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DUTIES OF PRIVATE PERSONS AND THE RIGHT TO EQUALITY IN SOUTH AFRICA

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Thesis submitted in fulfilment of the requirements for the degree
DOCTOR OF PHILOSOPHY (LAW)
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Supervisor:
Professor Catherine Albertyn

February 2023

DECLARATION

I declare that this thesis is my own work and that I have not previously submitted it in whole or in part to any university for a degree.

I acknowledge that portions of this thesis have been published in an article under my name entitled ‘Befriending the Bogeyman: Direct Horizontal Application in AB v Pridwin’ (2020) 137 South African Law Journal 591.

This thesis is up to date as of December 2022.

Meghan Finn

28 February 2023

ABSTRACT

To what extent does the right to equality (and specifically, the right not to be discriminated against unfairly) give rise to duties that are borne by private persons in South African law? This question is morally, legally and politically freighted in South Africa, marked as the country is by gaping inequality and the legacies of centuries of colonial, apartheid and patriarchal oppression that was sustained by not only the government, but also in private spheres. The overall project of this thesis is to map out and normatively justify South Africa's approach to private anti-discrimination duties in the Constitution, legislation and emerging doctrine. Most surveyed jurisdictions use a test of publicness as a threshold determination of whether an entity is an anti-discrimination duty-bearer. Conversely, in South Africa, the possible class of duty-bearers is much wider – in principle, all persons as well as the state are duty-bearers. I argue that South Africa's approach is substantiated by a legal endorsement of substantive equality which requires a historically and contextually sensitive analysis of systemic inequalities that cut across public and private spheres. However, although the class of anti-discrimination duty-bearers is broad, this does not mean that private duties exactly mirror the duties of the state. Instead, the scope for private discrimination to be justified – i.e. found to be fair – is generally broader than when the state is the discriminator. Courts are charged with determining the balance to be struck when private actors' rights compete. I argue that this balance must be struck within PEPUDA's section 14 fairness enquiry, which to date has been chronically neglected by litigants and courts.

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CHAPTER 1

INTRODUCTION

1.1 OVERVIEW

Substantive equality demands the tackling of systemic forms of discrimination which, in South Africa, cut across both public and private spheres. Historically, constitutions have been understood as governing the vertical relationship between subject and state, rather than between private persons.[1] This is animated by the premise that individuals in private relations exercise parity of power, and by the public/private divide which has been recruited to insulate private relationships from legal scrutiny.[2] However, in South African law that premise has been interrogated,[3] in part as a result of the gaping inequalities that are the legacies of colonial, apartheid and patriarchal oppression.[4] For centuries, the state, and social norms more generally, put in place the most stark, pernicious forms of discrimination. Apartheid was characterised by the deepening and expanding legal legitimisation of discrimination – perpetrated by both the state and non-state entities. Moreover, as the Constitutional Court has recognised, racially oppressive systems and past discrimination have ongoing consequences.[5]

Against this backdrop and the extensive – and sometimes coercive – power wielded by private, non-state actors, the South African Constitution[6] marks a shift away from the premise that private persons exercise equal power and that constitutional obligations bind only the state. The Constitution provides for the general (albeit qualified) horizontal application of rights to

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[1] DM Chirwa, 'Towards Economic, Social and Cultural Rights Obligations of Non-State Actors in International and Domestic Law: A Critical Study of Emerging Norms' (PhD Thesis, University of Cape Town 2005) 38–39.
[2] Alfred Cockrell, '"Can You Paradigm?" – Another Perspective on the Public Law/Private Law Divide' [1993] Acta Juridica 227; FI Michelman, 'Constitutions and the Public/Private Divide' in M Rosenfeld and A Sajó (eds), *Oxford Handbook on Comparative Constitutional Law* (OUP 2012) 310; C Pateman, 'Feminist Critics of the Public/Private Dichotomy' in C Pateman (ed), *The Disorder of Women* (Stanford University Press 1989) 118–140.
[3] *KwaZulu-Natal Joint Liaison Committee v MEC of Education, KwaZulu-Natal* 2013 ZACC 10 [92]; *Shabangu v Land and Agricultural Bank of South Africa* 2019 ZACC 2 [22 fn 13].
[4] M Leibbrandt, I Woolard and C Woolard, 'Poverty and Inequality Dynamics in South Africa: Post-Apartheid Developments in the Light of the Long-Run Legacy' in J Aron (ed), *South African Economic Policy Under Democracy* (OUP 2009); Statistics South Africa, 'Inequality Trends in South Africa: A Multidimensional Diagnostic of Inequality | Statistics South Africa' (2019) <http://www.statssa.gov.za/?p=12744> accessed 21 May 2020.
[5] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 ZACC 15 [60]; *Prinsloo v Van der Linde* 1997 ZACC 5 [20].
[6] Constitution of the Republic of South Africa, 1996.

private persons and sets out that the duty not to unfairly discriminate applies to *all* persons and not only the state. This creates an express horizontal anti-discrimination duty, which exerts force on the social and interpersonal relationships between individuals.

The multidimensional right to equality in the Constitution cannot be understood in a historical vacuum. Instead, the right acts as a corrective to centuries of colonial and apartheid oppression, which were premised on white supremacy, inequality and discrimination,[7] and which have left 'deep scars'.[8] Many other jurisdictions only impose duties not to discriminate on particular private persons (that is, those with distinctive forms of social or public power).[9] Not so in South Africa. Section 9(4) of the Constitution prohibits all persons from unfairly discriminating, and requires the state to enact national legislation to prevent or prohibit unfair discrimination. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) is this legislation and it, too, puts in place further obligations to be borne by private persons.

It is true, however, that the scope for the justification of discrimination may be larger for private persons than it is for the state. Notionally, discrimination by private persons may be justified – that is, found to be fair – in circumstances where the right to equality is to be balanced against other rights, interests or principles.[10] This balance has been weighed by courts in other jurisdictions.[11] The appropriate balance to be struck in South African law is determined by history and context, by the lived conditions that individuals and groups experience including continued struggles against oppression and disadvantage, by the imperative of relational equality given deep ruptures in social relations, and by the fact that equality – both as right and value – now plays such a central role in our constitutional democracy.

