as discrimination carries a pejorative meaning, the recognition of poverty as a listed ground will, over time, infiltrate everyday practices and structures, thereby raising awareness and responsiveness to poverty discrimination.[125] Poverty as a ground of discrimination would become an indictment to the existing socio-economic order that sustains and generates poverty.[126] Moreover, where impoverished people are affected by structural, systemic and other disadvantages, prohibited grounds provide a strong legal basis for some kind of relief or remedy.[127]

Third, it also provides a textual signal to all branches of government that heightened attention should be paid to the impact of policies or budgetary allocations on impoverished groups. Even though socio-economic status is recognised as a directive principle with little practical difference to listed grounds,[128] a directive principle does not have the same legal basis as listed and prohibited grounds. Therefore, poverty does not currently operate as an entrenched prohibited discrimination norm that must inform all practices, guide (re)distributive efforts and infiltrate all spheres of everyday life.

These advantages make a strong case that poverty should be expressly listed in PEPUDA as a prohibited ground of discrimination as it can provide a significant representation for impoverished people to either represent themselves or be represented in their absence.[129] Moreover, as the disadvantageous conditions attached to living in poverty meet the test to be recognised as a listed ground, poverty as a ground of discrimination should be elevated from the status of a directive principle in PEPUDA. It should also be listed in section 9(3) of the Constitution for the same reasons.

When poverty is fully recognised as a discrimination ground, its relationship with other grounds is still contested. The next section considers whether an intersectional

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[123] S 9(5) of the Constitution; s 13 of PEPUDA.
[124] Albertyn et al *Introduction* 50-51.
[125] See the symbolic significance of judicial pronouncements in relation to poverty in Chapter 5 part 5 2.
[126] Gutto *Equality and Non-Discrimination* 233.
[127] 232-234.
[128] For the exact practical implications, see Chapter 1 part 1 2 at footnotes 52-55.
[129] Chapter 2 part 2 3.

conception of disadvantage can assist in establishing an appropriate relationship with poverty and other grounds of discrimination.

4 2 1 3 2 "On one or more grounds": Poverty as intersectional discrimination

As chapter 1 indicates, an argument has been made that poverty could "overshadow" and detract from other status grounds' utility and centrality, such as race and gender.[130] There is merit in this argument in post-apartheid South Africa as poverty stubbornly persists among black people and especially black women.[131] However, the South African discrimination jurisprudence shows promise by not emphasising one ground at the expense of others when a claim of discrimination is instituted. Instead, within an intersectional conception and interpretation of discrimination provisions, grounds can reflect new and different light on each other, thereby enlarging each ground's utility.

The Constitution and PEPUDA's textual stipulation that discrimination may occur "on one or more" of the prohibited grounds has resulted in a substantial amount of jurisprudence dealing with the intersectional nature of discrimination. The frontrunner is the *Harksen* case where the Court stated that "[t]here is often a complex relationship between these grounds. […] The temptation to force them into neatly self-contained categories should be resisted."[132] This means that poverty as a prohibited ground of discrimination should not "overshadow" other status grounds, but should rather be litigated, adjudicated and conceptualised in an "overlapping or intersecting" fashion.[133]

There is, however, a difference in conceiving these grounds intersectionally as opposed to formalistically staggering or adding different grounds together. Atrey argues that an intersectional conception of discrimination is different from some of the "single-axis contextual" evaluations of discrimination visible in the Constitutional Court's jurisprudence.[134] A "single-axis contextual" approach reads other grounds into one ground through context, but ultimately undermines the value of intersectional

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[130] Chapter 1 part 1 2.

[131] See the specific statistical data as indicated in Chapter 1 part 1 1.

[132] Para 50. Most cases that refer to the intersectional nature of discrimination uses this passage as a springboard: *Van Heerden* para 27; *Brink v Kitshoff* 1996 4 SA 197 (CC) para 44; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1991 1 SA 6 (CC) para 113; *Hassam v Jacobs* 5 SA 527 (CC) para 28; *Tshabalala v S* 2020 5 SA 1 para 92; *Mahlangu v Minister of Labour* 2021 2 SA 54 (CC) para 85; *Sithole v Sithole* 2021 6 BCLR 597 para 31.

[133] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 40.

[134] S Atrey *Intersectional Discrimination* 125-135, 40-145. See specifically the cases of *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC)*, S v Jordan* 2002 6 SA (CC) and *Volks v Robinson* 2005 5 BCLR 446 (CC) for this type of single-axis contextual approaches and how it negatively influenced the possibility of an intersectional analysis as these cases are class blind.

discrimination by foregrounding one ground at the expense of others.[135] In poverty discrimination, a "single-axis contextual" approach would read in the gendered and racial forms of discrimination, but it will ultimately "overshadow" these status grounds. A form of an intersectional single-axis contextual approach would be poverty plus race plus gender that culminates in demarcated layers of disadvantage.

An intersectional-multiple-axes contextual understanding of a specific case would not collapse one ground into the other. Instead, it would keep them in the same magnetic field as a method to move closer to how they intersect and bring a peculiar intersectional disadvantage to the fore. As Crenshaw has argued, the hermeneutic value of an intersectional awareness of discrimination is that the intersecting layers of disadvantage "converge"[136] at a point of contact.[137] This would suggest that racialised and gendered poverty is an intersectional form of discrimination, as opposed to race plus gender plus poverty.

However, the jurisprudence before the *SJC* and *Mahlangu* judgments suggests an under-appreciation of how these grounds intersect, especially poverty as the maldistribution intersection. One explanation could be that poverty as a recognised ground is not well developed compared to other grounds and is therefore not easily actuated with other grounds in an intersecting fashion. For example, courts usually argue that for time sufficiency of court proceedings, discrimination can be established even if it is only partially linked to one prohibited ground.[138] There are instances where poverty would be able to operate as a stand-alone ground,[139] but it is highly unlikely due to the current disproportionate gendered and racialised forms of poverty.

Moreover, as Fraser has argued, the tensions between these injustices should not be ignored but ultimately highlighted to transform the structures underlying it.[140] In this sense, poverty as a ground should not be understood as an unhelpful pivot to litigate and adjudicate racialised and gendered forms of poverty on poverty as a single-axis ground

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[135] Atrey *Intersectional Discrimination* 159. This is also textually visible in s 34(2)(c) of PEPUDA where the Act states that the directive principle of "socio-economic status" could be "included" within the already listed grounds.

[136] See K Crenshaw "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Colour" (1991) 43 *Stan L Rev* 1241 1246.

[137] DW Carabo & K Crenshaw "An Intersectional Critique of Tiers of Scrutiny: Beyond Either/or Approaches to Equal Protection" (2019) 129 *Yale LJ* 107 127-129.

[138] *Brink v Kitshoff* 1996 4 SA 197 (CC) para 43; *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 33.

[139] For example, where a group of white squatters would challenge their municipality cutting off their electricity. This could be controversial but as the neo-Marxists would insist, poverty in any shape or form and attached to any identity, is unjust. Chapter 2 part 2 4 2.

[140] Chapter 2 part 2 2 1.

alone. Instead, poverty discrimination, intersectionally conceived and interpreted, can shed new light on the status grounds of race and gender, thereby not undermining their utility but giving them more redistributive teeth. The two judgments of *SJC* and *Mahlangu* show promise in understanding poverty-based discrimination intersectionally and will thus be considered in more detail in the following section.

4 2 1 3 3 Intersectional discrimination in *SJC* and *Mahlangu*

The *SJC* case illustrates the value of an intersectional reading of grounds as the case was litigated on both race and poverty.[141] The Court held that the fact that the allocation occurred due to a racially neutral allocation system does not negate the fact that it is racially discriminatory.[142] The inverse, although not mentioned in the judgment, is also true. If the Court did not consider that the 56 socio-economic considerations resulted in the favourable allocation for wealthier white areas, it would not have been able to establish that the poverty-blind resource allocation was racially discriminatory.

Regrettably, the Court rejected the Women's Legal Centre's ("WLC") *amicus curiae* submission that the method used to calculate the allocation of resources also indirectly discriminated against women based on their gender and sex.[143] The WLC directed the Court's attention to the gender-blind method of the allocation of resources that also does not account for the significant underreporting of sexual violence and rape.[144] Moreover, the WLC indicated that the policy methods used to calculate resources do not reflect the reality that there are more resources needed to police offences such as rape and domestic violence. They indicated to the court that more resources would significantly combat the levels of violence against women that constitutes a discriminatory barrier to full and equal enjoyment of all rights.[145] Despite this credible indication that the method used to allocate police human resources also indirectly discriminated against women based on gender and sex, the Court held, without substantive reasoning, that the only grounds in question are "race and poverty and not gender."[146]

In contrast to the gender-blind holding of the *SJC* case, the *Mahlangu* judgment is an exemplar of conceiving the grounds of race, gender, and poverty as a structural form of

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[141] Paras 2, 48 and 78.
[142] Paras 88-89.
[143] See the *amicus curiae* submission of the WLC <https://sjc.org.za/wp-content/uploads/2018/11/WLC_as_Amicus_Heads.pdf> (accessed 18-07-2021) para 97 ("*WLC amicus curiae submission*").
[144] *WLC amicus curiae submission* paras 78-81.
[145] Para 82-83.
[146] *SJC* para 92.

intersectional discrimination. The Constitutional Court appreciated the intersecting disadvantages of domestic workers. For the first time, the Court explicitly introduced intersectionality not only as a manner to analyse discrimination, but as a constitutional theory of interpretation to provide a window into how intersectional discrimination impacts the full and equal enjoyment of all rights and freedoms.[147]

The intersections of maldistribution and misrecognition is specifically noted by Mhlantla J. She states, "it is worthwhile to […] unpack the patterns of race, sex, gender and class from a historical perspective."[148] Mhlantla J foregrounds the gender and racial means of production as instituting the "cycle of generational poverty":

> "[…] there is the discriminatory notion that domestic work […] should be performed in most instances by black people, as a form of slavery, servitude, subordination and oppression. Through white settlers and colonialism, the role of the domestic worker shifted from white women to women of colour, again with the majority being Black women. […] This has been attributed to black male labour being absorbed by growing industrial sectors such as mining and manufacturing, coupled with the concomitant increase in the demand for domestic workers."[149]

Mhlantla J then explicates the means of (re)production as a driver of gendered poverty:

> "This is where the intersection of sex, gender and class is pertinent. […] The plight of domestic workers is ignored because the work these women perform is seen as inferior and not as challenging as a traditional man's job. That view perpetuates the gendered character of domestic work and the notion that household work – such as washing, cleaning, cooking and child-care – is naturally women's work, and is not as psychologically challenging, physically strenuous, and socially productive as men's work."[150]

Significantly, she then foregrounds class explicitly as an important indicator of current disadvantage by stating that "severe power asymmetries" "continue to privilege employers and to protect the private household employment space."[151] She highlights the class dimension of the peculiar intersectional discrimination by stating that the precarity of domestic work continues, "despite the fact that our post-apartheid households have changed, and domestic workers are employed in households of diverse races, religions, cultures and varying socio-economic classes." The cycle of the disadvantages attached to poverty and advantages attached to class privilege is intractable as "'cheap, black, domestic labour is the instrument whereby white women [today, women of any colour]' escape from some of the constraints of their domestic roles."[152]

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[147] *Mahlangu* para 17-18. See S Atrey "Beyond Discrimination: *Mahlangu* and the use of Intersectionality as a General Theory of Constitutional Interpretation" (2021) 11 *Int J Discrim Law* 1-11.
[148] Para 188.
[149] Para 188.
[150] Para 189.
[151] Para 190.
[152] Para 193.

Therefore, after a closer read of the *SCJ* and *Mahlangu* judgments, poverty should not overshadow other status grounds in a litigation context but lead to a more sophisticated understanding of impoverished people's intersectional disadvantage. The intersectional conception of poverty discrimination at this stage of the inquiry will also influence the unfairness inquiry, especially through activating an intersectional gaze on context and it will also influence the extent to which the discrimination is justifiable.

In its totality, the above analyses of the first component of the discrimination inquiry indicate that it has the potential to detect the wide range of intersecting dimensions of poverty discrimination identified in chapter 2. This is possible when the concept of discrimination is interpreted through the lens of transformative substantive equality. When poverty discrimination is shown, the next consideration turns on the fairness of the impugned discrimination that must be proved. The subsequent section aims to postulate the features of the fairness inquiry through a transformative substantive equality interpretation.

4 3 The fairness inquiry

The equality right and its elaboration and enactment in PEPUDA has the unique function to strongly prohibit discrimination that is unfair.[153] This is a manifestation of transformative constitutionalism that is sensitive to historic and systemic disadvantage.[154] This warrants a context-sensitive judicial inquiry of fairness to engage the complexities of the case at hand and filter permissible from impermissible forms of discrimination.[155] It filters the permissible forms of discrimination by going a step further than the discrimination inquiry by evaluating whether the discrimination deepens the identifiable group's disadvantage. Such an evaluation provides a strong basis to evaluate the extent of the discrimination that will result in a more stringent proportionality exercise for any justifications posed.

A determinative consideration of fairness is thus the nature and extent of the disadvantage that flows from the discrimination which is, in turn, informed by the context in which the claim is embed.[156] The following section analyses and evaluates the current context-sensitive inquiry in terms of the Constitution and PEPUDA. It does so by

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[153] *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 41.
[154] K Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146 150.
[155] Albertyn & Goldblatt "Equality" in *CLOSA* 35-44-33-45.
[156] For a poverty discrimination claim in terms of the Constitution, see the cases of *Brink v Kitshoff* 1996 4 SA 197 (CC) paras 23 and 40 and *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) paras 41 read with s 36(c) of the Constitution; s 14(2)(a) of PEPUDA.

examining how the context could enable impact factors that consider whether the impugned discrimination impedes impoverished people's ability to participate on an equal footing with others.

4 3 1 Context

As indicated above, this context-sensitive inquiry could be similar to the contextual method of determining discrimination.[157] Thus, nothing deters a litigator or adjudicator from considering comparators to contextualise the matter. However, this part of the context-sensitive inquiry should delve deeper into the lived inequalities of the impoverished claimants, to examine whether the discrimination stifles the ideal of achieving roughly equal political, economic, and social conditions. Woolman and Botha argue that "hard cases" would require innovative contextual judicial narration to counter the tendency of mechanical analyses rooted in rigid constitutional norms that tend to reinforce the marginalisation of disadvantaged groups such as the poor.[158] They also posit that the values of "openness" and "democracy" should guide courts to consider a plurality of different voices that would enable the recognition of radical differences of impoverished people as a non-homogenous group.[159]

The attention to the context can assist litigators and adjudicators in detecting the institutionalised nature of the misrepresentation, maldistribution, and misrecognition that leads to the impoverished claimants' intersecting disadvantages. Moreover, as indicated under transformative substantive equality, it will be important not to stigmatise impoverished people's group status or experiences within a single narrative.[160] A context inquiry would therefore be infused with transformative substantive equality that narrates the lived inequality against the backdrop of the "systemic […] nature" of the discrimination.[161] A focus on the context will also allow for the justificatory reasons given by the respondents in the justification leg of the inquiry to be less mechanical and divorced from the concrete realities of the impoverished group.

The following two subsections elaborate on the importance of judicial narration that does not divorce deprivation from impoverished people's structural powerlessness. It first does so by indicating the importance of the structural context that must be followed by an engagement with the concrete different realities of impoverished people.

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[157] Part 4 2 1 2 above.
[158] Woolman & Botha "Limitations" in *CLOSA* 34-68-34-69.
[159] 34-127.
[160] Chapter 2 part 2 5 3 2.
[161] *Harksen* para 51(1); s 14(3)(e) of PEPUDA.

4 3 1 1 Socio-economic context

Recall, a transformative conception of substantive equality requires a constant awareness of the similar experiences of impoverished people subjected to structural forces but that these "same" experiences should be amplified by the "differences" between them.[162] This sheds light on the "sameness" of identifiable groups in order to come to terms with the entrenched nature of inequality that generates individual "different" cases of poverty discrimination. As indicated above, under the discrimination inquiry, South African courts often utilise a symmetrical approach to determine whether there was discrimination, which can overlook the implications of the context.[163] In the unfairness leg of the discrimination claim, however, courts helpfully adopt an asymmetrical view of discrimination.[164] This is appropriate in light of South Africa's rife unequal past and present, requiring a focus on groups that experience historical and current systemic disadvantage.

Attention to the context in which the impugned discrimination occurs is also informative for a transformative conception of substantive equality that attempts to engage the complexity of people's experiences.[165] In this light, the Constitutional Court has indicated that contextual factors should guide the impact inquiry. The Court stated that each case must be contextually considered, and the factors must be "nuanced and comprehensive".[166] Therefore, the contextual elaboration between the specific poverty discrimination and the structural generators thereof should be nuanced and comprehensive to consider all the relevant factors. An important stipulated consideration in PEPUDA that ties in with this backwards-looking inquiry is that there must be an awareness of whether the discrimination is "systemic in nature".

The contextual inquiry should proceed to focus on the "difference" of the lived inequality against the "sameness" of the systemic contextual undercurrents of poverty discrimination. The importance of also considering the "differences" of the impoverished group is illustrated in the next section by analysing case law that considered the lived inequalities of impoverished groups.

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[162] Chapter 2 part 2 5 3.
[163] Part 4 2 1 1 2.
[164] *Harksen* para 62.
[165] Albertyn & Goldblatt (1998) *SAJHR* 260-262.
[166] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 41.

4 3 1 2 The "difference" in socio-economic context

As a point of departure, discrimination jurisprudence encourages litigants to express their lived inequality. Most grounds are therefore open-textured, wide, and left open for litigators to contextually narrate the claimants' lived realities. For example, in *MEC for Education: KwaZulu-Natal v Pillay* ("*Pillay*), the Court held that the School Code that prohibited Sunali Pillay from wearing "a tiny gold nose stud"[167] as an expression of her cultural and religious beliefs unfairly discriminated against her on the grounds of religion and culture.[168] Langa CJ stated that "[i]t is always desirable, and may sometimes be vital to hear from the person whose religion or culture is at issue" to understand the context, extent and nature of the discrimination.[169] The Court has expressly stated that "it is not for the Court to tell" how the specific claimant experiences exclusion on the ground at play.[170] This illustrates that the Court must make space for the impoverished claimants to express their discrimination and exclusion themselves.[171]

In considering the specific context of impoverished claimants, courts, litigators, NGOs and public interest litigation firms should rely on a wide range of qualitative, anthropological, sociological and psychological research.[172] Moreover, impoverished people should be provided with appropriate conditions and circumstances to fill in the nature of their deprivation and disadvantage.[173] The importance of the contextual method of adjudication in discrimination cases that highlights the vastly different experiences of impoverished people is well illustrated in *Mazibuko*, *SJC* and *Mahlangu*.