In this thesis, I examine the horizontal application of the right to equality, focusing specifically on the right not to be discriminated against unfairly (although, as I explain later, employment law is excluded from the ambit of this research). Below, I briefly survey some of the pertinent debates in South African doctrine and jurisprudence before setting out my research questions.

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[7] S Terreblanche, *History of Inequality* (UKZN Press 1991); J Seekings and N Nattrass, *Class, Race and Inequality* (Yale University Press 2005); T Ngcukaitobi, *The Land Is Ours* (Penguin 2018).
[8] *Brink v Kitshoff NO* 1996 ZACC 9 [40].
[9] Tarunabh Khaitan, *Theory of Discrimination Law* (OUP 2015).
[10] *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being* 2015 ZACC 35. The Constitutional Court has left undecided whether a church has the right to suspend a minister because she became engaged to her same-sex partner.
[11] *Bull v Hall* 2013 UKSC 73; *Eweida v United Kingdom* 2013 ECHR 37; *Masterpiece Cakeshop v Colorado Civil Rights Commission* 128 Ct 1719; *Zoroastrian Co-Operative Housing Society v District Registrar* AIR 2005 SC 2306.

1.1.1 Horizontal application

The Constitution sets out that the Bill of Rights may bind a natural or juristic person. Section 8 of the Constitution provides for the possibility of horizontal application,[12] providing a mechanism for challenging conduct of private, non-state actors. Arguably, the public/private divide has not entirely dissolved, but it has at least become far more permeable.[13] Section 8 is, however, a strikingly ambiguous constitutional provision, characterised as much by its caveats ('if, and to the extent that, it is applicable, taking into account') as by its expansion of the ambit of application of the Bill of Rights (to 'all natural and juristic persons').

The section also does not cover the field. Horizontal application has also been governed by two other key constitutional provisions: section 7(2) and section 39(2). Section 7(2) provides that the state 'must respect, protect, promote and fulfil the rights in the Bill of Rights'. This duty has been interpreted to extend to a duty to protect, including by regulating private actors through legislation.[14] Section 39(2) of the Constitution also governs the indirect application of the Bill of Rights, providing that '[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'.

Because section 39(2) entails that the Constitution has a radiating effect across all law, and because of the principle of subsidiarity (in terms of which the higher norm – such as a right in the Bill of Rights – should only be invoked where the more local, concrete or detailed principle or rule does not apply),[15] historically courts have had more ready recourse to interpreting and developing the law indirectly, rather than to section 8(2), although not consistently so.[16] The remedies that govern any dispute are also typically drawn from legislation, the common law or customary law.

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[12] Michael Dafel, 'The Constitutional Rebuilding of South African Private Law' (DPhil Thesis, University of Cambridge 2018). Dafel voices a note of caution about the metaphor of horizontality, on the basis that it is obfuscating, does not capture the doctrines, and presumes a fictional parity of power among private individuals.
[13] *KwaZulu-Natal Joint Liaison Committee v MEC of Education, KwaZulu-Natal* (n 3) [92].
[14] *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 ZASCA 47; *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies intervening)* 2001 ZACC 22.
[15] *My Vote Counts NPC v Speaker of the National Assembly* 2015 ZACC 31 [46]; *S v Mhlungu* 1995 (3) SA 867 (CC) [59]; M Murcott and W van der Westhuizen, 'The Ebb and Flow of the Application of the Principle of Subsidiarity – Critical Reflections on Motau and My Vote Counts' (2018) 3 CCR 25, 43.
[16] *AB v Pridwin Preparatory School* 2020 ZACC 12; Meghan Finn, 'Befriending the Bogeyman: Direct Horizontal Application in AB v Pridwin' (2020) 137 SALJ 591; N Ally and D Linde, 'AB v Pridwin Preparatory School: Private School Contracts, the Bill of Rights and a Missed Opportunity' (2021) 11 CCR 275.

For years, the academic debate about horizontality in South Africa pivoted on fine-grained technical analyses of sections 8, 39(2) and 7(2) of the Constitution, and on whether horizontal application should be direct (with rights binding non-state actors through a straightforward reliance on the Constitution itself) or indirect (with rights binding non-state actors as mediated through other, more particularised rules in legislation, the common law and customary law).[17] Bhana contends that the horizontality debate, which has largely turned on whether direct or indirect application is preferable, misses the point. The more difficult enquiry is about the *scope* of application of the Bill of Rights, rather than the *form* of that application.[18]

In practice, courts have deployed all of these provisions – sometimes, somewhat haphazardly. In the early years of South Africa's constitutional democracy, by and large courts shied away from *expressly* imposing horizontal obligations – and especially positive obligations – on private people.[19] The courts' reluctance was principally on the basis that the purpose of horizontality is simply to require that private persons do not interfere with others' enjoyment of or access to a right, and 'not to obstruct private autonomy or to impose on a private party the duties of the state'.[20] Accordingly, where the Bill of Rights does apply to private persons, this is typically in the form of negative obligations (that is, obligations not to interfere with the exercise of a right), with autonomy placing a restraint on more searching horizontal duties.

This approach is shifting. In a number of recent judgments, the Constitutional Court has suggested that sometimes private persons can bear positive duties – that is, duties to act, including in certain instances duties *vis-à-vis* socio-economic rights.[21] The past three years have seen a number of significant judgments of the Constitutional Court that extend and develop horizontal duties. In *Pridwin*,[22] the Court drew on section 8(2) to hold a private school

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[17] See, for example, the debate outlined by S Woolman, 'Chapter 31: Application' in S Woolman (ed), *Constitutional Law of South Africa* (Juta 2013); Chris Sprigman and Michael Osborne, 'Du Plessis Is *Not* Dead: South Africa's 1996 Constitution and the Application of the Bill of Rights to Private Disputes' (1999) 15 SAJHR 25; I Currie and J de Waal, *Bill of Rights Handbook* (6th edn, Juta 2013); Christopher J Roederer, 'Post-Matrix Legal Reasoning: Horizontality and the Rule of Values in South African Law' (2003) 19 SAJHR 57; K Hopkins, 'The Common Law Is Indeed a Living Creature: A Noteworthy Decision Is Handed Down in the Cape High Court' (2001) 118 SALJ 149; Johan van der Walt, 'Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Co-Operative Relation between Common-Law and Constitutional Jurisprudence' (2001) 17 SAJHR 341; S Ellmann, 'A Constitutional Confluence: American State Action Law and the Application of Socio-Economic Rights Guarantees to Private Actors' in P Andrews and S Ellmann (eds), *Post-Apartheid Constitutions* (Wits University Press 2001).

[18] Deeksha Bhana, 'The Horizontal Application of the Bill of Rights: A Reconciliation of Sections 8 and 39 of the Constitution' (2013) 29 SAJHR 351.

[19] *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC).

[20] *Governing Body of Juma Musjid Primary School v Essay NO* 2011 ZACC 13 [58].

[21] *Baron v Claytile (Pty) Limited* 2017 ZACC 24 [36]; *Daniels v Scribante* 2017 ZACC 13.

[22] *AB v Pridwin Preparatory School* (n 16).

to direct constitutional obligations with respect to the right to basic education (although these obligations were principally procedural in character). In the context of the right to equality, two important judgments – *King*[23] and *Wilkinson*[24] – both drew on prior horizontality jurisprudence to affirm that the duty not to discriminate unfairly applies to private testamentary decisions, a sphere often thought to be intensely private. While the outcome of these judgments is bold and welcome, the reasoning is often casuistic and qualified, and the Court is yet to develop a clear and principled test for horizontal duties.

While horizontal application more generally has received important scholarly attention in South Africa, neither the more particular instantiation of horizontal application contained in section 9(4), nor the demands that the right to equality place more generally on private persons, has been subject to in-depth academic treatment. My project aims to address this. I now turn to discuss conceptions of equality in South African constitutional law.

1.1.2 Equality and anti-discrimination rights

Contemporary South Africa is persistently positioned as one of the most unequal countries in the world.[25] At least on some measures,[26] inequality has increased since the end of apartheid. Abiding social and status inequalities, the widescale effects of COVID-19, a global capitalist order, years of corruption and state dysfunction and, increasingly, the climate crisis (with its multifarious, cross-cutting impacts) only reinscribe and exacerbate these inequalities.

Confronted with the fact that democratic South Africa has not led to a radical rupture from the social, material and racist conditions of colonialism and apartheid, recent political and academic debates have contested the legitimacy of South Africa's constitutional project. Constitutional sceptics contend that the Constitution has preserved injustice (in part because it resulted from illegitimate political compromise), and that public interest lawyering and social justice

[23] *King NO v De Jager* 2021 ZACC 4.
[24] *Wilkinson v Crawford NO* 2021 ZACC 8.
[25] World Bank, 'Inequality in Southern Africa' (2022) <http://documents.worldbank.org/curated/en/099125303072236903/P1649270c02a1f06b0a3ae02e57eadd7a82> accessed 25 October 2022.
[26] Statistics South Africa (n 4) 144–148; World Bank (n 25); David Francis and Edward Webster, 'Inequality in South Africa' (2019) 36 Development Southern Africa 733; Justin Winchester, 'Too Taxing, Too Much Taxing or Not Progressive Enough? The Introduction of a Wealth Tax as an Equality Imperative in South Africa' (2022) 37 SAJHR 512 on the case for a wealth tax in South Africa; Kehinde Omotoso, Jimi Adesina and Ololade Adewole, 'Profiling Gendered Multidimensional Poverty and Inequality in Post-Apartheid South Africa' (2022) 14 African Journal of Science, Technology, Innovation and Development 564 on persistent gendered inequality.

discourses are complicit in perpetuating a form of neo-apartheid.[27] In response, others have contended that the constitutionally sceptical position is limited, for not providing a workable alternative to the constitutional order; for eliding the extent to which the constitutional drafting process was informed by local feminist and decolonial struggles;[28] for scapegoating the Constitution for some serious shortcomings of political will and implementation, particularly in the context of widescale corruption;[29] or for insufficiently accounting for the underlying class structures that are constituted by capitalism.[30] What is clear on any version, however, is that South African society is far away from what any commitment to equality requires.

How equality should be understood is disputed. Equality has been described as the most difficult right.[31] The foundations of equality law – or even, more narrowly, anti-discrimination law[32] – are contested.[33] This is in part because it begs the question: equality of what?[34] Some argue that equality is an 'empty idea',[35] or that equality is a loose and imperfect proxy for worthier goals.[36]

Dignity has been suggested as one answer to 'equality of what?' In our own jurisdiction, early judgments centred dignity in the unfair discrimination analysis and Ackermann, a former Constitutional Court Justice, provides a leading account that human dignity is critical for understanding both equality and unfair discrimination.[37] Because autonomy interests are understood to be encompassed by the right to dignity in the Constitution, a dignitarian account could theoretically accommodate the idea that what matters is that individuals are equally able

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[27] Joel SM Modiri, 'The Grey Line In-between the Rainbow: (Re)Thinking and (Re)Talking Critical Race Theory in Post-Apartheid Legal and Social Discourse' (2011) 26 SAPL 177; Tshepo Madlingozi, 'Social Justice in a Time of Neo-Apartheid Constitutionalism' (2017) 1 Stell LR 123; Sanele Sibanda, 'Not Purpose-Made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty' (2011) 22 Stell LR 482.

[28] Shireen Hassim, 'Decolonising Equality: The Radical Roots of the Gender Equality Clause in the South African Constitution' (2018) 34 SAJHR 342; T Ngcukaitobi, *The Land Is Ours: Black Lawyers and the Birth of Constitutionalism in South Africa* (Penguin 2018).

[29] Firoz Cachalia, 'Democratic Constitutionalism in the Time of the Postcolony: Beyond Triumph and Betrayal' (2018) 34 SAJHR 375.

[30] Robert Krause, 'A Historical Materialist Critique of the Potential and Limits of the South African Constitution as a Vehicle for Socialist Transformation (PhD Proposal)' (University of Witwatersrand 2021).