Recall, *Mazibuko* largely turned on whether the threshold of 25 litres per person per day was a reasonable measure for "sufficient water" as demanded by section 27 of the Constitution. As this chapter set out earlier, there were also three different forms of impugned discrimination.[174] What is of significance is that the Court overlooked the reality of living in poverty, despite the availability of expert evidence and the impoverished people's articulations that several systemic barriers made the 25 litres per person per day allocated wholly insufficient to meet their basic water needs.

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[167] 2008 1 SA 474 (CC) para 1.
[168] Para 112.
[169] Para 56.
[170] Para 87.
[171] See the potential of structural and meaningful engagement orders in Chapter 5 part 5 4 3 that could assist courts and various stakeholders in moving closer to the lived vulnerabilities of the claimants.
[172] Albertyn et al *Introduction* 42.
[173] Chapter 2 parts 2 3 1 2 and 2 3 2.
[174] Part 4 3 1 1 3.

In contrast, in the High Court in *Mazibuko*, Tsoka J embarked on a far more context-sensitive analysis to understand from the perspectives of the impoverished claimants and expert evidence the water needs of the community. The High Court relied on expert evidence to indicate that the community lives in a poor urban area with large households and unemployment, meaning more water is needed for domestic requirements.[175] The Court also relied on expert evidence indicating that Soweto has a hot and dry climate where high amounts of drinking water are necessary for basic bodily functions.[176] Another lived reality of the community is that they do not have water sanitation services and would require more water to manage human excretion healthily in a densely populated area.[177] The Court underscored that because the community lives in an urban area, they cannot use rivers for bathing, thereby requiring more water.[178] The community also mostly buys food from lower quality outlets, where thorough washing and cooking is needed to ensure that the food is safe to eat.[179] It is therefore regrettable that the Constitutional Court marked these realities insignificant as it creates the impression that these "differences" are justifiable as other poor people are poorer.[180]

In *SJC*, the Court has referred to the broader group of impoverished black townships in South Africa, such as Nyanga, Harare, Gugulethu and Mfuleni, that face similar challenges in inadequate police services and resource allocations.[181] In the contextual analysis, the Court focused more on the different lived inequalities between the three Khayelitsha police stations and "for example, Rondebosch".[182]

In *Mahlangu,* the Court focused on the broader group of poor black women in South Africa in establishing discrimination but contextually evaluated the peculiar lived reality of specifically black female domestic workers. The Court also went deeper into the specific context by indicating that many black female domestic workers are single parents without an additional salary to support the people for whom they are responsible.[183] This was a critical contextual factor in the case as the applicant was left destitute after her mother, on whom she was dependant, drowned in her employer's swimming pool during the course of performing her domestic duties.[184]

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[175] Para 171.
[176] Para 171.
[177] Para 171.
[178] Para 171.
[179] Para 171.
[180] Part 4 2 1 4.
[181] Para 46.
[182] Para 74. Rondebosch is the wealthier mostly white suburb.
[183] Para 104.
[184] Paras 7-9.

Albertyn et al suggest that the intersectional nature of the discrimination should be highlighted and analysed in this contextual part, especially to come to terms with the differences in the various lived realities.[185] In the High Court judgment of *Mazibuko*, the Court employed a helpful intersectional context-sensitive analysis of the water deprivation of women and people living with HIV/AIDS. The High Court contextualised the fact that women must walk far to fetch water in being assigned the gender burden as the primary caretakers in their households.[186] The High Court also considered the expert evidence that showcased the intersecting disadvantage of the high number of the community being HIV positive and therefore needing more water to see to their hygiene.[187]

In *Mahlangu,* the Court also employed an intersectional context-sensitive approach. The Court stated that "one cannot generalise" as "individuals within the same group may simultaneously experience discrimination in the same way, and also differently."[188] As an example, if the case concerned the exclusion of asylum-seeker gardeners who are predominantly black men, different contextual considerations would have been at play. Considerations such as high rates of xenophobia[189] and the difficulty of non-nationals to submit the relevant applications at Home Affairs would have been important contextual markers of exclusion.[190] Another relevant marker could have been that asylum seekers are considered to be more disposable than other employees when they experience an injury at work. This is so as a result of their economic vulnerability and the enduring stigma that their work is "illegal work".

The cases analysed above illustrate the importance of a proper contextual approach that is sensitive to the intertwined structural disadvantages faced by poor people. At the same time, it is a method of adjudication that seeks to understand the lived inequalities that will significantly influence the analysis of the impact the discrimination has on impoverished people. Thus, the context can guide a more sophisticated analysis of the impact of the impugned discrimination on impoverished people. However, thus far it is

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185 Albertyn et al *Introduction* 42.
186 Para 159.
187 Paras 169 and 172.
188 Para 35.
189 Human Rights Watch "They Have Robbed Me of My Life" Xenophobic Violence Against Non-Nationals in South Africa (2020).
190 P Marais & C Kreuser "Naturalised Citizenship in SA Limbo Land: Not Today, Tomorrow or the Foreseeable Future" (2021-05-19) *Daily Maverick* <https://www.dailymaverick.co.za/article/2021-05-19-naturalised-citizenship-in-sa-limbo-land-not-today-tomorrow-or-the-foreseeable-future/> (accessed 10-06-2021).

unclear how the impact factors could be considered in light of a transformative conception of substantive equality.

4 3 2 Impact: Recalibrating impact as impediments to equal participation

The factors listed in PEPUDA mirror the Constitutional Court's established list of factors that "must" be considered to determine the discrimination's impact on the complainant and their identifiable group. These factors seek to detect the "nature and extent" to which discrimination disadvantages impoverished people.[191] In turn, these factors have a significant bearing on the extent to which the right to equality and non-discrimination is impaired. The impact inquiry essentially seeks to determine whether the discrimination furthers the entrenched nature of the disadvantage of a vulnerable group.[192] Currently, the impact inquiry is not rooted in whether the discrimination impedes impoverished people's ability to participate on an equal footing with others as argued for by a transformative conception of substantive equality.

The Constitutional Court's jurisprudence suggests that the impact inquiry focuses primarily on the impairment of human dignity.[193] Albertyn and Goldblatt have indicated that the impact-sensitive inquiry should not only rely on one factor.[194] Their criticism is that although human dignity is a welcome advancement, an overbearing centrality of human dignity can stifle the redress of the unjust systemic socio-economic conditions for which the equality right is aimed. [195] Thus far, the factors listed in PEPUDA as a codification and clarification of the Constitutional Court's jurisprudence show promise in considering the impact of discrimination on impoverished people's rights and freedoms beyond merely their human dignity.[196] As is set out below, the jurisprudence considers the extent of the impairment of the rights and interests of the identified group. Thus, the rights and interests that the discrimination affects relate to the intersections of the material, political and social disadvantages impoverished people endure.

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[191] S 36(c) of the Constitution; s 14(3)(d) of PEPUDA.
[192] Albertyn & Goldblatt (1998) *SAJHR* 257-259.
[193] Albertyn & Goldblatt "Equality" in *CLOSA* 35-80. Human dignity is central to courts' determination of the impact of the discrimination on the group as expressed in *Harksen* para 50.
[194] Albertyn & Goldblatt (1998) *SAJHR* 273.
[195] Albertyn & Goldblatt (1998) *SAJHR* 257-260; S Cowen "Can 'Dignity' Guide South Africa's Equality Jurisprudence?" (2001) 17 *SAJHR* 34 51.
[196] The factors are stipulated in s 14(3)(a)-(e) of PEPUDA emanating from the Constitutional Court's jurisprudence established in *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 112, *Harksen* paras 50 and 51; *Khosa* para 49.

Furthermore, the position of the identifiable group in society is central to the impact inquiry under both PEPUDA[197] and the Constitution.[198] The positionality pinpoints the structures and rules of the political arena that impact on the capacity of the poor's democratic voice to influence decisions that affect them.[199] In identifying this positionality, the Court looks at the vulnerability of the identifiable group. In *President of the Republic of South Africa v Hugo* ("*Hugo*"), the Court stated, "the more vulnerable the group adversely affected by the discrimination, the more the discrimination will be held to be unfair."[200] In *Mahlangu,* the Court indicated that domestic workers "are one of the most vulnerable groups of society" because their labour is not valued and they have faced and continue to face intersectional disadvantages.[201] However, the concept of vulnerability in human rights law has been criticised for its vagueness and over-usage at the expense of dissecting the various dimensions of vulnerability.[202]

The following section analyses and evaluates whether the current factors and their jurisprudential application has the potential to recalibrate the impact inquiry in terms of the impact it has on impoverished people's ability to participate as equals socially, economically, and politically. These three-dimensional intersecting disadvantages render impoverished people vulnerable in an open and democratic society. Thus, this part of the unfairness inquiry should focus on whether the discrimination further impedes the rough social, material, and political conditions necessary for impoverished people to influence decisions that affect their everyday lives.

It should be stated that although these three impact considerations will be contemplated separately below, their intersections should also be noted as it will be a compounding consideration to determine the impact. The following sections consider the general factors utilised by the Constitutional Court's approach to determining the impact of discrimination concerning these three preconditions. Thereafter, and more specifically, it draws out the implications of that approach for establishing the impact of the discrimination on impoverished people's three intersecting disadvantageous conditions.

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[197] S 14(3)(c).
[198] *Harksen* para 51(a).
[199] Chapter 2 part 2 3.
[200] 1997 4 SA 1 (CC) para 112.
[201] Para 19.
[202] M Heikkilä & M Mustaniemi-Laaksa "Vulnerability as a Human Rights Variable: African and European Developments" (2020) 20 *AJHRL* 777-798.

4 3 2 1 The impact on social standing

Social vulnerability ensues through stigmatisation and marginalisation, which fails to accord impoverished people equal concern and respect.[203] However, scholars claim that the discrimination jurisprudence focuses too much on a specific conception of human dignity, where the affected person's feelings are advanced at the expense of addressing structural inequalities.[204] They argue that this conception of human dignity is too individualistic and reinscribes an individual as a subject devoid of their socio-economic context.[205] Albertyn indicates that this conception results in courts establishing a threshold of sufficiency to secure the dignity of the poor.[206] Thus, the overbearing centrality of equal worth divorced from its relational aspect renders the equality right to be merely inclusive.

However, with the conception of recognition advanced in chapter 2 that emphasises the reciprocity of recognition, human dignity remains a critical consideration in an unfair poverty discrimination analysis.[207] First, dignity will help capture many of the misrecognition dimensions attached to poverty where impoverished people should be regarded as having inherent moral worth.[208] Second, in terms of the various rights and interests that are impacted by poverty discrimination explored below, dignity will assist in a more collective and material sense in who counts as members of South Africa's democracy.[209] Various scholars have also indicated that a transformative conception of substantive equality would infuse human dignity with a more material dimension.[210] Thus, the focus on human dignity, together with an emphasis on the other impairments of the impoverished complainant's rights and freedoms, will allow the court to appreciate the cumulative impact of the interpenetrating conditions of poverty.[211] Furthermore, the focus of the impact on impoverished people's social standing should also be intersectional as the patterns of group disadvantage and harm of poverty, race and gender converge to

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[203] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 44.
[204] Albertyn & Goldblatt (1998) *SAJHR* 257-260.
[205] Albertyn & Goldblatt (1998) *SAJHR* 257-260; Cowen (2001) *SAJHR* 51.
[206] C Albertyn "Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion Towards Systemic Justice" (2018) 34 *SAJHR* 441 458.
[207] Chapter 2 part 2 5.
[208] See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 54.
[209] See *Khosa* para 44.
[210] For an exposition of human dignity's aim to secure conditions to live a dignified existence in German Law, see H Botha "Human Dignity in Comparative Perspective" (2009) 20 *Stell LR* 178-182. See also G Brodsky & S Day "Denial of the Means of Subsistence as an Equality Violation" (2005) *Acta Juridica* 149 163.
[211] Albertyn & Goldblatt "Equality" in *CLOSA* 35-79.

severely obstruct the majority of poor people's ability to participate. Moreover, an intersectional awareness of the impact on social standing vividly exposes that poverty remains deeply gendered and racialised which must be a decisive factor in determining the fairness of the discrimination. The following paragraphs examine how the various functions of human dignity elaborated on above have been captured in case law related to poverty discrimination.

In *Khosa*, Mokgoro J emphasised the impact of the exclusion of access to social security on the claimant's human dignity.[212] She stressed that the exclusion forces permanent residents into relationships of dependency with other, already strained, community and family members. Moreover, apart from the burden it places on others, the exclusion has a severe impact on the dignity of the permanent residents as it "cast[s] them in the role of supplicants."[213]

In *Minister of Health v New Clicks,* Moseneke DCJ stated that the Constitution's promise of dignity "[…] is at strenuous odds with demeaning deprivation. Abject poverty wrenches dignity out of any life."[214] In the High Court *Mazibuko* judgment, Tsoka J, argued that human dignity should inform the interests that the right of access to "sufficient water" in section 27(1) seeks to protect.[215] By doing so, he found the 25 litres per person per day the government's policy regarded as "sufficient", insufficient to meet the needs of the claimants to live a life of dignity.[216] Unfortunately, in the Constitutional Court, O'Regan J did not substantively consider how these discriminatory measures impacted the equal moral worth of the impoverished people of Phiri.[217]

In the *SJC* case, the applicants indicated that the overarching impact of the disproportionate allocation of police resources placed the poor and black community of Khayelitsha "at a greater risk of violent crime" that impacted a range of constitutional rights.[218] In the context of human dignity, the applicants argued that the impairment of impoverished people's human dignity also instituted entrenched symbolic harm. They state, "it entrenches the idea that poor, Black people are less deserving of protection

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[212] 2004 6 SA 505 (CC).
[213] Para 76.
[214] 2006 2 SA 311 (CC) para 705.
[215] *Mazibuko High Court* para 2.
[216] *Mazibuko High Court* para 160. However, see the Constitutional Court judgment of O'Regan where she regarded the 25 litres of water per person per month as "sufficient". She did not refer to "human dignity" once in her judgment.
[217] O'Regan J rather subsumed the impact inquiry in a thin rationality justification inquiry. Part 4 4 5 3 below. This case illustrates the importance of disentangling the justifications posed from the impact of the discrimination on the identifiable group.
[218] *SJC Applicants' Heads of Argument* para 266.

from crime than rich, White people. It not only practically entrenches disadvantages but tells South Africans that those patterns are acceptable or inevitable."[219]

The *Mahlangu* judgment helpfully illustrates the individual, collective and material impact of denying impoverished people equal moral worth. The Court indicated that the exclusion of domestic workers from the definition of employee under COIDA "has an egregious discriminatory and deleterious effect on their inherent dignity."[220] The Court held that the deeply gendered and racist undercurrents of domestic work enable the stigma that domestic work is not "real work"[221] and "has a significant stigmatising effect" on domestic workers' dignity.[222]

The abovementioned cases suggest that human dignity remains a significant animating value that can capture various injustices of poverty discrimination that deny impoverished people inherent moral worth deserving of equal concern and respect. To what extent the impugned discrimination impairs or is likely to impair the human dignity of impoverished people should rest on both individual and collective conceptions.[223] This will draw attention to the institutionalised subordinated patterns of impoverished people's statuses that deny them appropriate social standing to be equal members of society. This will also allow for a more sophisticated evaluation of whether the denial of equal moral worth would disproportionately impact impoverished people's ability to have equal standing in decisions that affect their lives.

4 3 2 2 The impact on political voice

Vulnerability also encapsulates the political vulnerability faced by impoverished people who are not in a position to influence decisions that affect their lives.[224] Political positionality targets the structures and rules of the political arena that impact the political voice of impoverished people.[225] These touches on the extent of the impairment of all the rights, freedoms, and interests of impoverished people.

In *Khosa*, the permanent residents had an interest in social benefits and, without assistance, their rights to social security, life, equality, and dignity were severely

[219] Para 275.
[220] *Mahlangu* para 42.
[221] Para 110.
[222] Para 112.
[223] *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 187.
[224] *Khosa* para 71.
[225] Chapter 2 part 2 3.

impaired.[226] Moreover, the Court determined the impact of the exclusion on impoverished people's political disadvantage in relation to wealthier people. The Court stated:

> "Sharing responsibility for the problems and consequences of poverty equally as a community *represents* the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole. In other words, decisions about the allocation of public benefits *represent* the extent to which poor people are treated as equal members of society."[227]

This excerpt illustrates the extent to which impoverished people will be represented in the allocation of resources and benefits, which in turn, impacts their material well-being. The *Mazibuko* judgment is in stark contrast. The applicants showed that the indigent register has a disproportionate impact on the most destitute, as it did not consider the various difficulties impoverished people have to register.[228] The impact of this measure was therefore that the most disadvantaged of the impoverished community were excluded. Another discriminatory consequence of the PPWMS that had a bearing on impoverished people's ability to have a political voice in decisions that affect their fundamental interests, pertains to the unlawfulness of the PPWMS in terms of administrative law. Poor people were not given fair procedural safeguards to make representations before water cut-offs, whereas the credit meter system had such a procedural safeguard and a grace period before water cut-offs.[229]

In *SJC,* the applicants have done significant work in their papers to indicate the impact of the disproportionate resource allocation on various rights of impoverished people that have a bearing on their political marginalisation. The applicants indicated that the unequal allocation had disproportionately impacted Khayelitsha's poor and black residents' rights to life, dignity, freedom and security of the person and privacy.[230] The applicants specifically highlighted the right to freedom and security of the person that guarantees everyone the right to be free from public and private violence.[231] The Court did not mention the implications of these rights but held that better funding and policing will reduce actual crime that will positively impact the safety of the Khayelitsha community.[232] It can be inferred from the judgment that improved safety influences the ability of impoverished people to fully exercise all their rights and freedoms.