[31] Beverley McLachlin, 'Equality: The Most Difficult Right' (2001) 14 Supreme Court Law Review 11.

[32] These are meaningfully distinct, even if overlapping, areas of law.

[33] Colm O'Cinneide, 'The Uncertain Foundations of Contemporary Anti-Discrimination Law' (2011) 11 International Journal of Discrimination and the Law 7.

[34] Bernard Williams, 'The Idea of Equality' in G Hawthorn (ed), *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Princeton University Press 2005).

[35] Peter Westen, 'The Empty Idea of Equality' (1982) 95 Harvard Law Review 537; Harry Frankfurt, 'Equality as a Moral Ideal' (1987) 98 Ethics 21.

[36] Derek Parfit, 'Equality and Priority' (1997) 10 Ratio 202. Parfit suggests prioritarianism – that the requirements of those most in need be given urgency.

[37] Laurie Ackermann, *Human Dignity: Lodestar for Equality in South Africa* (Juta 2012).

to pursue an autonomous life. South African courts have granted central status to dignity in the equality enquiry, including in the enquiry into whether discrimination is unfair, in part 'to contradict our past in which human dignity for Black South Africans was routinely and cruelly denied'.[38]

A number of academic commentators have cast scepticism on this, arguing that human dignity is too vague a principle to perform the conceptual heavy lifting required in an equality analysis;[39] that dignity alone is insufficient for disrupting the structurally unjust status quo, not least because its focus is on the individual, rather than on the structural (political, social and economic) conditions of inequality;[40] or that dignity does not truly underpin courts' reasoning, which is instead determined by a concern with patterns of group disadvantage.[41]

Ultimately, however, substantive equality is the central paradigm for South African anti-discrimination law. Substantive equality, as many have previously noted, is a 'contested concept'.[42] First, it can be understood against formal equality which, in its most thin form, is solely concerned with equal treatment. Conversely, substantive equality is concerned with 'the actual impact or results of social and legal classifications: the problem is not differentiation, per se, but the (systemic) harm that might flow from it'.[43] As such, its demands are necessarily contextual, focusing at least in part on outcome, and typically requiring an asymmetric approach (that is, an approach that does not begin with the assumption that all are similarly advantaged).[44] Put more concretely, what formal equality would require is equal treatment while what substantive equality would require extends to include a variable set of conditions ranging from recognition of equal status (and with that, an entitlement to equal concern and respect),[45] to conferring equal opportunities to ensuring equality of condition (by addressing

[38] *Dawood v Minister of Home Affairs* 2000 ZACC 8 [35].
[39] Chris McConnachie, 'What Is Unfair Discrimination? A Study of the South African Constitutional Court's Unfair Discrimination Jurisprudence' (DPhil Thesis, University of Oxford 2014); Rósaan Krüger, 'Equality and Unfair Discrimination: Refining the Harksen Test' (2011) 128 SALJ 479. McConnachie argues that instead of dignity, the factors that inform the Constitutional Court's enquiry as to whether there has been unfair discrimination are whether there is (i) unfavourable treatment on the basis of protected grounds; (ii) that threatens to create or perpetuate patterns of group disadvantage; and (iii) that lacks justification.
[40] Catherine Albertyn, 'Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion towards Systemic Justice' (2018) 34 SAJHR 441, 463.
[41] McConnachie (n 39) 4–5; Khaitan (n 9).
[42] Albertyn, 'Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion towards Systemic Justice' (n 40).
[43] ibid 457.
[44] Sandra Fredman, *Discrimination Law* (2nd edn, Clarendon 2011).
[45] R Dworkin *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2000).

structural disadvantage), all of which is rooted in eradicating disadvantage and the systemic drivers of oppression.[46]

From the above discussion, it emerges that one way to chart theories of equality law (or, more narrowly, anti-discrimination law) is on axes of individual and group. Some theories take their frame as a societal or structural one (and how society replicates patterns of exclusion) while others take their frame to be rather that of an individual life (either a complainant or a discriminator). Another important axis on which to map theories of equality are theories that endorse recognition claims (which are status-oriented), on the one hand, and redistribution ones (materially, regarding the allocation of goods), on the other. Fraser compellingly argues that only a dualist account can capture dimensions of subordination which are both status-oriented and material in nature.[47] This is not least because recognition and redistribution concerns are not insulated: recognition issues can have distributive consequences and vice versa.[48]

Fredman and Albertyn both build on Fraser's framework by proposing multidimensional accounts of substantive equality that address both socio-economic and status-oriented inequalities. Fredman contends that substantive equality should not be reduced to a single formula such as dignity or equality of opportunity. Instead, she proposes four dimensions of equality: redistribution (breaking the cycle of disadvantage, with substantive equality requiring asymmetric treatment of the advantaged and the disadvantaged); recognition (promoting respect for dignity and worth); transformation (accommodating difference and achieving structural change) and participatory parity (facilitating full social and political participation).[49] Albertyn tracks the varied conceptions of equality in South Africa's constitutional era, noting that 'the plasticity of equality' has given rise to a range of interpretations by the three arms of state. She contends that the judiciary has largely favoured process over substance and, as a result, recognition goals have been prioritised over redistributive ones. She argues for a transformative approach that is not centred exclusively on dignity concerns but recognises an 'equality of condition' that embodies systemic and material justice.[50]

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[46] T Ngcukaitobi, I Currie and J de Waal, 'Equality', *Bill of Rights Handbook* (6th edn, Juta 2013) 213; McConnachie (n 39) 76. McConnachie characterises the difference as turning on equal treatment versus equal situation or outcomes. However, this risks being too reductive.

[47] Nancy Fraser, 'Redistribution or Recognition?' in Nancy Fraser and Axel Honneth, *Redistribution or Recognition? Political-Philosophical Exchange* (Verso 2003) 3.

[48] Sandra Fredman, 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23 SAJHR 214.

[49] ibid.

[50] Albertyn, 'Contested Substantive Equality in the South African Constitution' (n 40).

In this thesis, I argue that the paradigm of substantive equality (which has been primarily theorised with the state as duty-bearer) accommodates – and indeed requires – the imposition of anti-discrimination duties on private persons. I trace this argument across theoretical accounts, the right in section 9 of the Constitution and PEPUDA, South Africa's equality legislation.

It is true that PEPUDA has been criticised for being incoherent,[51] ineffective in achieving its potential to transform South African society (especially socio-economically),[52] 'cumbersome and confusing',[53] not sufficiently distinguishing between discrimination by state actors versus non-state actors,[54] and not being helpful for adjudication.[55] Courts sometimes, though not uniformly,[56] return to the constitutional text when adjudicating a dispute, rather than relying on PEPUDA's provisions. This is at odds with the doctrine of subsidiarity,[57] and has resulted in the side-stepping and thus side-lining of PEPUDA's provisions.[58] PEPUDA is also currently under a process of being amended,[59] although this process may take some time to be completed.

Turning to specific PEPUDA provisions, consistent with section 9(4), the prohibition of unfair discrimination in section 6 of PEPUDA is expressly horizontal in nature: '[n]either the State *nor any person* may unfairly discriminate against any person'. It would be a mistake to conclude that the prohibition against discrimination only imposes duties which are negative in nature.[60] Instead, the duty may also require positive steps, including by private actors. The burden of proof for discrimination, in terms of section 13 of PEPUDA, is that a complainant must make out a *prima facie* case of discrimination and that, if that has been made out, the respondent then bears the burden to show either that the discrimination did not occur or that the conduct is not based on one of the prohibited grounds. If, however, the discrimination

[51] C Albertyn, B Goldblatt and C Roederer, *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (Wits University Press 2001).
[52] Anton Kok, 'A Socio-Legal Analysis of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000' (LLD Thesis, University of Pretoria 2009).
[53] McConnachie (n 39) 38.
[54] Kok (n 52) 152.
[55] *MEC for Education: KwaZulu-Natal v Pillay* 2007 ZACC 21 [168].
[56] *MEC for Education: KwaZulu-Natal v Pillay* (n 55); *Nelson Mandela Foundation Trust v Afriforum NPC* 2019 ZAEQC 2; *iSimangaliso Wetland Park v Sodwana Bay Guest Lodge* 2018 ZAKZDHC 62; *Woodways CC v Vallie* 2009 ZAWCHC 155; *Lourens v Speaker of the National Assembly of Parliament* 2016 ZASCA 11; *September v Subramoney NO* 2019 ZAEQC 4.
[57] Krüger (n 39).
[58] *Gaum v Van Rensburg NO* 2019 ZAGPPHC 52; *Harvey NO v Crawford NO* 2018 ZASCA 147; Catherine Albertyn, 'Getting It Right in Equality Cases: The Evaluation of Positive Measures, Groups and Subsidiarity in Solidariteit v Minister of Basic Education' (2018) 135 SALJ 403.
[59] Promotion of Equality and Prevention of Unfair Discrimination Amendment Bill (X-2021).
[60] Ngcukaitobi, Currie and De Waal (n 46) 235.

occurred on a prohibited ground, then it is presumed to be unfair and the respondent bears the burden to persuade the court that it is fair.

In determining whether discrimination is fair or unfair, section 14 of PEPUDA sets out a number of factors to be taken into account. Section 14 includes both factors that usually fall under a fairness analysis and factors that inform a limitations inquiry in terms of section 36 of the Constitution.[61] Although it has been insufficiently tested, the enquiry under section 14 of PEPUDA is wide enough to 'accommodate a consideration of other rights';[62] in effect, it puts in place a multifactorial proportionality test. Unfortunately, section 14 of PEPUDA has been neglected by litigants and the courts alike. This is a missed opportunity because the fairness analysis it sets up is key, I argue, to determining the balance to be struck when private actors' rights compete.

1.2 RESEARCH QUESTIONS

In this thesis, I argue that the constitutional, legislative and doctrinal scheme in South Africa establishes a universal class of anti-discrimination duty-bearers – in principle, all persons, as well as the state, are duty-bearers. This, I contend, is underpinned by a commitment to substantive equality which requires a historically and contextually sensitive analysis of systemic inequalities that are shot through public and private spheres. However, while the class of anti-discrimination duty-bearers is broad, private duties do not straightforwardly mirror state duties. Instead, the scope for private discrimination to be justified – i.e. found to be fair – is generally much broader than when the state is the discriminator. I argue that this justification must be accommodated within PEPUDA's section 14 fairness enquiry, which to date has been underused.

The primary questions that this thesis thus examines are: (i) What is the scope of private persons' anti-discrimination duties in South African law, as determined by the Constitution, PEPUDA and the courts? and (ii) What are the underlying normative justifications for these duties?

In answering these primary questions, the thesis will consider the following ancillary questions:

[61] *MEC for Education: KwaZulu-Natal v Pillay* (n 55).
[62] Albertyn, 'Getting It Right in Equality Cases' (n 58) 419.

- How have South African courts understood horizontal application under the Constitution generally? What is the interaction between the broad horizontal application provision in section 8(2) of the Constitution, and the more targeted horizontal anti-discrimination duty in section 9(4) and PEPUDA?
- What conception, or conceptions, of equality does the Constitution require? How have these conceptions of equality been formulated, articulated and understood in case law and legislation? How do these conceptions of equality, which have primarily been developed with the state as duty-bearer, apply in respect of private persons?
- How do comparative jurisdictions approach private anti-discrimination duties? What theoretical accounts are advanced in comparative constitutional law to justify the boundaries of these duties? Do these accounts have salience in the South African context?
- How does South African law's commitment to substantive equality translate to regulating private anti-discrimination duties in legislation and case law? What lessons can be drawn from the legislative drafting history? What principles emerge from recent doctrine on private anti-discrimination duties?
- How should courts' reasoning on private anti-discrimination duties be developed and deepened? How should courts strike the balance in the private sphere between one person's right to equality (including the right not to be discriminated against unfairly) and another person's rights and interests, when the two are in tension? What interpretive content should be given to the unfairness enquiry housed in section 14 of PEPUDA, and what prospects does this enquiry have as a balancing or proportionality mechanism?