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[226] *Khosa* paras 44 and 72.
[227] Footnotes from original text omitted. Emphasis added.
[228] *Mazibuko Applicants' Heads of Argument* para 146.2.
[229] Para 304.2.
[230] *SJC Applicants' Heads of Argument* para 265. The right is stipulated in s 12 of the Constitution.
[231] Para 267. Subsection 12(1)(c) of the Constitution.
[232] *SJC* para 88.

In *Mahlangu*, the Court indicated that the exclusion of domestic workers from COIDA resulted in a significant impairment of their rights to and interests in access to social security benefits and their right to human dignity.[233] The impairment of their rights and interests significantly impacted their ability to voice their concerns and to be heard in everyday political democratic processes.[234]

Thus, the abovementioned cases illustrate that the political disadvantage of impoverished people often leads to a disproportionate impact on their ability to influence the just (re)distribution of resources. In turn, material deprivation increases their political marginalisation. The material disadvantage caused by the discrimination will frequently be at the core of the impact of the discrimination and should thus occupy a prominent place in the analysis of impact.

4 3 2 3 The impact on material well-being

Impoverished people's vulnerability also relates to the extent that their material disadvantage impacts their well-being.[235] This consideration must have a particular focus on the discrimination's impact on the realisation of impoverished people's socio-economic rights. Thus, the court should determine the extent to which the discrimination impacts impoverished people's access to the necessary goods to live a human dignified life.[236] In cases directly concerning poverty, the impact on impoverished people's material well-being is not always clear.

In *Hoffmann v South African Airways* ("*Hoffmann*"), the refusal to grant the HIV positive claimant access to apply for the job as a cabin attendant for South African Airways resulted in the complainant's employment prospects being impaired.[237] Moreover, his rights to dignity and non-discrimination were also impaired.[238] *Hoffmann* illustrates that the stigma and political disadvantage of the HIV positive claimant had a severe impact on securing material needs.

In *Khosa*, the permanent residents were facing poverty, and without assistance, their rights to social security were severely diminished.[239] In contrast, as argued above, in the *Mazibuko* case, the Constitutional Court did not engage in an in-depth consideration of

[233] *Mahlangu* para 65.
[234] Para 84.
[235] *Khosa* para 74; *Mahlangu* para 95.
[236] Chapter 2 part 2 4.
[237] 2001 1 SA 1 (CC) para 8.
[238] Paras 27 and 54.
[239] *Khosa* paras 44 and 72.

the reality of living in poverty, despite the availability of expert evidence. Thus, the Court did not undertake a substantive analysis of whether the 25 litres per person per day was adequate to meet the community's basic water needs. The Court did not consider that access to socio-economic services must extend to both physical and economic accessibility, otherwise, its denial will have a disproportionate impact on impoverished people's well-being.[240]

The applicants' papers in the *SJC* case are significant as the applicants expressly indicated that the discriminatory police resource allocation severely impacted the right to basic education of the poor and black community of Khayelitsha. In this respect, the applicants drew from a wide range of empirical studies to indicate that inadequate and inappropriate policing disproportionately impacts children's learning ability.[241]

In *Mahlangu,* the Court indicated that the exclusion of domestic workers from the definition of employee under COIDA further disproportionately impacted their already precarious material position in excluding them from fundamental social security. The Court held that this impact further trapped them into cycles of generational poverty.[242]

4 3 3 Concluding reflections on impact as impediment to participation

A nuanced and comprehensive evaluation of the specific contextual factors at play and an analysis of the impugned discriminatory measure's impact on the impoverished claimants are required. As illustrated above, the intersecting social, political, and material impediments to participation have dire consequences for the ability of impoverished people to effectively use democratic means to influence decisions that affect their lives. Therefore, any impediment to their equal participation should be regarded as an adverse and disproportionate impact that ultimately renders discrimination unfair. Significantly, in *Hugo*, O'Regan J held that "the more invasive the nature of the discrimination upon the interests of the individuals affected by the discrimination, the more likely it will be held to be unfair."[243] Moreover, the extent to which impoverished people's rights are impaired should have a significant bearing on the justifiability of the discrimination.

4 4 The justification inquiry

[240] Chapter 2 part 2 4 3 at footnote 218.
[241] *SJC Applicants' Heads of Argument* paras 269-275.
[242] Para 57.
[243] Para 112.

The justification part of the unfair discrimination analysis shifts the focus to the respondent's justification in terms of administrative or financial policy considerations.[244] As poverty discrimination is ingrained into the fabric of everyday structures, institutions, interactions, and relationships, there is a danger that unfair poverty discrimination may seem justified as it appears to be a natural and legitimate outcome of everyday endeavours. Unfair poverty discrimination cases would therefore warrant a stringent judicial review standard for any justifications posed for the discrimination.

The justification inquiry will play out differently under the Constitution and PEPUDA. Under the former, there is a chance that unfair discrimination may nevertheless be held to be reasonable and justifiable under section 36 of the Constitution. With the latter, the proportionality factors are internal to the inquiry into fairness. As already indicated, the merging of the impact factors with the justification factors could restrict the scope of interpretation, while simultaneously downplaying practical policy, economic and administrative issues. The problem with a claim instituted in terms of the Constitution is that section 36 has a strict requirement of "law of general application" that courts interpret narrowly.[245] It follows then that where discrimination does not arise out of a law of general application, courts could incorporate the section 36 inquiry into the fairness inquiry. This gives rise to the same issues as with PEPUDA's merging of the different sets of inquiry. In terms of a claim instituted under the Constitution, the inverse is also true. When discrimination does not stem from a law of general application, courts may omit critical factors of a limitation inquiry. The next section proposes a justification inquiry that should be separated from the impact inquiry for both section 9(3) and PEPUDA.

In terms of section 9(3) of the Constitution the implication is that some of the factors that are internal to the fairness inquiry, should rather be considered in the justification inquiry in terms of section 36. Where the impugned discrimination does not meet the strict requirement of a law of general application in terms of section 36 of the Constitution, the justification factors should still be separated from the impact factors. The implication for PEPUDA is that the justification factors that are lumped together with the impact factors, should be disentangled and the factors that resemble a limitation analysis should be queried in the justification leg of the discrimination inquiry. The following section turns to the form of judicial scrutiny that is necessary within a justification inquiry to enhance

[244] Albertyn & Goldblatt "Equality" in *CLOSA* 35-81.
[245] Woolman & Botha "Limitations" in *CLOSA* 34-47-34-67.

the transformative impetus of impoverished people's right to equality and non-discrimination.

4 4 1 Judicial scrutiny: From "balancing" to justifications

In constitutional jurisprudence, the justification stage has been criticised for using the deficient judicial method of "balancing" where, for example, the impact of the discrimination on the identifiable group must be balanced against other competing interests.[246] Balancing can disguise itself in ostensibly scientific and neutral legal language but in reality, reflect the hidden value-laden and subjective political stances of litigants and adjudicators.[247] For example, balancing impoverished people's interests will pit equality and discrimination concerns against other democratic values such as freedom.[248] Moreover, balancing will further the perception that poverty discrimination is something natural and intractable.[249] Therefore, a claim of poverty discrimination can easily end up in a "cost-benefit analysis" in the justification leg of the inquiry,[250] which invites a formalistic equality jurisprudence that absolves itself from engaging with critical issues that affect impoverished peoples' rights. This will debilitate the transformative potential of the right to equality and non-discrimination.

A transformative conception of substantive equality provides a significant theoretical grounding to interrogate any justifications posed for the discrimination. The following section critically analyses and evaluates the relevant factors that should be considered in the justification leg of the inquiry. It does so by examining the various justifications posed by respondents for rights' infringements in case law that relate to poverty discrimination.[251]

4 4 2 Burden of justification

In considering who bears the onus of justifying the limitation of a right, the general principle has been described as an "onus of a special type" where the burden is on the

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[246] Woolman & Botha "Limitations" in *CLOSA* 34-94-34-104.
[247] 34-100.
[248] Chapter 2 part 2 4 1.
[249] Chapter 2 part 2 3.
[250] Woolman & Botha "Limitations" in *CLOSA* 34-101.
[251] The respondents in all these cases did not specifically raise the purposes within a justification or limitation analysis. Some of them occurred in terms of the Court's reasonableness review standard crafted for socio-economic rights with a different set of factors to consider. The purpose of analysing these cases is to illustrate what possible justifications can be posed in poverty discrimination cases and what a possible transformative substantive equality approach would be.

party invoking the justifiability of the infringement of the right.[252] Scholars have argued that the burden of justification rightfully falls on the respondent as the information needed to show unfairness is seldom ascertainable by or in possession of the vulnerable group, but will rather be in the hands of the duty bearer.[253]

It follows that the state or private party that seeks to justify poverty discrimination must not only make a legal argument as to why it is justifiable in terms of a transformative conception of substantive equality but must also place sufficient factual and policy-based arguments before the court. The jurisprudence suggests that where the respondent fails to place sufficient justifications before the court, it will more readily amount to unfair and unjustifiable discrimination.[254] However, in terms of discrimination claims the Constitutional Court has held that where the respondent does not attempt to discharge its "burden of justification", the Court must still assess whether a limitation of the right is justifiable.[255] In doing so, a court should investigate several interrelated factors grounded in a transformative conception of substantive equality.

4 4 3 Importance of the purpose of the discrimination

An important factor that arises in the fairness and limitation inquiries is the assessment of the purpose and the importance of limiting the right.[256] Difficult issues will arise when the respondent offers compelling reasons as to why the discrimination serves a legitimate purpose. The grounding principle remains that the limitation must have a legitimate constitutional purpose.[257] This factor requires two interrelated assessments. The first is that there must be a legitimate purpose for the discrimination and the second is that the court must interrogate its importance. What distinguishes this from a thin rationality standard in terms of section 9(1)[258] is that the courts must, at a minimum, ensure that the purpose is not inconsistent with the tenets of transformative substantive equality, expressed through the values of democracy, equality, human dignity, and freedom.

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[252] De Vos & Freedman *Constitutional Law in Context* 380. In terms of a claim instituted under the Constitution, the onus usually falls on the party invoking the justifiability of the infringement of the right as established in *Ferreira v Levin* 1996 1 SA 984 (CC) para 44.

[253] Albertyn et al *Introduction* 50-51; Woolman & Botha "Limitations" in *CLOSA* 34-44.

[254] De Vos & Freedman *Constitutional Law in Context* 380-382.

[255] De Vos & Freedman *Constitutional Law in Context* 381; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) paras 56 and 59. In terms of PEPUDA, see *Pillay* para 69 where the Court held that the burden of justification is similar to that of direct application.

[256] The importance of the purpose of the discrimination is a weighty factor in the fairness inquiry of the Constitutional Court's jurisprudence. See *Harksen* para 64. It is similar to the factor in s 36(b) of the limitation analysis that inspects the "importance of the purpose of the limitation". This factor is stipulated in s 14(3)(f) of PEPUDA.

[257] *Makwanyane* para 131.

[258] Part 4 2 1 above.

Furthermore, there may be legitimate purposes for discrimination, but it is not the end of the inquiry. Due to poverty discrimination arising out of structural causes, it will not always be visible on the facts what the specific objectives of the discrimination are. The courts are therefore tasked with the difficulty of measuring social, economic, political, and administrative purposes against transformative substantive equality.[259] It should be cautioned that legitimate objectives can be tainted by systemic discrimination that furthers and entrenches various forms of "povertyism", material disadvantage or the silencing of impoverished people's voices. Courts will therefore have to interrogate whether the proposed justifications for poverty discrimination are reconcilable with the features of transformative substantive equality.

In terms of the status grounds, the Constitutional Court is alive to the fact that proposed justifications can be tainted with prejudicial underpinnings. For example, the Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice* ("*NCGLE I*") held that the purpose of enforcing private moral views by criminalising sexual practices outside of heteronormative standards is tainted with "prejudice" that cannot be justifiable.[260] However, challenging issues surface when the "purpose" of the discrimination is disguised as legitimate in terms of economic considerations.[261] In *Hoffmann,* the Court made a noteworthy remark in relation to questioning economic policy choices. The Court held that economic considerations might very well amount to legitimate purposes, but there must be a reluctance to allow discrimination "to creep in under the guise of commercial interests".[262] The Court indicated that "prejudice can never justify unfair discrimination."[263] The following paragraphs investigate the purposes posed by respondents in some selected cases concerning impoverished people.

In *Khosa,* the Court expressed that differentiation between groups of people would serve a justifiable constitutional purpose to allocate benefits or impose a disadvantage on more privileged groups to ensure the effective delivery of social services.[264] Nevertheless, the Court indicated that such differentiation should not amount to an "arbitrary", "irrational" or "naked preference".[265] The respondents argued that the exclusion was justifiable as it was temporary and that permanent residents would be

[259] Woolman & Botha "Limitations" in *CLOSA* 34-74-34-76.
[260] 1999 1 SA 6 (CC) para 38.
[261] Albertyn et al *Introduction* 44-45.
[262] Para 34.
[263] Para 37.
[264] Para 53.
[265] Para 53.

entitled to social benefits after the prescribed five years of naturalisation.[266] Mokgoro J rejected this argument as the differentiation had no rational connection to the professed governmental purpose of combatting poverty.[267] Moreover, she indicated that naturalisation is not certain as permanent residents may be met with administrative difficulties beyond their control.[268]

However, Mokgoro J did accept that the financial burdens that non-citizens place on the state may be a legitimate and compelling justification for not making social security benefits available to all.[269] On the other hand, the Court indicated that the state produced insufficient evidence to show that the inclusion of permanent residents would amount to an excessively high financial burden and would therefore be justifiable.[270] It is unclear what the implications would have been if the respondents could show that the inclusion would amount to an excessively high financial burden.[271]

The state further argued that the purpose of the discrimination is legitimate as it seeks to promote the state's immigration policy that encourages self-sufficiency amongst foreign nationals in order to prevent them from becoming a burden on the state.[272] This is a worrying argument as it raises stereotypical assumptions that result in deserving and undeserving "burdens" on the State.[273] Although Mokgoro J did not refute this argument based on its erosion of permanent residents' equal moral worth, she indicated that even where they become a burden on the state, it is "a cost we have to pay for the constitutional commitment to developing a caring society, and granting access to socio-economic rights."[274] This is a welcome judicial pronouncement as someone must bear the cost of redressing discrimination[275] to enhance the restitutionary nature of the equality right.

Although the exclusion of other non-citizens such as temporary residents and undocumented migrants were not before the Court, the Court makes worrying remarks that could be utilised in the future to justify discriminatory measures against non-nationals. The Court justifies the inclusion of social security benefits to permanent

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[266] *Khosa* para 55.
[267] Para 51.
[268] Para 56.
[269] Para 58.
[270] Para 62.
[271] See what possibilities a transformative participatory remedy such as structural interdicts pose for cases with greater financial implications in Chapter 5 part 5 4 3.
[272] *Khosa* paras 63-65.
[273] Chapter 2 part 2 5.
[274] *Khosa* para 65.
[275] Chapter 2 part 2 4 3.

residents as they are different from those who have not "become part of our society and have made their homes in South Africa."[276] It is contradictory that the Court states that "everyone" "within our borders" is entitled to the necessities of life, but then argues that it "may" be legitimate to exclude temporary and illegal workers.[277] It is not clear why the Court made such a contradictory remark. One reason could be distilled from the Court's reasoning that permanent residents contribute to the welfare system through paying taxes and enhancing economic growth.[278] This is worrying as equal moral worth is intrinsic and not conditional to the value a human life adds to an economic system.[279] Moreover, it is concerning that the Court disregard the disadvantageous conditions of poor non-citizens by declaring that controlling immigration policies can be a less restrictive means to ensure that non-citizens do not become a burden on the State.[280]

A noteworthy example of the Constitutional Court rubberstamping ostensibly justifiable governmental purposes emerges in *Mazibuko*. The City argued that the water losses were unsustainable to the extent that the water distribution to Soweto was not in balance, with Soweto only generating one per cent of the City's water revenue.[281] The Court held that the differentiation was therefore rationally connected to the governmental purpose of curbing unaccounted water.[282] The Court also held that means-testing is an appropriate mechanism to ensure that government services prioritise the worst off.[283] The applicants argued that the means-testing is underinclusive as the threshold is set so low that many poor people who do not meet the threshold do not qualify for the indigent register and therefore cannot pay for their water needs.[284] The Court found the means-testing mechanism to be favourable irrespective of it being demeaning to poor people and being underinclusive. O'Regan J further held that the water allocation per household is justifiable as the calculation of an allocation per person would amount to an unjustifiable administrative burden on the State.[285] This administrative burden seems to justify that the most vulnerable impoverished people were excluded from the system. In

[276] *Khosa* para 58. LA Williams "Issues and Challenges in Addressing Poverty and Legal Rights: A Comparative United States/South African Analysis" (2005) 21 *SAJHR* 436-471.
[277] Para 59.
[278] Para 74.
[279] Chapter 2 part 2 5.
[280] Para 65. See part 4 4 5 below on less restrictive means.
[281] *Mazibuko* para 146.
[282] Para 150.
[283] Para 101.
[284] *Mazibuko Applicants' Heads of Argument* para 356.
[285] Paras 84 and 89.

addition, the Court did not consider the justifiability of the City's argument that it cannot extend water services to impoverished people on the basis that they are credit risks.

The City's purpose to achieve more sustainable use of natural resources may very well be legitimate. However, if the Court considered less disadvantageous means to realise this purpose within a transformative conception of substantive equality, it arguably would not have placed the excessive burden on the low income, disadvantaged community of Phiri.[286] As is indicated above, in showing discrimination through comparators, the Court's reasoning in *Mazibuko* creates the impression that the discrimination is justifiable as other poor people are worse off. Moreover, these comparisons do not square with a commitment to transformative substantive equality that would seek to be responsive to impoverished people's immediate needs.[287]

The *SJC* case provides a good example of economic considerations that appeared to constitute a legitimate purpose. The respondents averred that the purpose of their method of allocating resources was to be racially neutral and that it did not seek to "provide affirmative allocation of police resources."[288] They indicated that their allocation method aimed to fairly distribute resources according to reported crimes to meet the policing needs of the community.[289] The applicants conceded that distributing resources according to needs is a justifiable purpose.[290] However, the purpose in this case, was by its very nature unjustifiable as the means deployed to fulfil the purpose failed to base the allocation on actual crime instead of reported crime.[291] Moreover, the applicants argued that the method used to calculate resource allocation must take the limited resources into account to effectively fulfil its purpose of responding to actual crime.[292] The applicants therefore claimed that the limited resources justification makes the discrimination against impoverished people even less justifiable, as an equitable distribution would have adjusted its distribution to those in a greater need of the police resources.[293]

The abovementioned cases illustrate that the inquiry as to whether the discrimination serves a constitutionally mandated purpose, should be scrutinised within the purview of transformative substantive equality. If the purpose is illegitimate, it will be fatal for the

[286] Part 4 4 5 3 below.
[287] Chapter 2 part 2 4 2.
[288] *SJC Applicants' Heads of Argument* para 284.
[289] Para 286.
[290] Para 287.
[291] Para 288.
[292] Para 287.
[293] Para 287.

respondents. However, if the purpose of the measure does offer a compelling justification, it could still have a disproportionate impact on impoverished people. If, on the other hand, the purpose is not particularly important, the other factors should be considered, and the justifiability of the discrimination or limitation will depend on its proportionality. Therefore, it is not the only factor that must be considered. The other factors in an unfair and limitation analysis should also be considered.

4 4 4 The relationship between the discrimination and its purpose

Once the purpose of the discrimination is found to be legitimate, it is important to ask whether the means employed to achieve that purpose are rationally connected, or reasonably capable of achieving that objective.[294] The second justification factor that must be considered therefore relates to what extent the discrimination achieves its purpose. For example, in *NCGLE II,* the Court held that no rational connection existed between the purpose of protecting heteronormativity and the exclusion of same-sex partners from certain benefits to which heterosexual married couples were entitled. The Court held that this purpose would neither be realised nor diminished by extending the same benefits to permanent same-sex partners.[295] In cases concerning poverty discrimination, this will be a crucial factor to consider. The importance of this factor is well illustrated in the *SJC* judgment.

The respondents argued that the outcome of the method used to allocate police resources was rationally connected to its purpose of responding to reported crime. The applicants indicated that the discrimination and the irrationality of the method used to calculate the resources are interlinked.[296] They demonstrated that it is irrational as the poor black people of Khayelitsha who experience the heaviest burden of violent crime are also allocated the lowest number of resources.[297] Thus, the respondents failed to indicate that the allocation is rationally connected to its purported outcome. In addition, if the purpose of the method of resource allocation is to distribute resources effectively and fairly to respond to policing needs, then the need is to respond to actual crime and

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[294] S 36(d) of the Constitution and s 14(g) of PEPUDA that is slightly differently formulated. S 14(g) of PEPUDA asks "whether and to what extent the discrimination achieves its purpose." This is also a consideration in the internal fairness *Harksen* test. However, courts often ask this question at the first step of determining whether there was "differentiation" to establish the rationality thereof in terms of s 9(1). See *Harksen* paras 53, 55 and 58. Also see O'Regan's dissenting minority at para 111 where she considered this factor under the limitation analysis. *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) considered this factor in the fairness inquiry.

[295] *SJC Applicants' Heads of Argument* para 56.

[296] Para 292.

[297] Para 292.

not merely reported crime. As such, the fact that the purpose of the allocation seeks to respond to reported crime is not rationally connected to its purpose of responding to policing needs.

The Court dismissed the respondent's averment that the very nature of the socio-economic conditions of the Khayelitsha community itself lead to more crime. The respondents' averment creates the impression that the purpose of diverting police resources away from poor communities, is rationally connected to fairly distributing limited resources, as more policing would not result in enhanced safety for impoverished people. The Court responded that even where poor black communities face socio-economic and infrastructural obstacles that make police efficiency and effectiveness difficult, it cannot be used to excuse and justify bad police services or inadequate resource allocation.[298]

Closely related to the purpose and rationally connected justification factors is PEPUDA's stipulation that the discrimination must be based on "objectively determinable criteria, intrinsic to the activity concerned."[299] This factor offers the same problems as the first two factors, as poverty discrimination can easily be justified under a purpose that is tainted with discrimination but on its face seems to be legitimate.

The objective consideration of whether the discriminatory act or omission might be "intrinsic to the activity concerned" present problems for impoverished complainants.[300] This consideration was specifically included through the lobbying of the banking and private business sectors as they were worried that PEPUDA would stifle their economic endeavours.[301] The word "intrinsic" denotes a close link between the use of discriminatory or differential measures and the prospects of the activity concerned where the activity would not be possible, but for the discrimination.[302] Here a private party can easily argue that its business endeavours are aimed at profit-making and that charging impoverished people less for the service, would undermine the intrinsic nature of the business activities. In circumstances like this, the consideration of this factor might be deemed unconstitutional as it may result in disadvantaged groups being accorded fewer safeguards than what the Constitution provides.[303]

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[298] *SJC* para 88.
[299] S 14(2)(c) of PEPUDA.
[300] Liebenberg & O'Sullivan (2001) *Acta Juridica* 98-99.
[301] 98.
[302] Albertyn et al *Introduction* 47.
[303] Liebenberg & O'Sullivan (2001) *Acta Juridica* 99.

The abovementioned two factors are not the only considerations in the unfair or limitation analysis. The limitation jurisprudence and PEPUDA offer a further critical factor in light of transformative substantive equality ideals.

4 4 5 Less restrictive and less disadvantageous means

The last factor that should be considered is whether there were less restrictive and less disadvantageous means available to achieve the purpose.[304] This factor is a particular expression of transformative constitutionalism that places fundamental rights at the centre of its operation.[305] The factor places a significant justificatory burden on respondents to show that they employed means that are less restrictive of the right to equality and non-discrimination.[306] This factor strongly relates to how the purpose of the infringement is constructed. In discrimination law, this will result in two assessment strands. The first relates to whether alternative and less restrictive means are available. The second assessment is conceptually distinct from the first and requires an investigation as to whether the respondent has taken positive steps to address the discrimination. These two assessments will now be considered.

4 4 5 1 Alternative measures

Considering that the unfairness inquiry is rooted in a commitment to transformative substantive equality, it is likely that a wide range of less restrictive measures is available to achieve the said purposes. Nevertheless, the Court has repeatedly indicated that it is not well-suited to discover alternative hypothetical means that are less invasive.[307] In this respect, the burden of justification becomes particularly significant.

The respondent will have to show that the means they have adopted were less restrictive of impoverished people's rights, taking into account all factors such as cost,

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[304] S 36(e) of the Constitution uses the language of "less restrictive" and s 14(h) of PEPUDA refers to "less restrictive and less disadvantageous means". This factor is not a usual consideration within the internal *Harksen* fairness test with the direct application. It could be that the courts have thus far found discrimination claims to either succeed or fail earlier in the discrimination inquiries. In poverty discrimination cases, it will be a critical factor to consider. There are thus two options for direct application. There must be an unfair *and* limitation inquiry, or the unfairness inquiry must be reformed also to consider this factor in its justification inquiry.

[305] M Pieterse "What Do We Mean When We Talk About Transformative Constitutionalism?" (2005) 20 *SA Public Law* 155 164.

[306] Also note that the less restrictive means must be equally effective in achieving the state's purpose in Woolman & Botha "Limitations" in *CLOSA* 34-92.

[307] For a first holding that other cases follow, see *S v Makwanyane* 1995 3 SA 391 (CC) para 107. However, see *Brink v Kitshoff* 1996 4 SA 197 (CC) para 49, where the Court held that less restrictive measures were available where the purpose of the discrimination could be achieved by a provision that does not discriminate. In this respect, the respondents did not discharge their burden of justification to indicate why the purpose could not be achieved by a measure that does not discriminate against women.

other rights, and transformative substantive equality duties. For example, in the *SJC* case, the Court indicated that alternative methods of allocating police resources would have resulted in a less invasive impairment of the non-discrimination right of poor and black people.[308] Moreover, the Court held that even though the ideal budget is constrained by 68%, upon using socio-economic indicators that were more truthful to impoverished people's reality, this number could have been much higher by diverting unnecessary resources away from wealthier areas.[309]

4 4 5 2 Reasonable accommodation

Second, to enable the transformative commitment of substantive equality, respondents will also have to indicate that they have taken reasonable steps to address the discrimination.[310] If reasonable steps were taken, it might absolve the respondent from liability. However, it also implies that positive measures should have been taken to address the discrimination.[311]

In *Pillay*, the Court considered the content and idea of "reasonable accommodation" and its relationship with positive measures to address discrimination under PEPUDA. Langa CJ held that the School Code, which prevented Sunali from wearing her nose stud, did not reasonably accommodate religious and cultural diversity. In elaborating on the concept of reasonable accommodation, the Court indicated that:

> "At its core is the notion that sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally."[312]

This judicial formulation of reasonable accommodation indicates that positive measures are required, which may involve incurring "expense" "or" "additional hardship" to allay discrimination that impedes the ability of people to participate and fully and equally enjoy all rights and freedoms.

However, the language of reasonable accommodation can easily invoke a liberal-egalitarian sufficiency-based material inclusion of impoverished people.[313] This would

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[308] Paras 86-87.
[309] Paras 47-49.
[310] S 14(3)(i) of PEPUDA; reasonable accommodation is a significant factor in general limitation analyses of direct invocation of constitutional rights but have not been considered in an unfairness analysis. This leaves the door open that reasonable accommodation could also be considered in direct application of s 9(3) of the Constitution. For one example of reasonable accommodation in an examination of proportionality, see *Prince v President of the Law Society of the Cape of Good Hope* 2002 3 BCLR 231 (CC) para 76.
[311] S 24(4) of the PEPUDA Draft Amendment Bill of 2021 is particularly significant as it requires the state and all persons to publicly indicate how their budgets prioritise the elimination of unfair discrimination.
[312] *Pillay* para 73.
[313] Chapter 2 part 2 4.

mean that fulfilling basic needs will merely be an affirmative remedy that does not seek to address the underlying socio-economic conditions that make poverty and inequality possible. In this regard, the Court in *Pillay* shows a sound understanding of reasonable accommodation as a "nonreformist reform" that can transform the underlying structures that constitute discrimination.[314] The Court uses the example of reasonable accommodation that is needed in instances of disability discrimination as:

> "[d]isabled people are often unable to access or participate in public or private life because the means to do so are designed for able-bodied people. The result is that disabled people can, without any positive action, easily be pushed to the margins of society."[315]

The Court indicates that the barriers people with disabilities face are due to the entrenched structures that "are designed for able-bodied people" to participate in all spheres of life. The Court therefore engages the more structural inequalities that entrench certain norms and standards where people are excluded because they depart from the norm. In this regard, the Court held that reasonable accommodation requires positive measures.[316] Significantly, the Court extended the reasonable accommodation factor within a proportionality assessment and not within the judicial review standard of "undue hardship" courts in foreign jurisdictions follow.[317] The question is therefore not only whether positive steps were taken, but whether the respondents have done "more than a negligible effort" to accommodate the excluded group.[318] Such a proportionality assessment of reasonable accommodation enables the restitutionary duties attached to impoverished people's rights to equality and non-discrimination to be taken into account.[319] This suggests that impoverished people must not only be accommodated but that the respondents must show that they have taken positive steps to eliminate the discrimination.

More significantly, the Court's understanding of reasonable accommodation traverses the dichotomy between affirmative and transformative strategies to address structural social exclusion. It states that positive steps can be affirmative as it "might be as simple as granting and regulating an exemption from a general rule" or it can be transformative by requiring the changing of rules, practices or the alteration of structures that will require incurring a monetary loss.[320] This suggests that, for example, where a private party is

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[314] Chapter 2 part 2 2 2.
[315] *Pillay* para 74.
[316] Para 75.
[317] See para 76 where the Court mentions the Canadian Supreme Court as well as the United States Supreme Court.
[318] Para 76.
[319] Chapter 3 part 3 5.
[320] Para 75.

contracted to improve or build water infrastructure for impoverished communities, poor people should be exempted from the market logic of paying for safe and potable drinking water to reasonably accommodate their financial inability to pay for basic and human dignifying goods. In other instances, reasonable accommodation must "address the disadvantage which arises from or is related"[321] to poverty discrimination by, for example, not allowing impoverished people to be disproportionately affected by state expenditure cuts in pursuit of fiscal consolidation programmes.[322]

The Court's inability to embark on a transformative substantive equality justification analysis that investigates whether there were less invasive means and whether positive steps were taken to address the discrimination is vividly expressed in the *Mazibuko* judgment.

4 4 5 3 Mazibuko justifications reconsidered

The lower courts held that access to sufficient water extends beyond financial access and would require free provisioning to impoverished people.[323] O'Regan J, in contrast, held that "the City is not under a constitutional obligation to provide any particular amount of free water to citizens per month."[324] This is not a sound argument in terms of discrimination law if the Court understood that impoverished people could not access their very basic human needs through the market. If the Court acknowledged this structural exclusion, it would have given the Court leeway to ask the respondents to meet their burden of justification by showing that they have made reasonable accommodations for impoverished people to fully enjoy their right to sufficient water.

Moreover, the applicants indicated that if the City is correct that the PPWMS is a better solution for poor people, then poor people must be allowed to decide for themselves

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[321] S 14(3)(i)(i) of PEPUDA.

[322] See the reference to austerity measures in Chapter 2 part 2 4 3 at footnote 218. The Constitutional Court has cited the Committee on Economic, Social and Cultural Right's interpretation that "any deliberate retrogressive measure" such as reducing socio-economic benefits, or the withdrawal of social programmes requires a high level of justification in terms of socio-economic rights. Where the retrogression involves the reduction or removal of the socio-economic goods of impoverished people as a marginalised group, it should be subject to heightened justification burdens on the part of the duty-bearer. In addition, non-discrimination is a critical factor whether the retrogressive measure could be justified. See Committee on Economic Social and Cultural Rights *General Comment No 3: The Nature of States Parties' Obligations (Art 2, para 1 of the Covenant)* (14 December 1990) E/1991/23 para 9 and *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 45 for the endorsement of CESCR's interpretation; S Liebenberg "Austerity in the Midst of a Pandemic: Pursuing Accountability Through the Socio-Economic Rights Doctrine of Non-Retrogression" (2021) *SAJHR* 1 19.

[323] *Mazibuko High Court* para 22; *City of Johannesburg v Mazibuko* 2009 3 SA 592 (SCA) paras 28-46.

[324] *Mazibuko* para 85.

whether the PPWMS is a better option than the credit system.[325] The applicants argued that the claimants were not asking for the extension of credit services as the City averred. They merely indicated that the City must justify why impoverished people are not given the same option to restore their pre-existing services or have procedural safeguards at their disposal.[326]

As indicated above, the means-testing may very well be a legitimate purpose to prioritise the worst off, but the Constitutional Court overlooked the following. Even where the means-testing would prioritise the poorest, the extra ten kilolitres per month, upon the condition of successful registration, would still not have been enough to provide the bare minimum for impoverished people to survive in their specific context. The High Court held that, as a minimum,[327] the living conditions of the Phiri community warrants the free allocation of 50 litres of water per person per day to live a dignified life.[328] The High Court also indicated that the City had the necessary resources to meet the water needs above and beyond the sufficiency threshold.[329] Moreover, on a formalistic interpretation of equality, the means adopted seemed to have distributed the water fairly to all income groups as everyone, across all income levels, freely received 25 litres per person per day. However, the PPWMS was in effect a punitive measure that relegated impoverished people to restricted water services.[330]

Most significantly in terms of the burden of justification, the Constitutional Court overlooked the applicants' submission that the City did not adequately explain why they deemed it necessary to disadvantage an already impoverished community to address the urgent need of another disadvantaged group.[331] In contrast, the High Court judgment held that the applicants successfully demonstrated that the relief sought could be cross-subsidised by higher tariff rates on wealthier areas[332] that, in proportion to their income, pay low rates and receive a similar amount of free water. In this respect, the wealthier neighbourhoods could have absorbed the financial pressures the City faced.[333] The

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[325] *Mazibuko Applicants' Heads of Argument* para 308.5.
[326] Para 309.1.
[327] The Supreme Court of Appeal unfortunately set a normative "ceiling" by its holding that 42 litres per person per day is sufficient in *City of Johannesburg v Mazibuko* 2009 3 SA 592 (SCA) paras 22-24. See J Dugard & S Liebenberg "Muddying the Waters: The Supreme Court of Appeal's Judgment in the *Mazibuko* case" (2009) 10 *ESR Review* 11.
[328] Para 181.
[329] Para 181.
[330] *Mazibuko Applicants' Heads of Argument* para 281.
[331] Para 286.
[332] *Mazibuko High Court* para 22.
[333] S Liebenberg "Toward an Equality-Promoting Interpretation of Socio-Economic Rights in South Africa: Insights from the Egalitarian Liberal Tradition" (2015) 132 *S Afr Law J* 411 431 at footnote 109.

City's argument that it cannot extend water services to impoverished people on the basis that they are credit risks demonstrates an unjustifiable prejudice towards poor people as middle- and higher-income groups are also credit risks.[334] Prejudice against the impoverished community thus seems to "creep in under the guise of commercial interests".[335]

The *Mazibuko* case illustrates the dangers of a formalistic and scientific "balancing" proportionality exercise that blunts the transformative potential of an unfair or limitation inquiry. The critical impetus of the justification inquiry is that courts should closely scrutinise the objective posed for discrimination to enable the maximum protection and realisation of impoverished people's right to equality and non-discrimination. The less restrictive means and reasonable accommodation factors should also consider the contextual socio-economic factors that impoverished people, for example, cannot access their basic needs through a market economy. In addition, the respondents would not be able to escape the reality that poverty discrimination would require some positive "levelling up" and/or (re)distributive "levelling down" measures. The *Mazibuko* judgment is therefore a good illustration of how ostensibly justifiable governmental purposes could be tainted with poverty discrimination that can reinforce impoverished people's disadvantages if it is not scrutinised against transformative substantive equality. There is still a possibility that the respondents can prove that the discrimination is proportionate to its impact on impoverished people, and therefore fair.