1.3 CROSS-CUTTING THEMES

Answering these questions requires engaging with a number of significant and cross-cutting themes. These include relational equality, the public/private divide, autonomy and the potential tension between freedom and equality, and the balancing of competing rights. In the section that follows, I briefly introduce these themes, which will surface and resurface at various points in the thesis.

1.3.1 Relational equality[63]

Relational equality is an account of equality that foregrounds the relationships among individuals: the aim (or at least one of the aims) of equality is for persons in a society to relate to each other as equals.[64] These relationships are sites of equality's demands which contrast with more institutionally oriented accounts of equality and justice (for example, arising out of Rawls' influential work).[65] Relational egalitarianism is not necessarily mutually exclusive with other accounts of equality, and can be accommodated within a multidimensional framework. Indeed, at least some theoretical accounts of substantive equality do provide for relational aspects. This synthesises the fundamental question of what we owe each other[66] with a context-based imperative to obliterate, or ameliorate, disadvantage.

Relational egalitarianism has some salience for understanding South Africa's scheme of private anti-discrimination duties, which shifts the focus away from the state and towards the duties that individuals bear in respect of each other. The Constitution must be a rupture with the past, and must, in addition to recognition and redistributive claims, affirm relational equality, 'commit[ting] individuals to the rebuilding of the ethical relations so radically shattered during apartheid'.[67] This idea is also expressed, albeit in different terminology, by Fraser's emphasis on participative parity.[68] Participative parity is a component of her conception of justice, and requires that social relations are constituted in ways that enable individuals to interact and participate from a position of equal concern and respect in public life.[69] Relational egalitarianism can also be linked to the indigenous concept of ubuntu – often expressed through the phrase *umuntu ngumuntu ngabantu*, translated as 'a person is a person through other people'.[70] Cornell and Muvangua argue that ubuntu moralises social relations, and that this is welcome given the constitutional project of building 'a new shared public world'.[71]

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[63] See further discussion in 2.2.3, 3.5.3 and 6.2.1.
[64] Elizabeth S Anderson, 'What Is the Point of Equality?' (1999) 109 Ethics 287; Kasper Lippert-Rasmussen, *Relational Egalitarianism: Living as Equals* (CUP 2018); Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (2011); Samuel Scheffler, 'What Is Egalitarianism?' (2003) 31 Philosophy and Public Affairs 5.
[65] J Rawls, *A Theory of Justice* (Harvard University Press 1971).
[66] T Scanlon, *What We Owe to Each Other* (Harvard University Press 1998).
[67] Nick Friedman, 'The South African Common Law and the Constitution: Revisiting Horizontality' (2014) 30 SAJHR 63, 67.
[68] Nancy Fraser, 'Recognition without Ethics?' (2001) 18 Theory, Culture and Society 21.
[69] See further discussion in 6.2.1.
[70] Drucilla Cornell and Nyoko Muvangua, *Ubuntu and the Law – African Ideals and Postapartheid Jurisprudence*, vol 72 (Fordham University Press 2012); John Murungi, *African Philosophical Currents* (Routledge 2018); JY Mokgoro, 'Ubuntu and the Law in South Africa' (1998) 1 PELJ 15.
[71] Cornell and Muvangua (n 70) 8.

1.3.2 The public/private divide[72]

The public/private divide – and its prospects – is an important theme across this thesis. The divide can mean multiple things: the public/private divide may be used to designate the distinction between public and private law; between public spheres and private spheres; or between public actors and private actors. Private and public spheres are typically divided on the basis of the activity and the nature of the duty-bearer.[73] To this end, 'public' usually means state-related, accessible to all, of concern to all, pertaining to a common good; while 'private' usually alludes to private property in a market economy, or intimate sexual, domestic or personal life.

The divide is employed both descriptively and normatively, including to insulate private activities from legal scrutiny[74] or to limit the application of duties to private persons.[75] This is often on the premise that private persons relate to each other from positions of equality.[76] Feminist thought and critical legal theory have advanced searching critiques of the public/private divide.[77] Theorists argue that preserving the divide calcifies unequal and unjust power relations and distributions, often under the guise of neutrality.[78] South African jurisprudence maintains an uneasy commitment to aspects of the public/private divide, notwithstanding some important doctrinal shifts away from a rigid dichotomy.[79] Substantive equality necessitates departing from a strict divide, even if some considerations relating to autonomy and the right to privacy (rather than an insulated private sphere) remain apposite.

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[72] See discussion in 2.2.2, 4.4, 5.6 and 6.2.

[73] Hugh Collins, 'Discrimination and the Private Sphere' in Kasper Lippert-Rasmussen (ed), *The Routledge Handbook of the Ethics of Discrimination* (Routledge 2018).

[74] ibid 368; Nancy Fraser, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy' (1990) 25 Social Text 56, 76; Nicola Lacey, 'Theory into Practice? Pornography and the Public/Private Dichotomy' (1993) 20 Journal of Law and Society 93.

[75] Liebenberg S and Kolabhai RL, 'Private Power, Socio-Economic Transformation and the Bill of Rights' in Z Boggenpoel (ed), *Law, Justice and Transformation* (LexisNexis 2022) 251.

[76] Cockrell (n 2) 228.

[77] Pateman (n 2); Lacey (n 74); Susan Boyd, 'An Overview' in Susan Boyd (ed), *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (University of Toronto Press 1997); Tracy Higgins, 'Reviving the Public/Private Distinction in Feminist Theorizing' (2000) 75 Chicago Kent Law Review 847 (for a critical discussion).

[78] Lacey (n 74) 97.

[79] Liebenberg and Kolabhai (n 75) map out a number of significant cases on the divide across various areas of law, arguing that a failure to reckon with how public and private power are mutually constitutive weakens the protection of human rights.

1.3.3 Autonomy[80]

The public/private divide in turn is partially sustained by the idea that individuals exercise a degree of autonomy in the private sphere. Autonomy, then, is another important theme in this thesis. It is often drawn on as a value that competes with equality, or at least exerts a constraining influence on the kinds of duties that can be imposed on private persons. Even this, however, is contested. A number of commentators argue that equality law – or, at the very least, anti-discrimination law – has as its guiding purpose the ideal of an autonomous life, which is understood to be a 'life substantially lived through the successive valuable choices of the person who lives it, where valuable choices are choices from among an adequate range of valuable options'.[81] Discrimination undermines the autonomous life because it robs an agent of her choices[82] or conveys to an agent that her life is not valuable.