4 4 6 Proportionality

As indicated above, the Constitutional Court has stated numerous times that the unfairness (or justifiability) of the discrimination turns on its impact on the identifiable group.[336] However, this does not mean that the degree of the impact will supersede all other possible justifications. Neither does it mean that any justification should supersede the impact of the discrimination on impoverished people. Rather, if the unfairness and limitation inquiry is not to blunt the transformative potential of poverty as a ground of discrimination, the impact of the discrimination must guide the proportionality exercise. In this respect, the more severe the impact on the impoverished group, the greater the burden of justification would be on the respondent to show that it has done everything in

[334] *Mazibuko Applicants' Heads of Argument* para 309.2.
[335] *Hoffmann* para 34.
[336] Part 4 3 2.

its power to limit the enjoyment of the right to its less invasive extent and that active steps were taken to curb and eliminate the discrimination.

Thus far, bar *Mazibuko*, no respondent could illustrate that poverty discrimination is justifiable as it has a proportionate impact on impoverished people as a group. This is mainly because the claims were either upheld or dismissed earlier in the discrimination or justification inquiries. However, a respondent could argue that the discrimination is proportionate as it does not strike to the core of the right.[337] The *Pillay* case is instructive to determine whether discrimination is proportionate when it is said that the discrimination amounts to a limited invasion of impoverished people's rights.

The Court in *Pillay* held that even though the degree of discrimination could be regarded as minimal as it only amounted to a few hours of Sunali not wearing her nose stud during school hours, contextually evaluated, the prevention impaired Sunali's ability to express herself and therefore "constitute[s] a significant infringement of her religious and cultural identity."[338] Moreover, the Court highlighted the severity of the infringement as the school "sends a message that Sunali, her religion and her culture are not welcome."[339] The Court therefore held that the discrimination had a disproportionately severe impact on Sunali.

Consequently, there are no hard and fast rules for the justification leg of the fairness inquiry as every case must be approached in its totality, guided by the context of the claimants, the impact of the discrimination, and a critical scrutiny of any objectives posed for its infringement. Moreover, the proportionality analysis will reveal to what extent adjudicators are indeed serious about transformative substantive equality that undergirds the right. This suggests that any objective should not immediately supersede the impact of the discrimination as it would jeopardise, if not completely nullify, the Constitution and PEPUDA's aim of redressing disadvantage. Moreover, if the disparities and exclusions created by the ostensibly "free" market are seen as justifiable and reasonable by-products of everyday endeavours, the aim of substantive equality will become more elusive.[340]

4 5 Conclusion

[337] Part 4 3 2 above criticising the Constitutional Court's overreliance on human dignity in determining the impact of the discrimination (thus, only the misrecognition aspect).
[338] Para 85.
[339] Para 85.
[340] Liebenberg & O'Sullivan (2001) *Acta Juridica* 98.

This chapter developed a comprehensive interpretative framework for an unfair poverty discrimination inquiry in light of transformative substantive equality. It structured the discussion according to three interrelated inquiries, which focus on discrimination, fairness, and justification, respectively.

The chapter examined the current construction and interpretative possibilities of the concept of discrimination. It found that a transformative interpretation of the concept of discrimination in PEPUDA and the Constitution has far-reaching implications for structural poverty. First, any actions that deepen the disadvantage of impoverished people should be found to be discriminatory, including in cases where the relevant duty bearer fails to take impoverished people's disadvantage into account.

The chapter thereafter found that to show some sort of harm, prejudice or disadvantage towards impoverished people that flows from the discrimination, a comparator in combination with the more contextual socio-economic features could be powerful to address the deep levels of class stratification but also the underlying generators thereof. The chapter then indicated that poverty meets the test for prohibited grounds of discrimination and should be recognised as a listed ground under the Constitution and PEPUDA. Furthermore, the phrase "on one or more grounds" allows discrimination law to capture the intersectional nature of poverty.

The chapter argued that the fairness stage should be expanded into two further inquiries to provide impoverished people with optimal protection against unfair discrimination. It contended that the first fairness inquiry should focus on the context of the specific claimants' lived inequalities. The contextual factors that are identified should also play an important role under the impact and justification inquiries. Furthermore, it was argued that the second fairness inquiry relating to the impact it has on impoverished people should determine whether the impugned discrimination furthers or entrenches impoverished people's disadvantage. It specifically argued that the court's focus on the vulnerability of marginalised groups should be infused with the three-dimensional conditions for equality of participation – recognition, redistribution, and representation. This resonates with transformative substantive equality's normative grounding of a form of democracy that seeks to provide for rough equal social, political, and economic conditions. In addition, considering whether the discrimination impedes impoverished people's ability to participate on an equal footing in all spheres of life will guide courts' proportionality assessment of the justifications posed for the discrimination.

Lastly, this chapter postulated that a transformative substantive equality interpretative framework would separate the justification inquiry from the discrimination and fairness inquiries. The chapter elaborated on the burden of justification as "an onus of a special type" where the relevant duty bearer must provide appropriate legal, economic and policy arguments regarding their transformative substantive equality obligations. The chapter developed a reconsidered justification and/or limitation inquiry.

The chapter indicated that the first factor of the purposes that a respondent presents to justify the discrimination should be carefully scrutinised given that poverty discrimination is structural and pervasive in market economies. Furthermore, the chapter found that the objective of the discrimination or limitation should be rationally connected to its purpose. The last compelling factor that should not be overlooked is that the respondent must show that the discrimination is the less disadvantageous or less restrictive means of fulfilling its legitimate purpose. Moreover, the respondent must show that it has taken positive steps not only to curb the discrimination but also to effectively eliminate it. The chapter concluded that a stringent proportionality exercise must stay faithful to the democratic ideals of a rough equality of political voice, resources, and reciprocal recognition if impoverished people's right to equality and non-discrimination is to have transformative representative effects.

The development of this transformative interpretative substantive equality paradigm gives rise to critical issues relating to the court's legitimacy and competency to make a finding of unfair poverty discrimination. It raises contested issues about whether and to what extent courts can effectively enforce impoverished people's right to equality and non-discrimination. The following chapter considers these institutional questions which inevitably arise in adjudicating a claim of poverty discrimination.

CHAPTER 5: ADJUDICATING POVERTY DISCRIMINATION

5 1 Introduction

This chapter aims to identify the institutional constraints of adjudicating poverty-based discrimination claims. It also considers whether and to what extent a transformative substantive equality reading of judicial review and remedial powers can effectively navigate the constraints identified. If we are serious about the ideals of rough material, social and political equality, institutions such as courts are well placed to challenge unequal power structures and to be the catalyst for some form of transformative change. This is particularly the case in view of the fact that impoverished people and other vulnerable groups often lack political power, and courts are often their last resort after other political avenues have failed to realise their rights.[1] Even though these are strong arguments in favour of judicial intervention, two significant challenges arise namely, institutional legitimacy and competency concerns.

These concerns warrant investigation, especially in the context of poverty discrimination claims. This chapter considers what advantages and limits a transformative substantive equality constitutional dialogue poses for the separation of powers and competency concerns as it relates to the enforcement of poverty as a ground of unfair discrimination. It proceeds to consider whether the remedies available under PEPUDA and the Constitution could allow courts to mitigate legitimacy and competency concerns, while at the same time upholding impoverished people's right to equality and non-discrimination.

5 2 Institutional (il)legitimacy

The primary institutional legitimacy concern around the inclusion of poverty as a ground of unfair discrimination is that it asks a court to overstep its boundaries as constituted by the traditional and liberal conception of the separation of powers doctrine.[2] A liberal conception of constitutional theory postulates that the separation of powers doctrine dictates that each branch of government should act within its appropriate functions and that the boundaries should only be crossed with a general sense of restraint.[3] The

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1 Chapter 2 part 2 3.

2 S Fredman "Positive Duties and Socio-Economic Disadvantage: Bringing Disadvantage onto the Equality Agenda" (2010) *Eur Hum Rights Law Rev* 1 4-5.

3 S Seedorf & S Sibanda "Separation of Powers" in S Woolman & M Chaskalson (eds) *Constitutional Law of South Africa* (2002) 2 ed 12-1-12-3.

contention is that when a court is asked to consider poverty as a ground of unfair discrimination, it will inevitably question, or make, policy.[4] This task is generally said to be the appropriate function of the political branches of government.[5] In this respect, the right to equality and non-discrimination with its "remedial and restitutionary" aim,[6] offers challenges for adjudication as courts will ultimately question policy choices of the other branches of government.

The role of courts in transformative change should not be over-emphasised at the expense of the transformative possibilities in the other branches of government.[7] Moreover, courts are not the only viable forum where impoverished people can institute their justice claims within a democratic order.[8] Yet, courts and legal strategies play an important symbolic role,[9] and often foreclose or enable extra-judicial transformation.[10] This is so as the judiciary, deliberately or unconsciously, mediates, by way of interpretation, many competing ideas of equality underlying anti-discrimination provisions. In this regard, a claim of poverty discrimination that is instituted through judicial proceedings, can at first glance appear to be a merely affirmative strategy, but it could have transformative outcomes. The important qualification is that it should not be pursued solely through judicial means, as an overly court-driven transformative strategy poses democratic dangers.[11] However, these dangers do not entirely absolve the court from being responsive to the plight of impoverished people.

In the context of socio-economic rights, the Constitutional Court has been extensively criticised for not aptly understanding and imposing its institutional role in relation to structural poverty.[12] In the context of discrimination claims, the Court has been charged

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4 S Kilcommins, E McClean, M McDonagh, S Mullally & D Whelan *Extending the Scope of Employment Equality Legislation: Comparative Perspectives on the Prohibited Grounds of* Discrimination (2004) 86-91.

5 Seedorf & Sibanda "Separation of Powers" in *CLOSA* 12-22-12-30.

6 See an analysis of this aim in Chapter 3 part 3 5 2.

7 Albertyn calls for an activist sate, strong democratic institutions and civil society must all fulfil the aspirations of addressing economic inequality in C Albertyn "(In)equality and the South African Constitution" (2019) 10 *Dev South Afr* 1 1.

8 Chapter 1 part 1 5.

9 D Brand "The 'Politics of Need Interpretation' and the Adjudication of Socio-Economic Rights Claims in South Africa" in A van der Walt (ed) *Theories of Social and Economic Justice* (2004) 17 24.

10 C Albertyn "Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion Towards Systemic Justice" (2018) 34 *SAJHR* 441 454.

11 For a critique of court induced transformation, see S Sibanda "When Do You Call Time on a Compromise? South Africa's Discourse on Transformation and the Future of Transformative Constitutionalism" (2020) 24 *Law Democr Dev* 384-412.

12 J Dugard "Judging the Judges: Towards an Appropriate Role for the Judiciary in South Africa's Transformation" (2007) 20 *Leiden J Int Law* 965-981; J Dugard "Testing the Transformative Premise of the South African Constitutional Court: A Comparison of High Courts, Supreme Court of Appeal and Constitutional Court Socio-Economic Rights Decisions, 1994–2015" (2016) 20 *Int J Hum Rights* 1132-1160.

for not sufficiently interrogating the underlying structures that generate instances of discrimination.[13] Flowing from these criticisms, transformative constitutional scholars have argued that separation of powers concerns, as ordinarily understood in other liberal democratic societies, should not be overstated in relation to the judicial role in effecting some transformative change.[14] The following sections consider what insights a transformative conception of law could pose for the separation of powers doctrine.

5 2 1 Towards a transformative substantive equality separation of powers doctrine

The Constitution commits all branches of government to address the heritage of ongoing oppressive systems, structures, practices, or circumstances to achieve equality.[15] However, courts can still resurrect a confined and static understanding of the separation of powers and avoid its constitutionally crafted role to interpret and enforce the constitutional guarantee of non-discrimination. This resurrection is a quelling possibility when the judiciary endorses the liberal understanding of a false dichotomy between law and politics, thereby legitimating the entrenched *status quo* of poverty and the power structures that drive it.[16] Klare notes on the separation of powers doctrine in South Africa that:

> "We should not be satisfied with a free-floating discourse of separation of powers based on vintage conceptions of checks-and-balances, institutional competence, and simplistic binaries. Separation-of-powers analysis must be understood as a democracy-seeking project - a process of working out and instantiating in a context-specific manner the innovative and transformative vision of democracy embodied in the South African Constitution."[17]

Klare argues for a democracy-enhancing approach to the separation of powers doctrine where there is a rich engagement with fundamental rights and guarantees between the different branches of government. A separation of powers doctrine that emphasises the democratic ideal of a rough social, economic, and political equality shows affinity with a "distinctively South African model"[18] of separation of powers. A "distinctively South

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13 C Albertyn "Substantive Equality and Transformation in South Africa" (2007) 23 *SAJHR* 253 255.

14 K Klare "Self-Realisation, Human Rights, and Separation of Powers: Democracy Seeking Approach" (2015) 3 *Stell LR* 445 456.

15 See s 8(1) of the Constitution that states that the "rights in the Bill of Rights binds the legislature, the executive, the judiciary and all organs of state." "Achievement of equality" is one of the founding values of the Constitution, s 1(a). See Cameron J's observation for crafting an extensive remedy to rectify systemic blockages of land claims that would amount to a "colossal crisis" in *Mwelase v Director-General for the Department of Rural Development and Land Reform* 2019 6 SA 597 (CC) para 46.

16 K Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146 156-166.

17 Klare (2015) *Stell LR* 446. Footnotes from original text omitted.

18 The quoted phrase emanates from the case of *South African Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 (CC) para 24.

African model" seeks to prevent the condensation of power in one branch to halt the abuse of power and, in particular, to prevent violations of human rights.[19]

The democratic values of a responsive, open and accountable government, inform the fluidity of the boundaries of the doctrine where the different branches of government should hold each other accountable for transformative substantive equality obligations.[20] These values are encapsulated in the concept of checks and balances, and the assertion that there is a relationship of "independence and interdependence" between the different branches of government to effect transformative change.[21] These democratic values and constitutional principles have given rise to a general academic endorsement of a "constitutional dialogue" between the different branches of government.[22] Such a dialogue ensures that all laws and exercises of public power remain in line with the constitutional commitment of "achieving equality".

A constitutional dialogue in the context of structural poverty and inequality poses a dilemma for courts, requiring them to perform two seemingly opposite tasks. First, courts must respect the domains and powers of the coordinate branches of government and second ensure that these branches undertake their activities in accordance with the Constitution.[23] The Constitutional Court is aware of this dilemma by affirming that "undue judicial adventurism can be as damaging as excessive judicial timidity… Both extremes need to be avoided."[24] This suggests that the Court would shy away from either extreme, being either judicial overreach or deference. In coming to terms with these extremes, Brand argues that separation of powers concerns should rather be constantly contested and not overstated.[25] Botha also argues that the value of the doctrine lies in its fluidity of the boundaries.[26]

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19 Seedorf & Sibanda "Separation of Powers" in *CLOSA* 12-1.

20 S 1(d) of the Constitution.

21 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC) para 112.

22 For a recent explication of a constitutional dialogue for challenging poverty, see N Bohler-Muller, G Pienaar, YD Davids & SL Gordon "Realising Socio-Economic Rights: A Reconceptualised Constitutional Dialogue" in C Soudien, V Reddy & I Woolard (eds) *The State of the Nation: Poverty & Inequality: Diagnosis, Prognosis and Responses* (2019) 111-136.

23 12-56.

24 *Prince v President of the Law Society of the Cape of Good Hope* 2002 3 BCLR 231 (CC) paras 155-156; *Mwelase v Director-General for the Department of Rural Development and Land Reform* 2019 6 SA 597 (CC) paras 53-56.

25 D Brand "Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa" (2011) 22 *Stell LR* 614-638.

26 H Botha "Democracy and Rights: Constitutional Interpretation in a Postrealist World" (2000) *THRHR* 561-581.

A transformative constitutional dialogue, where the constitutional obligation of achieving equality is foregrounded, will in fact allow or validate government to make the necessary policy choices to remedy the many harms attached to poverty discrimination. Thus, a transformative constitutional dialogue would aim not to stifle the transformative aims of the Constitution.[27] Furthermore, judicial scrutiny that is rooted in transformative constitutional commitments does not violate the separation of powers but rather enhances a system of checks and balances where the democratic ideals of a rough equality of political voice, material resources and social standing can be furthered. The next section examines how a dialogic conception of the separation of powers could be applied in poverty discrimination cases.

5 2 2 A transformative constitutional dialogue in discrimination law

Fredman states that it is the political disadvantage of marginalised groups that justifies the justiciability and enforcement of discrimination protections.[28] A court's refusal to interrogate the unfairness of a discrimination claim will therefore be blind to the poor's political disadvantage concerning the political capacity they have to influence decisions that affect them. This could undercut the importance of the transformative representation of anti-discrimination measures in a highly unequal society.[29]

In the discrimination law context, Sachs J stresses the functionality of the separation of powers doctrine by stating:

> "[The separation of powers doctrine] reduces the danger of over-intrusive judicial interventions in matters of broad social policy, while emphasising the Court's *special responsibility for protecting fundamental rights in an affirmative manner*. It also diminishes the possibility of the Court being inundated by unmeritorious claims, and best enables the Court to focus on its special vocation, to use the techniques for which it has a *special aptitude*, and to defend the interests for which it has a particular responsibility. Finally, it places the Court's jurisprudence in the context of evolving human rights concepts throughout the world, and of our country's own special history."[30]

This excerpt indicates that courts can expound on the intersecting disadvantageous conditions attached to poverty within a framework of transformative substantive equality. However, it is inconceivable that courts would be able to, for example, effect an immediate large-scale change to discriminatory relations of production and

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[27] See the critical perspectives of T Roux "The Constitutional Court's 2018 Term: Lawfare or Window on the Struggle for Democratic Social Transformation?" (2018) 10 *Const Court Rev* 1-42.

[28] S Fredman "Providing Equality: Substantive Equality and the Positive Duty to Provide" (2005) 21 *SAJHR* 163 169-170.

[29] Chapter 2 part 2 3.

[30] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para (CC) para 123. Emphasis added.

(re)distribution. The precise measures needed to give effect to fundamental rights are subject to political will and the concomitant ability to implement effective judicial remedies. It does not however restrict a court's "special vocation" to advance the interests of impoverished people that are overlooked or silenced in other political arenas.

In *Mahlangu v Minister of Labour* ("*Mahlangu*") Mhlantla J, in her concurring minority judgment, highlighted the inability of domestic workers to claim their fundamental rights through the ordinary legislative process.[31] She states:

> "The impact of this judgment must go beyond a symbolic victory for domestic workers, and should also, practically speaking, cement their rights and place in our society. *Domestic workers have for many years reported being unable to vindicate rights through legislative protection; this may, to an extent, be attributed to traditional attitudes towards domestic workers.*"[32]

This excerpt highlights the various systemic prejudices and attitudes towards impoverished people that warrants poverty as a ground of unfair discrimination to be justiciable. However, the limits of the law and litigation are also showcased here. The inclusion of domestic workers as employees within COIDA would not remedy and redress the stereotypes, prejudices and material deprivation established by a history of servantship and oppression. As Singlee has specified, the *Mahlangu* judgment is a small victory for domestic workers, "but more needs to be done."[33]

In *Social Justice Coalition v Minister of Police* ("*SJC*") the Court has found a good balance between "judicial adventurism" and "timidity"[34] to illustrate and negotiate the many tensions of a transformative substantive equality constitutional dialogue.[35] The respondents averred that the doctrine necessitates that the Court should not commit to judicial overreach, except in circumstances where the intrusion is "unavoidable and constitutionally permissible".[36] The respondents argued for a bounded conception of the separation of powers doctrine with presumed pre-eminent terrains where they argued that:

> "It is the constitutionally ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues and to be sensitive in general to the interests of legitimately pursued by administrative bodies and the practical and financial constraints under which they operate."

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31 2021 2 SA 54 (CC).
32 Para 191. Emphasis added.
33 S Singlee "ConCourt's Mahlangu Judgment is a Victory for Domestic Workers — But More Needs to Be Done" (24-11-2020) *Daily Maverick* <https://www.dailymaverick.co.za/article/2020-11-24-concourts-mahlangu-judgment-is-a-victory-for-domestic-workers-but-more-needs-to-be-done/> (accessed 24-11-2020).
34 *Prince v President of the Law Society of the Cape of Good Hope* 2002 3 BCLR 231 (CC) paras 155-156.
35 2019 4 SA 82 (WCC).
36 Para 83.

However, the Court endorsed a more dialogic and transformative conception of the separation of powers, while being respectful of the coordinate branches of government. The Court held that the precedent to guard against judicial overreach by deferring to the appropriate branch of government with the necessary expertise, is a healthy democratic warning. Nevertheless, the Court stated that:

> "It remains the duty of the Court, however, to protect the [c]onstitutional rights and declare unlawful any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly, imposes burdens, obligations or disadvantages on or withholds benefits, opportunities or advantages from any person on [impoverished black people]."[37]

Thus, in principle, separation of powers concerns should not be relied on too readily to dismiss claims of poverty discrimination. Moreover, within a distinctly South African separation of powers model, the doctrine has fluid boundaries, especially as courts have a critical institutional part to play in redressing structural poverty and inequality. A transformative conception of the separation of powers should also not detract from the democratic functions of the coordinate branches of government and the role of social mobilisation and advocacy,[38] just as it should not be used to disregard the rights of impoverished people. Interrelated to the legitimacy concern is the competency concerns that will now be examined.

5 3 Institutional competence

The following section elaborates on the competency advantages courts will have and issues they will encounter in cases of poverty discrimination. Thereafter, it considers what mechanisms courts could utilise to overcome the competency challenges in relation to reviewing whether socio-economic policy considerations unfairly discriminate against impoverished people.

Closely related to the separation of powers concerns and the imposition of the positive duties that would flow from remedying poverty discrimination,[39] are the institutional competence problem of courts. Cases concerning poverty are normally said to have a redistribution dimension that is a matter of social welfare policy and centred on the

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[37] *SJC* para 84.

[38] For an exposition of the role of civil organisations, see M Heywood "South Africa's Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Rights to Health" (2008) 1 *J Hum Rights Pract* 14-36; for an exposition of social movements that utilises rights to mobilise for change, see J Dugard, T Madlingozi & K Tissington "Rights Compromised or Rights Savvy? The Use of Rights-Based Strategies to Advance Socio-Economic Struggles by Abahlali baseMjondolo, the South African Shack-Dwellers' Movement" in H Alviar García, K Klare & LA Williams (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2015) 23-41.

[39] Chapter 3 part 3 5.

economic structure.[40] Courts are said to be ill-suited to question economic policy as they lack the expertise.[41] This is closely connected to the courts' own role conception and legitimacy issue as courts typically seek to maintain a relationship of institutional comity and respect for the more democratically accountable branches of government.[42] Another competency concern is that adjudication can have unanticipated consequences where resources may be tilted in favour of the interests of the litigants before the court, thereby minimising other people's needs and rights who are not represented in the litigation.[43] This concern is succinctly put by Fuller's account of "polycentric issues" where polycentricity connotes that a socio-economic problem such as poverty implicates many distributive centres.[44]

Although courts have many disadvantages in questioning, reviewing, or setting economic policy choices aside, they also have advantages.[45] Pieterse argues that competency constraints should not too readily diminish the courts' abilities to review polycentric issues. The judicial review thereof does not mean that a court is taking over the democratic functions of the coordinate branches of government, but rather that it is actively engaging the question of whether the impugned discriminatory measure or inaction is permissible.[46] Therefore, in relation to the dichotomy between judicial overreach and deference, or activism and restraint, a transformative substantive equality South African separation of powers doctrine will not postulate "either/or counter poles" in polycentric policy issues.[47]

Courts are well-suited to craft remedies that can vindicate rights for individuals and groups.[48] Courts are also able to offer an expeditious remedy[49] when, for example, a discriminatory measure against impoverished communities is severe and urgent and not adequately responded to by the coordinate branches of government. However, even such urgent measures will be subject to the institutional comity the coordinate branches of government show to the judicial role. Courts are also experts of interpretation and can lend a helpful hand in reviewing the discriminatory laws and policies against the

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40 S Fredman "Redistribution and Recognition: Reconciling Inequalities" (2007) 23 *SAJHR* 214 214.
41 Fredman (2007) *SAJHR* 214.
42 *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 61; *Black Sash Trust v Minister of Social Development* 2017 5 BCLR 543 (CC) para 10.
43 *Soobramoney v Minister of Health, Kwa-Zulu Natal* 1998 1 SA 765 (CC) para 28.
44 L Fuller "The Forms and Limits of Adjudication" (1978) 92 *Harv LR* 353 394.
45 M Pieterse "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" (2004) 20 *SAJHR* 383 392-396.
46 In *International Trade Administration Commission v SCAW South Africa* 2012 4 SA 618 (CC) para 95.
47 Pieterse (2004) *SAJHR* 395.
48 S Fredman *Human Rights Transformed* (2009) 313-314. See part 5 4 3 below.
49 Pieterse (2004) *SAJHR* 395.

transformative aims of the Constitution. The court therefore becomes a deliberative forum that is aimed at enhancing informed contestation, nurturing a culture of justification,[50] and considering different interests to further transformative constitutional goals.[51]

Courts' institutional competence problem should not be overstated in an unfair discrimination claim based on poverty. Many of the successful challenges of groups relying on the grounds of unfair discrimination concerned policy or legislative measures that had redistributive consequences. For one example, unfair "marital status" discrimination jurisprudence has seen the activation of a multiplicity of legislative and policy redistributive measures and reforms.[52] The exclusions mostly turned on the consideration that certain groups could not materially benefit from the institution of marriage. This illustrates that courts are competent to consider whether a law or policy measure has discriminatory consequences for a marginalised group, but the court will often defer back to the coordinate branches of government to craft democratically sound solutions. Courts are indeed not experts in determining exactly how government or private parties should manage their resources, but this does not detract from their constitutionally mandated role to hold that unfair discrimination is impermissible.

South African courts have resorted to a wide range of mechanisms to overcome the constraints they face in reviewing polycentric socio-economic policies. These mechanisms include *amicus curiae* briefs that have offered novel insights that assist the court in various stages of a discrimination claim.[53] Or, as is indicated below, various mechanisms such as joinder of parties and the recruitment of experts during the remedial stage of litigation.[54]

In the *SJC* case, the Court relied on submissions and a report from experts to consider whether the province's formula for allocating human resources to the police unfairly

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50 For an exposition of the need to move from a "culture of authority" of the apartheid era to a "culture of justification", see the seminal article of E Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31 31 and 32.

51 Pieterse (2004) *SAJHR* 395.

52 See for example the founding in *Satchwell v President of Republic of South Africa* 2002 6 SA 1 (CC) where the Judges' Remuneration and Conditions of Employment Act 88 of 1989 was constitutionally invalid as it did not provide financial benefits to a same-sex partner; see also *Minister of Home Affairs v Fourie* 2006 910 SA 524 (CC*)* that found parts of the Marriage Act 25 of 1961 unconstitutional. Subsequently, parliament adopted the Civil Union Act 17 of 2006; see also the ground-breaking case of *Hassam v Jacobs* 2009 (5) SA 572 (CC) where the Court found parts of the Intestate Succession Act 81 of 1987 and the Maintenance Act 23 of 1963 constitutionally invalid as it discriminated against the applicant from inheriting on the grounds of religion, marital status, and gender.

53 *Hoffmann v South African Airways* 2001 1 SA 1 (CC); *SJC* and *Mahlangu*.

54 Part 5 4 3 3.

discriminated against poor black people.[55] In the *Mahlangu* judgment, the Court also scrutinised the actuarial report tabled by the respondents to find that there is no indication that a retrospective order to include domestic workers within the legislative scheme of COIDA would have dire consequences for the fund.[56] These two cases suggest that courts will rely on external expertise where they lack competence when poverty as a ground of unfair discrimination is alleged. In both cases the Court highlighted the impact the unfair discrimination would have as a justification for reviewing respectively the policy formula[57] and the legislative omission in COIDA.[58]

Thus, judges' allegiance to transformative constitutional commitments, in principle, should secure them as a trustworthy forum for impoverished people to make their justice claims that were overlooked in the formal political arena. Moreover, in discharging its constitutionally crafted role the court could mediate the dichotomy between judicial overreach and unbridled deference through the remedial exercise it embarks on, without halting the realisation of the equality and non-discrimination right.[59]

5 4 Transformative remedies

The remedial stage of litigation poses significant possibilities for courts not only to navigate legitimacy and competency issues but also to institute "nonreformist reform" remedies for unfair discrimination based on poverty. The function of the following section is not to produce specific worked out remedies, but rather to indicate that competency and legitimacy issues arising out of adjudicating poverty as a ground of unfair discrimination do not absolve courts from interrogating and enforcing claims based on poverty discrimination. The function of this section is to indicate that the remedial power of courts could help alleviate competency and legitimacy issues and that, at the same time, there are limits to the capacity of judicial remedies to address structural issues immediately.

Moreover, as poverty is entrenched, judicial remedies could at first be a mere affirmative remedial strategy for impoverished people to seek relief.[60] However, as Gloppen has indicated, within a transformative constitutional dialogue, judicial

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55 *SJC* para 41.
56 *Mahlangu* paras 127-129.
57 *SJC* Para 71.
58 *Mahlangu* para 127.
59 H Taylor "Forcing the Court's Remedial Hand: Non-Compliance as a Catalyst for Remedial Innovation" (2019) 9 *Const Court Rev* 247 250.
60 Chapter 2 part 2 2 2.

pronouncements and remedies are often a start of transformative change and not the end.[61] Thus, courts will sometimes have to find innovative means to realise the right of non-discrimination for impoverished people.[62] Albertyn has argued that destabilising the entrenched conditions of inequality, will require remedial strategies that are alternative, tentative or "even experimental" to facilitate transformative substantive equality.[63]

5 4 1 Parity of participation and remedial powers

Fraser's normative core of justice as parity of participation enters the terrain of how remedial measures should be designed to give effect to the procedural and substantive parts of transformative substantive equality.[64] To recapitulate, she argues that the normative core's substantive and procedural features cannot be divorced from each other.[65] This means that to realise the ideal of securing economic, social, and political conditions of participating on an equal footing with others, that ideal also ensues through participatory means. In this sense, judicial review remains a critical source for marginalised and vulnerable groups to vindicate their rights that are overlooked or disregarded in other democratic branches. This is so as it places courts in a position, at the very least, to assist in overcoming the procedural obstacles and political marginalisation impoverished people face in voicing their concerns within ordinary democratic avenues. This role of courts has been stressed by Sachs J where he held in *Port Elizabeth Municipality v Various Occupiers* ("*PE Municipality*") that "the procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways."[66]

In terms of discrimination law, the Constitution and PEPUDA empower courts to effectively vindicate impoverished people's right to non-discrimination in the following provisions. With direct application of poverty discrimination, section 38 read with section 172(1)(b), demands that a court may grant "appropriate relief" that is "just and equitable". In terms of PEPUDA section 2(f) read with section 21 requires a court to provide for "effective" remedies. South African courts generally follow a flexible remedial approach

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61 S Gloppen "Courts and Social Transformation: An Analytical Framework" in B Gargarella & T Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (2005) 35-59.
62 Klare (2015) *Stell LR* 451.
63 Albertyn (2018) *SAJHR* 462.
64 Chapter 2 part 2 3 1.
65 N Fraser "Identity, Exclusion, and Critique: A Response to Four Critics" (2007) 6 *Eur J Political Theory* 305 331.
66 2005 1 SA 217 (CC) para 39.

where the overarching principle is to "forge" remedies that will effectively vindicate the rights.[67] In determining appropriate and effective relief in discrimination cases, the Court has stated in *Hoffmann v South African Airways* ("*Hoffman*") that, "we must carefully analyse the nature of [the] constitutional infringement and strike effectively at its source."[68]

The remedial powers of courts are flexible to the extent that orders are contextually evaluated to ensure that there is not an over-intrusion by prescribing to the coordinate branches of government what policy measures or legislative interventions should be adopted to curb or eliminate the rights violation.[69] However, this should be distinguished from the interrogation of the disproportionate impact the discriminatory provision may have on impoverished people.[70] To date courts have shown sensitivity to the political climate in which their remedies are issued and they measure their remedial responses by a range of factors to ensure effective remedies.[71] In this respect, there is a wide range of options or a combination of options available to courts to respond to different forms of poverty discrimination.

5 4 2 Affirmative "via media" remedies

Affirmative remedies do not fundamentally address the deep-seated patterns of poverty but will nevertheless seek to address the unjust outcomes.[72] However, these remedies may serve as transformative "via medias" that could alter the generator of poverty discrimination. For example, in some instances, the "reading in" remedy would insert "poverty" within a statute to remedy the political exclusion that arises out of a legislative omission.[73] At first, such a remedy would only address the outcome of poverty

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67 The oft-quoted principle was first stipulated in *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 69.

68 2001 1 SA 1 (CC) para 45.

69 *Black Sash Trust v Minister of Social Development* 2017 5 BCLR 543 (CC) paras 14-15.

70 Chapter 4 part 4 3 2. However, see below at part 5 4 3 3, that transformative participatory remedial orders could helpfully blur the distinction between right and remedy where various stakeholders could through contestation and friction give meaning to the infringed right whilst tabling what will effectively vindicate it.

71 For example, the specific remedy should be able to vindicate the right for similarly situated people as the Court held in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) at para 82 that fundamental rights violations have a wider public dimension. Or, where it is a violation of a systemic nature it will call for a structural type of interdict as opposed to a more individually effective remedy. The type of remedial response will also be informed whether it will effectively vindicate the right and have a deterrent impact on future violations as per *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) paras 97-98.

72 Chapter 2 part 2 2 2.

73 For the seminal cases of the "reading in" remedy in discrimination cases, see *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) where the Court noted that even in

discrimination, but if for example, "poverty" is inserted in the National Credit Act 34 of 2005 as a prohibited ground, it will in some instances release impoverished people from disproportionate interests debts that will in the long term enable upward economic mobility.[74] In other instances, a court could sever provisions in by-laws that criminalise impoverished people by virtue of their homelessness.[75]

In terms of section 21(2)(f) of PEPUDA, a court can make an order that restrains the unfair discrimination or direct specific steps that will halt the discrimination. For example, a court can direct the SAPS to interrogate their class biases (or "povertyisms")[76] in their approach to policing and order that their policing agenda should be aimed at the safety and well-being of impoverished communities.[77] However, sometimes even affirmative remedies will be stifled by a conservative legal culture where an affirmative remedy could be seen to have an eventual "unsupportable budgetary intrusion",[78] thereby automatically foreclosing the court from ordering an effective remedy. This is visible in current discrimination cases where the "reading in" of excluded groups in legislative provisions that result in some form of monetary distribution is approved as it will have only marginal budgetary implications.[79] However, it is not clear whether courts will order remedies that will have bigger redistributive consequences.

When discrimination is found to be unfair, a court is entrusted with the remedial powers to order an effective and appropriate remedy to strike at the source of the discrimination. This will require some form of transformative remedy that must address the root cause of the deprivation in the long run. Furthermore, a combination of affirmative and transformative remedies would possibly enable effective remedies. For example, an affirmative remedy might address the urgent need of the impoverished claimant, but a more transformative remedy would be necessary to address the structural problem. The applicants in the *SJC* case explain this combination aptly. They sought differing forms of relief to first address the urgent and immediate discriminatory allocation of police

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cases of "reading in" the Court order is not final, and the other branches of government can still "fine-tune" them as they have the exercise over its control and benefits (paras 74-76).

74 B Dubbeld & F Pinto de Almieda "Government by Grants: The Post-Pandemic Politics of Welfare" (2021) 104 *Transformation* 55-66.