South Africa's Constitution does not expressly recognise the right to autonomy. Nevertheless, a number of Constitutional Court judgments have affirmed the importance of autonomy, and expressly linked this value to the right to human dignity which is guaranteed in section 10 of the Constitution, to the rights to freedom and security of the person in section 12 and privacy in section 14, and to the founding value of freedom.[83] The Constitutional Court's conception of autonomy has varied over time. Some judgments have favoured a negative conception that sees autonomy as requiring non-intervention, and as vouchsafing an individual's ability to regulate her own affairs.[84] In other judgments, however, the Court has affirmed a socially embedded conception of autonomy (linked to the value of ubuntu), which is that 'to be autonomous is to be socially and politically connected, rather than an agent of unfettered individual choice'.[85] On such a conception, state intervention and regulation which enable the recognition of marginalised or vulnerable persons and the redistribution of goods – including by imposing duties on private persons – can enhance, rather than impair, autonomy.

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[80] See discussion in 2.2.3, 2.5, 2.7, 3.5.1, 4.4.2 and 6.3.2.

[81] John Gardner, 'On the Ground of Her Sex(uality)' (1998) 18 Oxford Journal of Legal Studies 167; Sophia Moreau, 'What Is Discrimination?' (2010) 38 Philosophy & Public Affairs 143.

[82] Moreau (n 81). On Moreau's account, deliberative freedom is the freedom to have our decisions about how to live insulated from the effects of normatively extraneous features. One difficulty of this account is that it cannot mediate between clashing deliberative freedoms – under the account, both the decision maker within a religious institution and the lesbian minister within a religious institution have deliberative freedom stakes. Without a historical, context-sensitive account of patterns of discrimination it is not clear how these competing claims should be adjudicated.

[83] *AB v Minister of Social Development* 2016 ZACC 43 throughout; *Barkhuizen v Napier* 2007 ZACC 5 [57]; *Ferreira v Levin NO v Powell NO* 1995 ZACC 13 [251]; *NM v Smith* 2007 ZACC 6 [131].

[84] *Governing Body of Juma Musjid Primary School v Essay NO* (n 20); *Barkhuizen v Napier* (n 83).

[85] *AB v Minister of Social Development* (n 83) [51]; *MEC for Education: KwaZulu-Natal v Pillay* (n 55) [53].

1.3.4 Balancing competing rights and the unfairness enquiry[86]

Determining the scope of and justification for private anti-discrimination duties involves engaging with the balance to be struck between competing rights. Across jurisdictions, conflict between rights, or between rights and other principles, is often resolved through balancing.[87] Whether a duty is to be imposed under the circumstances requires courts to balance the competing rights and interests. Other jurisdictions have grappled with this question – particularly where the right not to be discriminated against is in tension with other rights.[88]

Both Barak and Dafel argue that the limitations analysis that is appropriate for testing state law cannot simply be transposed into determining disputes between private persons.[89] The state, unlike private persons, is not a bearer of rights. Although section 36 of the Constitution puts in place a limitations analysis which provides guidance for testing rights against legitimate state interests, there is no generalised test for balancing the clashing rights of private persons.[90]

Ultimately, South African courts have yet to develop a clear test to govern the balancing exercise between competing rights and interests. Instead, balancing enquiries have been casuistic and fact-dependent. This leaves open how exactly a balancing enquiry should be conducted, and what considerations should be factored in. While context sensitivity is critical, some more principled guidance is needed. Finally, whatever balance is ultimately struck, there is also the possibility of courts employing creative remedies such as meaningful engagement as part of mediating a clash of rights.[91] My project will traverse these questions and will examine how courts have approached this clash of rights, with the aim of suggesting how a home-grown balancing enquiry would work. This thesis will argue that in the context of private anti-discrimination duties, the fairness enquiry – legislatively housed in section 14 of PEPUDA – is key to balancing the right not to be discriminated against with other rights, and calls for scholarly and judicial engagement.

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[86] See discussion in 2.6, 4.2.3, 5.5, 5.6 and 6.4.
[87] See R Alexy, *A Theory of Constitutional Rights* (OUP 2010) 66-69 for his optimisation account of balancing.
[88] *Bull v Hall* (n 11); *Lee v Ashers Bakery Company Ltd* 2018 UKSC 49; *Ladele v London Borough of Islington* 2009 EWCA Civ 1357; *Eweida v United Kingdom* (n 11).
[89] Dafel (n 12) 65; A Barak, 'Constitutional Human Rights and Private Law' in D Friedmann and A Barak (eds), *Human Rights in Private Law* (Hart 2001) 13, 36.
[90] S Woolman and H Botha, 'Chapter 34: Limitations' in S Woolman (ed), *Constitutional Law of South Africa* (Juta 2013) 99.
[91] *Head of Department, Department of Education, Free State Province v Welkom High School* 2013 ZACC 25; S Liebenberg, 'Remedial Principles and Meaningful Engagement in Education Rights Disputes' (2016) 19 PELJ 1.

1.4 SIGNIFICANCE OF RESEARCH

There is important work in the global and South African legal academy both on horizontal application and the right to equality. In addition to a flurry of work commenting on the shift between the Interim and 1996 Constitutions on horizontality,[92] Bhana, Friedman, Van der Walt and Woolman,[93] among others, all engage with both the scope and form of horizontal application (as does Bhatia, though from a comparative perspective).[94] More recent legal developments on horizontal application have also received thoughtful scholarly attention.[95]

Against the backdrop of rich theoretical work on anti-discrimination law, the right to equality and substantive equality,[96] a number of authors write influentially on equality in a South African legal framework including especially significant work by Albertyn, Fredman, Goldblatt, Liebenberg and McConnachie,[97] which I traverse in detail in chapter 3. PEPUDA, too, has received important scholarly attention, particularly from Albertyn, Goldblatt and Roederer (whose early work on how the legislation should be interpreted has proven influential),[98] Gutto (who examines the drafting history of the legislation and implementation challenges, including the role of legal professionals and comparative law),[99] Kok (who engages in a socio-legal study of PEPUDA, including studying Equality Court personnel, and concludes that the Act is unlikely to achieve its goal of transforming South African society),[100] Krüger (who examines how the legislation has been implemented in the Equality Courts, with a particular focus on discrimination on the basis of race),[101] and Hunter-Parsonage and Albertyn

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[92] DM Davis and S Woolman, 'The Last Laugh: Du Plessis v De Klerk, Classic Liberalism, Creole Liberalism, and the Application of Fundamental Rights under the Interim and Final Constitutions' (1996) 12 SAJHR 361; Sprigman and Osborne (n 17); I Currie and J de Waal, *Bill of Rights Handbook* (Juta 2013).