75 For the seminal case of severing the "the bad from the good", see *Ferreira v Levin and Vryenhoek v Powell* 1996 1 SA 984 (CC). For an indication of discriminatory by-laws, see Chapter 2 part 2 2 1 at footnote 47.

76 Chapter 2 part 2 5 1.

77 The possibilities for a more appropriate approach to policing functions in an unequal South Africa is well illustrated in chapters 2 and 3 in the recent book of Z Stuurman *Can We Be Safe? The Future of Policing in South Africa* (2021) 40-87.

78 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 75.

79 *Khosa v Minister of Defence* 2020 3 SA 190 (GP) paras 88-89*; Mahlangu* paras 126-128.

resources in terms of a declaratory order. Second, they also sought a supervisory structural order that would cure the "'built in bias' against poor, Black areas" that is a countrywide systemic problem with how resources are allocated.[80] It is unfortunate that the Court in *SJC* decided to postpone the hearing on the remedy, despite the applicants seeking declaratory and supervisory relief.[81] How a transformative participatory remedy could be applied in a case of poverty discrimination warrants further investigation.

5 4 3 Transformative participatory remedies

When poverty discrimination relates to deep-seated systemic issues that will require the coordinate branches of government to reconsider policy measures, or even require some destabilisation of the engrained relations of production and (re)distribution, courts have a wide range of participatory remedies at their disposal that could address structural issues through democratic means. The following section evaluates the specific possibilities in the application of section 9(3) of the Constitution and in terms of PEPUDA. Thereafter, the section makes recommendations to address some of the challenges that arise with participatory remedies aimed at transformative structural changes.

5 4 3 1 Constitutional remedies for poverty-based discrimination

In cases of direct reliance on section 9(3) of the Constitution, courts can order far-reaching participatory remedies that will confront systemic inequalities. These orders relate to the possibility of structural interdicts or meaningful engagement orders or a combination of both.[82]

A structural interdict refers to a remedial order wherein a court can direct the duty bearer of the right of non-discrimination to address the breach of the right under court supervision.[83] In the context of a non-discrimination claim, a court will make a declaration of invalidity of the impugned discrimination to the extent that it is inconsistent with the equality and non-discrimination right.[84] Thereafter, a court will direct the relevant duty bearer to comply with the negative and/or positive obligations attached to the right to

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80 *SJC Applicants' Heads of Argument* in *Social Justice Coalition v Minister of Police* 2019 4 SA 82 (WCC) <*https://sjc.org.za/wp-content/uploads/2018/11/SJC_Heads.pdf*> (accessed 10-09-2020) ("*SJC Applicants' Heads of Argument*") para 314.

81 *SJC* para 93.4. As it stands, it is unclear whether the parties have decided on a remedy. S Mzakwe "Equitable Allocation of Police Human Resources: Social Justice Coalition and Others v Minister of Police and Others" (2020) 69 *SACQ* 1 7-8.

82 I Currie & J De Waal *The Bill of Rights Handbook* 6 ed (2016) 199.

83 199.

84 199.

equality and non-discrimination.[85] In turn, a court will show respect to the institutional advantages of the coordinate branches of government to choose amongst a variety of policy options and measures. A court will then prescribe certain time frames where the duty bearer must file relevant reports in which it sets out the steps it has taken to fulfil the obligations attached to the right and what steps it will continue to take to realise the right.[86] Thereafter, the rights bearers are afforded an opportunity to respond to the plan and steps postulated by the duty bearers and upon hearing, if a court is satisfied the report is made an order of court.[87] The court can also appoint an appropriate body or person to oversee the implementation of the order between the prescribed reporting time frames.[88] Structural interdicts are utilised for different reasons but will be informed by the nature of the right that is infringed, the nature of the impact of the rights' infringement, and the extent to which a court believes the duty bearer will effectively implement the obligations attached to the right.[89]

An advantage of a structural interdict when a claim of poverty discrimination is implemented is that a court could remain the watchdog that will secure the enforcement of the right that also guards against political backlash towards impoverished people. In South African jurisprudence, structural interdicts have expressly been extended to instances of fundamental rights claims that impact vulnerable and marginalised groups.[90] However, it has not been utilised to address the systemic and structural blockages that underlie a finding of discrimination.

The meaningful engagement orders that often appear in education[91] and housing[92] rights disputes are promising in their potential to broaden the scope of structural interdicts

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85 Currie & De Waal *Bill of Rights Handbook* 199. Chapter 3 part 3 5.

86 199.

87 199-200.

88 See the cases of *Black Sash Trust v Minister of Social Development* 2017 5 BCLR 543 (CC) and *Mwelase v Director-General for the Department of Rural Development and Land Reform* 2019 6 SA 597 (CC).

89 SM Viljoen & SP Makama "Structural Relief – A Context-Sensitive Approach" (2018) 34 *SAJHR* 209 212 -213.

90 For the case of prisoners, see *EN v Government of RSA* 2006 6 SA 534 (D); for the case of refugees, see *Kiliko v Minister of Home Affairs* 2008 124 (WCHC); for the case of children, see *Director of Public Prosecutions v Minister of Justice* 2009 4 SA 222 (CC) and *Equal Education v Minister of Basic Educatio*n 2021 1 SA 198 (GP); for the case of homeless people, see *Pheko v Ekurhuleni Metropolitan Municipality* 2012 2 SA 598 (CC); for the case of grant recipients, see *Black Sash Trust v Minister of Social Development* 2017 5 BCLR 543 (CC).

91 *Governing Body of the Juma Musjid Primary School v Essay NO* 2011 8 BCLR 761 (CC); *Hoërskool Ermelo v Head of Department of Education: Mpumalanga* 2009 3 SA 422 (SCA); *Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School* 2014 2 SA 228 (CC).

92 *PE Municipality*; *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC); *Schubart Park Residents Association v City of Tshwane*

whereby the systemic inequalities that underlie poverty discrimination could be addressed.[93] The Constitutional Court has broadened its initial approach to structural interdicts by resorting to "supervision *and* engagement" orders in evictions of impoverished people.[94] Meaningful engagement is a participatory remedial order where litigants are encouraged to "engage with each other in a proactive and honest endeavour to find mutually acceptable solutions."[95] The principles of meaningful engagement include "equality of voice", a "structured, consistent and careful engagement",[96] a context-driven and "two-way process" where the parties "talk to each other meaningfully to achieve certain objectives."[97] The engagement process must also not be constrained by "secrecy", where the constitutional value of openness[98] prescribes a complete and accurate account of the engagement.[99] There is also a preference for careful and sensitive facilitators to safeguard poor, vulnerable and illiterate parties.[100]

However, the meaningful engagement orders have been extensively criticised by transformative constitutional scholars. First, courts are criticised for abdicating their supervisory role in counteracting the power asymmetries in the deliberation as these matters usually include powerful elites or rich property owners deliberating with impoverished people.[101] The second danger is that courts often shy away from their interpretative mandate to give some judicial content on the substantive right at play before instituting the engagement order.[102] This poses a danger that the purposes and

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Metropolitan Municipality 2013 1 SA 323 (CC) and *Pheko v Ekurhuleni Metropolitan Municipality* 2012 2 SA 598 (CC); *Melani v City of Johannesburg* 2016 5 SA 67 (GJ).

93 See the recent legal proceedings of *Section 27* that are seeking to keep the government accountable through the structural order that the Court granted in 2018 whereby various departmental stakeholders of education were tasked to set out a plan to install toilets in place of the pit latrines in the rural schools in Limpopo. *Komape v Minister of Basic Education* 2018 JDR 0625 (LP). However, Section 27 has instituted proceedings where they argue that the plan and its implementation set out falls short of the terms of the structural order. See Anonymous "Media Advisory: Limpopo School Pit Toilet Case to be Heard Tomorrow" (05-08-2021) *Section 27* <https://section27.org.za/wp-content/uploads/2020/10/Heads-of-Argument-Komape-Structural-Interdict-12-10-2020.pdf> (accessed 05-08-2021).

94 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) para 14. Emphasis added.

95 *PE Municipality* para 39.

96 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) para 19.

97 Para 14.

98 Para 20.

99 Para 21.

100 Para 15.

101 L Chenwi "Democratizing the Socio-Economic Rights-Enforcement Process" in H Alviar García, K Klare & LA Williams (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2015) 178 193.

102 C Rodríguez-Garavito "Empowered Participatory Jurisprudence: Experimentation, Deliberation and Norms in Socioeconomic Rights Adjudication" in K Young (ed) *The Future of Economic and Social Rights* (2019) 233-257.

values that underpin fundamental rights for impoverished people can be "negotiate[d] away."[103] The consequence is that meaningful engagement becomes a tool for judges to use to promote settlement of disputes between the litigants rather than a tool for advancing structural reforms necessary to realise fundamental rights.[104] Related to this dispute-settlement paradigm problem, is that the engagement focuses on isolated individual claimants at the expense of engaging a broader stratified group of impoverished people.[105] The meaningful engagement orders often tokenise impoverished people and do not open space to acknowledge radical differences[106] and various situated voices to enter the engagement proceedings.[107] Lastly, the engagement jurisprudence has not been adequately developed by courts to invite various parties that have a material responsibility to redress the rights violation.[108] These concerns are being addressed in the sections to follow after the remedial functions of the court in terms of PEPUDA are discussed.

5 4 3 2 PEPUDA remedies for poverty-based discrimination

The systemic nature of poverty discrimination would not be solved by individual or "once-and-for-all" remedies.[109] The legislature introduced novel remedies that will enable courts to remedy systemic rights violations. A competent court[110] can order the implementation of "special measures"[111] or order a respondent to undergo "an audit of specific policies or practices."[112] In terms of section 21(2)(m) of PEPUDA, a court can issue a directive or order the respondent to make regular progress submissions on the measures taken to eliminate the discrimination, either to the court itself or an appropriate institution such as

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[103] Liebenberg *Socio-Economic Rights* 314.

[104] S Liebenberg "Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons From South African Evictions Law" (2014) 32 *Nord J Hum Rights* 312 328. For such an example, see *Mamba v Minister of Social Development* 2008 255 (GPHC) at para 2.

[105] R Gargarella "Why do We Care About Dialogue?" in K Young (ed) *Future of Economic and Social Rights* (2019) 212 213.

[106] Chapter 2 part 2 5 3 2.

[107] See the recent recommendations in relation to the quality of engagement that has a material bearing on the realisation of socio-economic rights in S Mahomedy "Extra-Judicial Engagement in Socio-Economic Rights Realisation: Lessons from #FeesMustFall" (2020) 26 *SAJHR* 49 59-72.

[108] For example, in the education rights jurisprudence the Court did not extend the engagement to, for example, NGOs operating in the schooling industry and neither to the broader parent community. For a discussion, see S Liebenberg "The Participatory Democratic Turn in South Africa's Social Rights Jurisprudence" in KG Young (ed) *The Future of Social Rights* (2019) 187 206.

[109] C Albertyn, B Goldblatt & C Roederer (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 28.

[110] PEPUDA provides a positive development in terms of jurisdiction where the complainants can institute claims in the Magistrate Court in terms of s 19(1)(e) of PEPUDA that exceeds the jurisdiction of the Magistrate's court in monetary terms. This development improves access to justice for the poor.

[111] S 21(2)(h) of PEPUDA.

[112] S 21(2)(k).

the Human Rights Commission. This suggests that the court can draw from expertise where they lack the competence to remedy an instance of unfair poverty discrimination. Significantly, in terms of PEPUDA, the adjudicator can also involve community participation in establishing an effective remedy.[113] This indicates that courts could utilise participation methods to better understand the lived realities of impoverished people and craft remedies that will be more responsive to their circumstances than imposing a top-down judicial remedy that could be less effective.[114]

Section 21(2)(g) of PEPUDA stipulates that a court can institute a remedy that will "make specific opportunities and privileges unfairly denied in the circumstances, *available* to the complainant in question."[115] Such a remedy could amount to an unwarranted intrusion on the functions of the coordinate branches of government if the court does not engage in a transformative substantive equality dialogue. Such an order should therefore be instituted in combination with other remedial sections where a court affords democratic institutions the latitude and space to provide solutions that will remedy the discrimination that the court can either approve or send back within certain intervals. Such a combination of remedial strategies is visible in section 21(4)(a). In this section, PEPUDA expressly indicates that a court could, before or after proceedings, refer the matter to the relevant constitutional institution, "particularly in the case of persistent contravention or failure to comply with a provision of this Act" "or" "in the case of systemic unfair discrimination".

As a guiding principle PEPUDA obliges adjudicators to use "corrective or restorative measures."[116] Albertyn et al argue that the Act seeks to balance remedying disadvantage and sending a strong signal of a deterrent nature to curb future similar rights violations.[117] Moreover, PEPUDA sends a strong message for rights protection through judicial means by indicating that a court has "all ancillary powers necessary" to achieve the objectives of the Act through "interlocutory orders" or "interdicts".[118] These remedies strongly resonate with other participatory interdicts developed in terms of direct constitutional remedies considered above. These transformative participatory remedial orders will be a necessary response to structural issues related to poverty discrimination. The following

[113] S 19 of PEPUDA.
[114] Albertyn et al *Introduction* 28.
[115] Emphasis added.
[116] S 4(1)(d) of PEPUDA.
[117] Albertyn et al *Introduction* 28.
[118] S 21(5) of PEPUDA.

section briefly introduces some strategies that could amount to effective participatory remedies.

5 4 3 3 Effective transformative participatory remedies

After the abovementioned critiques of the structural interdicts and the meaningful engagement jurisprudence when a court orders a structural engagement order to remedy a finding of poverty discrimination, the following recommendations are made.

First, courts should not abrogate their duty to interrogate the nature of the discrimination and the impact it has on impoverished people's ability to equally and fully enjoy all rights and freedoms.[119] Moreover, the court should specifically indicate the historical and current significance of systemic discrimination and be diagnostic in its orientation to identify the structural issues at play. In the context of socio-economic rights, Young argues that courts should not attach finality to the broad constitutional norms,[120] as rights implementation is most productive when there is contestation, disagreement and deliberation over their content and remedy.[121] Thus, the court should also indicate that impoverished people must continue to illustrate and indicate the nature of their exclusion and the purposes and interests the prohibition of discrimination seek to protect to ensure that effective solutions are crafted. This highlights the substantive and procedural parts of transformative substantive equality, where the excluded should also be the authors of the nature of their exclusion and the solutions posed to eliminate it.[122] In such remedial approaches to systemic rights violations the court's role is to stigmatise the *status quo* by their liability finding.[123] In the context of poverty discrimination, the court would publicly indicate that the *status quo* "is illegitimate and cannot continue."[124] In this respect, the court's liability finding secures a shift in power as the impoverished claimants receive an official legitimation of their equality and non-discrimination right and pressurises the respondents to account.[125]

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[119] S Wilson & J Dugard "Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights" (2011) 22 *Stell LR* 664-682.
[120] KG Young *Constituting Economic and Social Rights* (2012) 256.
[121] 59.
[122] Chapter 2 part 2 3 1.
[123] CF Sabel & WH Simon "Destabilization Rights: How Public Law Litigation Succeeds" (2004) 117 *Harv L Rev* 1015 1076.
[124] 1056.
[125] 1078.

Another important aspect of a transformative structural engagement order would be to extend the claimant group beyond the parties before the court.[126] This would aim to incorporate more voices that can assist the likelihood of the rights violations being captured more nuancedly and the proposed remedy to be more sensitive to the impoverished group's circumstances and be implemented effectively.[127]

The court can also extend the stakeholders beyond the parties before the court. The aim of extending the stakeholders is to shift the power balance between the parties to the litigation.[128] This is enabled by a "stakeholder effect" where more stakeholders are joined to the proceedings.[129] The first form of stakeholders that the court can join to the proceedings are stakeholders that can assist in the deliberation. In the context of eviction proceedings, Sachs J has indicated that a "top-down" engagement process will not result in meaningful engagement.[130] The court should, therefore, depending on the context, actively set out the parameters of a fair engagement process or make provision for trustworthy civil organisations or social movements that would be able to challenge the discursive power asymmetries.[131] In other instances, different stakeholders can bring specific expertise to the proceedings.[132]

Another group of stakeholders are those that share a material responsibility to redress rights violation. For example, in eviction cases relating to private property, courts ought to join the municipality to the proceedings as the positive constitutional duty to "fulfil" and "promote" the right rests on them.[133] Where it is established that private parties have a duty to curb or eliminate the instance of unfair discrimination, they should also join the proceedings.[134] One of the aims of inviting various stakeholders to the transformative structural interdict is to pool together information where polycentric concerns become an opportunity and aid for collaboration and innovation.[135]

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[126] S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013) 208-214.
[127] SP Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo L J* 1355 1402.
[128] Sabel & Simon (2004) *Harv L Rev* 1077-1079.
[129] 1079.
[130] See the concurring separate judgement in *Joe Slovo*, *Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) paras 378 and 384.
[131] R Gargarella "Deliberative Democracy, Dialogic Justice and the Promise of Social and Economic Rights" in H Alviar García, K Klare & LA Williams (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2015) 105 108.
[132] Taylor (2019) *Const Court Rev* 253-274.
[133] G Muller & S Liebenberg "Developing the Law of Joinder in the Context of Evictions of People From their Homes" (2013) 3 *SAJHR* 554-570.
[134] Chapter 3 part 3 5.
[135] Woolman *The Selfless Constitution* 199.

Thereafter, the judicial intervention materialises in a form of a "rolling-rule regime"[136] where the remedial deliberation is merely provisional and incorporates reassessment or "benchmarks"[137] with continued stakeholder participation. This results in the "publicity effect" where the vindication of impoverished people's right to non-discrimination will activate broader public concern to the systemic problems.[138] This cultivates a form of democratic accountability that will guard against the executive branches of government "ducking the issues" as they are pressed to account to the claimants and relevant stakeholders directly.[139]

Thus, transformative participatory remedial orders have significant potential to address numerous issues that underlie unfair discriminatory actions and inactions but are not without their pitfalls. It also remains unclear to what extent poor citizens will be willing to painstakingly engage with relevant stakeholders and government as South Africa remains deeply polarised with cross-cutting racial, socio-economic class and gender inequalities.[140] In this light, courts' remedial powers must be contextually evaluated to ensure the most optimising and effective realisation of impoverished people's right to equality and non-discrimination.

5 5 Conclusion

This chapter confronted two critical issues that loom large when poverty discrimination claims are instituted. The first challenge concerns the heightened fear that the judicial enforcement of poverty as a ground of prohibited discrimination would breach the demarcation of functions between the different branches of government. This chapter found that a transformative constitutional dialogue provides significant opportunities to contest structural poverty and inequality that arises in poverty discrimination cases. Courts have a "special vocation" to make pronouncements on the fundamental right to equality and non-discrimination as a "distinctively South African separation of powers doctrine" will seek to protect and advance the interests of impoverished people.[141]

The second issue the chapter interrogated is what challenges the institutional competency issue of courts pose to the effective justiciability of poverty discrimination.

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[136] Sabel & Simon (2004) *Harv L Rev* 1068.
[137] 1045.
[138] 1077.
[139] 1077. For the accountability function of judicial review, see *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 71.
[140] Liebenberg "The Participatory Democratic Turn" in *Future of Economic and Social Rights* 209.
[141] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1991 1 SA 6 (CC) para 123.

The chapter found that this issue should not be overstated as most, if not all, unfair discrimination cases thus far have had significant polycentric budgetary and legislative dimensions. It was argued that even though courts are not experts in balancing budgets, they have other institutional advantages such as the ability to interpret fundamental rights and provide a trustworthy institutional voice for impoverished people. The chapter observed that in poverty discrimination cases, where the policy measure was found to have a disproportionate impact on impoverished people, courts were willing to rely on the opinions of experts to consider the economic justifications posed by the respondents. It was illustrated that courts may be prepared to declare that budgetary allocations amount to unfair discrimination. Courts may also be prepared to make orders with indirect budgetary consequences in requiring programmes to include excluded groups. However, it is unclear to what extent the court will order public or private actors to expend significant resources to create new programmes to remedy the disadvantages of being poor.

The chapter also investigated the various affirmative and transformative remedies that are available under PEPUDA and the Constitution. The chapter indicated that remedies such as “reading in” or severing could be regarded as mere affirmative remedies but could offer a transformative “via media”. Furthermore, the chapter indicated that PEPUDA and the Constitution provide novel remedies that could redress the systemic disadvantages attached to a finding of unfair poverty discrimination. Specifically, the chapter illustrated that a combination of structural interdicts and meaningful engagement orders could not only circumvent institutional issues but also serve as innovative orders that have the potential to realise the right to equality and non-discrimination for impoverished people. The chapter found that these transformative participatory remedies are underexplored and have practical difficulties that could undermine their transformative potential. To this end, this chapter recommended that courts should demarcate the substantive and procedural parameters of the engagement and invite more stakeholders, while simultaneously retaining their watchdog role to protect and advance the interests of impoverished people.

CHAPTER 6: CONCLUSION

6 1 Introduction

Developing an appropriate interpretative theoretical framework for conceptualising poverty as a ground of unfair discrimination in post-apartheid South Africa lies at the heart of this study. This study specifically examined the implications of this appropriate framework for the litigation and adjudication of poverty discrimination under the Constitution and PEPUDA. This concluding chapter synthesises the main research findings, make recommendations, and indicate lines of future inquiry and research arising from the study.

6 2 Research findings and recommendations

Chapter 2 examined the substantive conception of equality that informs the right to equality and non-discrimination. It argued that the current jurisprudential conception of substantive equality does not provide an optimal theoretical framework for conceiving poverty as a prohibited ground of discrimination. This is mainly so as the current conception encompass a combination of a classic liberal and liberal-egalitarian approach that, at best, would yield inclusionary results for impoverished people. As a result, the interrelationship between structural poverty and inequality is insufficiently recognised. This leaves the structural drivers of poverty, and its discriminatory consequences across many sectors in society, unaddressed. To engage with the deeper structural dimensions of poverty-based discrimination under current capitalist conditions, the study drew from Nancy Fraser's critical social theory of justice.

It was shown that Fraser's specific conception of transformation is an appropriate diagnostic lens and remedial *praxis* to challenge the current liberal-egalitarian substantive equality approach. Her theory offers compelling insight for constitutional lawyers and adjudicators to realise the transformative potential of poverty discrimination claims, but at the same time provides workable tools for transforming discriminatory structural exclusions. Her remedial *praxis* proposes a combination of affirmative and transformative strategies that could have transformative effects when combined and persistently undertaken. Similarly, it insists on addressing the structural causes of poverty discrimination while at the same time addressing the immediate needs that stem from the discrimination. It was argued that poverty as a recognised ground of discrimination should not be co-opted into an affirmative approach that provides relief

from the worst impacts of poverty-related harms but fails to engage with the deeper transformative changes needed to prevent these harms from arising.

Drawing on Fraser's notion of justice as participatory parity it was argued that poverty discrimination manifests along three intersecting axes, namely misrepresentation, maldistribution, and misrecognition. These axes highlight the political marginalisation, material disadvantage and pervasive prejudices, violence and stigma that characterise the disadvantages of poverty.

In terms of the misrepresentation condition, it was indicated that impoverished people's democratic voice and participation is significantly impaired. This occurs not only through the silencing of and disregard for their voices, but as a result of their economic deprivation which erodes their ability to fully and equally participate within society. The research demonstrated that poverty as a recognised ground would foster a form of transformative representation that would enhance the democratic voice and participation of impoverished people. This will position poverty as a ground of discrimination as an essential legal tool against which all other legal measures, regulations and oppressive state and private apparatuses could be reviewed.

The research found that for poverty as a recognised ground to be transformative, it must be utilised to challenge poor people's material deprivation and disadvantage. The study illustrated that a relational understanding of equality, which underscores the connections between equality and freedom, would be conducive to securing production and (re)distribution relations that will enable people to pursue their freedom equally. Drawing from this, this study found that transformative substantive equality must strike an appropriate balance between "levelling up" to address the material deprivation of impoverished people and "levelling down" to redress the material inequalities that underpin instances of poverty discrimination. Against the backdrop of the centuries of material deprivation and exploitation, "levelling up" strategies are preferred to enable production and distribution relations that are conducive to conditions for full and equal participation. Due to the high concentration of wealth and resources in the hands and reach of a few "levelling down" through redistribution will also be necessary. Such redistributive strategies must be informed by its transformative mandate to secure equal participative conditions that will not amount to an "equality of the graveyard" approach. This means that the "levelling down" strategies must also seek to address the structures that advantage a few at the expense of others if they are to give effect to their transformative incentive.

Finally, the chapter found that the misrecognition conditions that manifest in the social stigma impoverished people are confronted with should also form a critical dimension of poverty discrimination. This study drew attention to the concept of "povertyism" that disregards impoverished people's equal moral worth and views them as "not-yet-beings" within a capitalist order. In principle, recognising impoverished people as a subordinated status group would be a formidable affirmative start. Still, caution should be exercised as not to condescendingly reify impoverished people's identity and, in doing so, mark them as a homogenous group with the same needs and experiences. This study indicated that a transformative conception of substantive equality must recognise radical differences to detect different forms and experiences of poverty. Moreover, due to the fact that poverty in South Africa has strong racial, gender, age, disability, and geographical features, it is vital that the intersectional dimensions of poverty-based discrimination are recognised. In conclusion, this chapter highlighted that a transformative view of substantive equality offers a robust legal framework to challenge poverty discrimination.

The study examined the current discrimination law paradigm governed by the Constitution and PEPUDA in light of the theoretical insights that emerged from a transformative conception of substantive equality. This study identified key potentials and drawbacks in the current paradigm. As a point of departure, this study indicated that there should be a disentanglement of the various stages of a discrimination claim. In essence, courts are obligated to consider what the right to equality and non-discrimination based on poverty entails before they are able to interrogate any justifications posed for its fairness. In particular, this research developed a comprehensive guide for interpreting the normative content of poverty as a ground of discrimination that is undergirded by a reimagined transformative conception of substantive equality.

This study stressed that poverty as a ground of unfair discrimination has a wide reach and is justiciable and enforceable against a broad range of state and private actors. In identifying whom the prohibition of discrimination binds, the study found that the prohibition of discrimination based on poverty entails a complex matrix of transformative duties to respect, promote, fulfil, and protect such a right. A transformative reading of anti-discrimination provisions does not only yield a negative duty of non-interference but also entails a more restitutionary and substantive duty to take positive steps to effectively address and eliminate poverty discrimination. Furthermore, this study demonstrated that a definition of poverty within a judicial setting should emphasise the three intersecting conditions of misrepresentation, maldistribution, and misrecognition in an open-ended

manner. As such, poverty as a ground of discrimination should remain wide and open to allow litigators and claimants to weave the narrative of their own exclusion and discrimination.

The study proposed three inquiries of an unfair discrimination analysis that provides litigators and adjudicators with a legal framework to interpret the various stages in line with a transformative substantive equality approach. These inquiries are, first, that it must be determined whether poverty discrimination is sufficiently established. The second inquiry – the fairness inquiry –then considers the impact of the discrimination on the impoverished claimants and impoverished people more generally. Lastly, the justification inquiry seeks to determine whether the respondent(s) can justify the discrimination.

It was argued that a transformative substantive equality discrimination inquiry must be alert to a wide range of conditions, practices, omissions, situations, policies, and circumstances that could be marked as discriminatory. In particular, a tenuous link between the disadvantage, harm or prejudice that flow from the discrimination and poverty should suffice to show discrimination. In this regard, a combination of comparators and a more contextual approach, that reveals the structural disadvantage of impoverished people, would be sufficient to show discrimination. It was also demonstrated that poverty discrimination meets the test of analogous grounds. Thus, when a court considers poverty discrimination or “socio-economic status”, it should be elevated from its status of a directive principle in PEPUDA to a prohibited ground. Moreover, when a court is tasked to consider its merits, poverty should also enjoy full recognition in section 9(3) of the Constitution as an entrenched constitutional ground of discrimination. The chapter also found that discrimination provisions can appropriately capture the intersectional nature of poverty discrimination. Thus, the study indicated that the discrimination inquiry can effectively detect poverty discrimination.

However, the study stressed that it is mainly the second and third inquiries of a claim determining the fairness of poverty discrimination that offer significant drawbacks due to the enmeshment of the impact and the justification factors. The study argued that the impact inquiry should be subdivided into two interrelated assessments to provide optimal protection and realisation of impoverished people’s right to equality and non-discrimination. The first assessment should employ a context-sensitive method of adjudication that would recognise the peculiar lived inequality of the impoverished claimants. Hereafter, the study reconstructed the current impact factors to enable a transformative substantive equality assessment of whether the extent of the

discrimination disproportionately impacts impoverished people's political marginalisation, material disadvantage and social prejudice.

Finally, the study elaborated on the third inquiry pertaining to the justifications offered for the discrimination. The study expressed concern about the justification leg of the unfairness inquiry that skews the analysis towards justifications that are ostensibly legitimate but tainted with poverty discrimination. It introduced a new transformative substantive equality model for courts when posing questions to respondents that seek to justify poverty discrimination. It was shown that such a model would enable a necessary judicial proportionality exercise that embodies the maximum protection for impoverished people's rights. Furthermore, it was argued that the "burden of justification" should rest on the respondent(s) to indicate that the measures taken were the less invasive or less disadvantageous for impoverished people and that it has taken positive steps to address the discrimination in line with transformative substantive equality commitments.

A final critical aim of this study was to examine the implication of conceiving poverty as a ground of unfair discrimination for courts' legitimacy and competency challenges. The study found that, in principle, nothing prevents a court from adjudicating a claim of poverty discrimination. However, the study demonstrated that this does not amount to a complete disregard for separation of powers and institutional comity issues that arise. Because impoverished people's discrimination is pervasive, a transformative conception of substantive equality will shed new light on the judiciary's role in structural transformation. The study found that a transformative constitutional dialogue that stresses commitments to substantive equality could address the tensions that emerge in a claim of poverty discrimination where courts must interrogate, and contextually consider the institutional role they have in providing maximum protection of impoverished people's rights.

When a claim of poverty discrimination raises legitimacy and competency concerns, a court is not absolved from being one of the institutional interpretative forums that would infuse impoverished people's right to equality and non-discrimination with meaning. The study found that it will be a restrictive understanding of the judicial review of discriminatory measures to expect courts to take over various democratic functions or processes to remedy discrimination. Discrimination jurisprudence to date indicates the contrary. If a competent court finds a discrimination claim unfair, it is usually the start of a "nonreformist reform" or transformative process that is deeply dependent on the other branches of government. Finally, the chapter found that courts' remedial role offers

significant institutional procedures to alleviate tensions in legitimacy and competency issues while enabling transformative participatory judicially supervised procedures that could address some of the structural causes of poverty discrimination.

6 3 Areas for future research

From a theoretical perspective, Fraser also introduced a fourth frame in her work, namely, the ecological condition.[142] This study did not consider the implication of this frame as another intersecting layer of disadvantage for impoverished people. More research must be done to incorporate this frame in the analysis of the intersecting disadvantages faced by poor people.

Although this study utilised Fraser's critical theory in addition to South African critical theorists' views, it did not consider these theories directly. There is a real need to investigate what insights decolonial feminist and African Black Marxist theories should and could offer to the interpretation of impoverished people's right to equality and non-discrimination.[143] Further study is also needed on how the concept of *Ubuntu* could further strengthen poverty as a ground of unfair discrimination by incorporating ethics of solidarity and care.[144]

Furthermore, the study only examined the domestic application of poverty as a ground of unfair discrimination within the South African context. Further research is required to critically examine existing mechanisms, and explore new international human rights mechanisms. This will be necessary to address the pervasive poverty discrimination that is caused and reinforced by, to name a few, global capitalist financial flows, extractions and debt strongholds that disproportionately impact impoverished people's well-being.[145]

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[142] N Fraser "What Should Socialism Mean in the Twenty-First Century?" (2020) 56 *Socialist Register - Beyond Market Dystopia: New Ways of Living* 294 296-297. This frame intersects with various injustices impoverished people face as impoverished people bear the brunt of ecological crises as they are relegated to the outskirts of societies and left with little or no means to combat the pervasive consequences of environmental decline. Within a human rights setting, see possible interactions between climate degradation and the disproportionate impact on impoverished people in United Nations Human Rights Council *Report of the Special Rapporteur on Extreme Poverty and Human Rights: Climate Change and Poverty* (17 July 2019) Un Doc A/HRC/41/39 at paras 49 and 58 specifically.

[143] For such a decolonial theory, see B de Sousa Santos, S Araújo & OA Andrande (eds) *Decolonizing Constitutionalism: Beyond False or Impossible Promises* (English version forthcoming 2021); for some application of African black Marxism, see C Robinson *Black Marxism: The Making of the Black Radical Tradition* (1983) and J Nyerere *Ujamaa: Essays on Socialism* (1968).

[144] *Hoffmann v South African Airways* 2001 1 SA 1 (CC) para 38; *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 174; TW Bennett "Ubuntu: An African Equity" (2011) 14 *PELJ* 30 49-51.

[145] L Williams "Beyond the State: Holding International Institutions and Private Entities Accountable for Poverty Alleviation" in M Davis, M Kjaerum & A Lyons (eds) *Research Handbook on Human Rights and Poverty* (2021) 550-565.

A comprehensive comparative study is also necessary to consider whether foreign jurisdictions with more extensive judicial application of grounds akin to poverty could offer any insights for the adjudication of poverty as a prohibited ground of discrimination.

More research must also be conducted within transformative human rights theories to consider what levels of inequality will be permissible within the parity of participation principle. This will require a broader application of socio-economic status as a prohibited ground. As a start, the study indicated that the deep structural levels of poverty and the concentration of wealth in the hands and reach of a few should urgently be addressed as a matter of constitutional concern.

Supplementary research is necessary to distil the specific transformative duties that are imposed on private parties flowing from the prohibition of non-discrimination based on poverty. There is also a need to investigate the interpretative and strategic implications of recognising poverty as a ground of discrimination for the interpretation and adjudication of the socio-economic rights provisions in the Constitution.

Finally, further research is necessary to develop methods that could assist courts in assessing their institutional role where specific claims of poverty discrimination are instituted. However, and more crucially, poverty as a recognised ground of discrimination is not only significant in a judicial setting. As this study indicated earlier, the Bill of Rights binds all branches of government, and more research is necessary to elucidate the implications of poverty as a ground of unfair discrimination for policy and legislative measures.[146] If all three branches of government persistently pursue poverty as a ground of discrimination by proactively taking it into account in all budgetary allocations, policy interventions and participation duties, the transformative potential of poverty as a recognised ground will be bolstered.

6 4 Significance of the study and concluding remarks

The full recognition of poverty as a ground of discrimination is a significant contribution to constitutional law within South Africa's emerging transformative constitutional democracy. The need to urgently address the relationship between poverty and inequality is indispensable for the nurturing and legitimacy of South Africa's not-yet-there democracy. Not only because the persistence of poverty and inequality is a moral tragedy but also a legal, political, economic, and social failure of the existing order. Under the existing order, multiple systemic barriers confront poor people in seeking to escape

[146] Chapter 1 part 1 5.

poverty. Impoverished people's disadvantage is institutionalised to the extent that they are viewed as natural and simply as unfortunate outcomes of the normal functioning of a market society. Ultimately, social institutions, power relations, and the dynamics of market economies create poverty and inequality. Poverty as a recognised ground of discrimination should therefore be understood within its political possibilities as establishing a tool for South Africa's impoverished majority that they have a right not to be poor.

On a global scale, legal theorists have started to consider how legal measures either preserve existing inequalities or offer a significant political tool to challenge the ingrained structures that uphold the privileges of a few at the expense of an impoverished majority.[147] The hope is that this study will contribute to an urgent and necessary "nonreformist reform" within the South African legal field. The contribution should be viewed as not only the exposition of theoretical possibilities but also as a potential legal project with workable and attainable solutions under capitalist conditions. The responsibility for redressing poverty discrimination in a transformative manner should become a directed and urgent broader constitutional democratic project.

[147] See the recent edited collection of M Davis, M Kjaerum & A Lyons (eds) *Research Handbook on Human Rights and Poverty* (2021).

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