[93] Bhana (n 18); Friedman (n 67); Johan van der Walt, *The Horizontal Effect Revolution and the Question of Sovereignty* (De Gruyter 2014); Woolman (n 17).

[94] Gautam Bhatia, 'Horizontal Rights: An Institutional Account' (PhD Thesis, University of Oxford 2021).

[95] Ally and Linde (n 16); Leo Boonzaier, 'Contractual Fairness at the Crossroads' (2021) 11 CCR 229; Tom Lowenthal, 'AB v Pridwin Preparatory School: Progress and Problems in Horizontal Human Rights Law' (2020) 36 SAJHR 261.

[96] There are so many significant thinkers here, and I discuss this in more detail in chapter 3. Key examples are Khaitan (n 9); Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (McGill-Queen's University Press 2010); Anderson (n 64); Lippert-Rasmussen (n 64); Nedelsky (n 64).

[97] Catherine Albertyn and Beth Goldblatt, 'Equality' in S Woolman (ed), *Constitutional Law of South Africa* (Juta 2013); Albertyn, 'Contested Substantive Equality in the South African Constitution' (n 40); Fredman, *Discrimination Law* (n 44); Sandra Liebenberg and Beth Goldblatt, 'The Interrelationship Between Equality and Socio-Economic Rights under South Africa's Transformative Constitution' (2007) 23 SAJHR 335; McConnachie (n 39).

[98] Albertyn, Goldblatt and Roederer (n 51).

[99] S Gutto, *Equality and Non-Discrimination in South Africa: The Political Economy of Law and Law-Making* (New Africa Education 2001).

[100] Kok (n 52).

[101] Rósaan Krüger, 'Small Steps to Equal Dignity: The Work of the South African Equality Courts' (2011) 7 Equal Rights Review 27, drawing on her PhD research.

(who recently published a report that examines the normative and practical roles played by the Equality Courts).[102] My project differs from theirs: while PEPUDA and the courts it establishes are a critical component of South Africa's equality regime and must form part of an analysis of private persons' obligations with respect to the right to equality, I do not propose to focus *solely* on this legislation or these institutions.

This scholarship is essential in supporting doctrinal development and has been instrumental for this thesis. However, there is a gap in scholarship on the intersection of these two areas. Most work on horizontality in South Africa pivots on section 8(2) of the Constitution and how horizontal application should be understood more broadly. Conversely, the body of knowledge on equality in South Africa – and indeed non-jurisdiction-dependent theories of equality more generally – focuses on the state rather than on private persons. Moreover, the intersection of these areas is currently contested, and there have been recent doctrinal developments that call out for academic engagement. My thesis seeks to advance this overlapping area of law by providing structure to and filling some of the gaps in the legal discourse, in part through examining underpinning theory, and by attempting to distil judicial reasoning. A deeper understanding of this jurisprudence will assist in providing proposals for how South African courts should approach future disputes.

To the best of my knowledge no other PhD project has been written directly on the topic of how South African courts determine when, and to what extent, the right to equality gives rise to anti-discrimination duties that are borne by private persons. My research is thus positioned in a burgeoning area of South African law which is currently under-theorised. It will, I hope, make a significant contribution to knowledge production in the field, and have both practical and theoretical implications for the South African legal community.

1.5 SCOPE AND LIMITS OF RESEARCH

My thesis studies how South African courts determine when, and to what extent, the right to equality gives rise to duties that are borne by private people. This topic implicates a number of substantial sub-enquiries, as sketched out in my research questions. Accordingly, I have made a number of key choices in defining, and limiting, the scope of my research.

[102] Mateenah Hunter-Parsonage and Catherine Albertyn, 'Emerging from the Shadows? The Equality Courts in South Africa' (NRF SARChI Chair in Equality, Law and Social Justice Research Report 1/2021, School of Law, University of the Witwatersrand 2021).

Although I intend to canvass the doctrinal development of horizontal application, I note that much of the development of (indirect) horizontal application to date has been to address particular questions including in the law of delict and especially the law of contract, which continues to be a site of change.[103] This development will form the backdrop of my research: my project is concerned with how the right to and value of equality manifests in private obligations. This in turn often implicates 'private law' questions (though, of course, the rigid distinction between public and private law, as traditionally understood, no longer applies). However, my principal focus is not on discrete areas of private law.

Second, save for where the jurisprudence on unfair discrimination by organs of state informs an understanding of substantive equality and for the state's duty to protect (including by regulating private persons), I do not focus on actions undertaken by the state. Instead, my research addresses equality duties borne by private persons.

Third, both in South Africa and in other jurisdictions, private duties not to discriminate are most often found in labour legislation and frameworks, which are often extensive and set out to regulate the power dynamic between employer and employee. Indeed, in other jurisdictions employment is a central case of the regulation of power wielded by private entities, and may be helpful for informing the normative basis of anti-discrimination law. However, this thesis is predominantly concerned with South African law and PEPUDA, which regulates employment discrimination only minimally and residually. Both because of this, and because labour law in South Africa is its own bespoke and highly regulated area with its own jurisprudence, procedures and dispute resolution mechanisms, I do not deal with employers' duties in any depth in my thesis. I leave the extensive analysis of these duties for future work.

Fourth, although remedial or restitutionary measures – most especially affirmative action and land redistribution – are critical components of substantive equality,[104] in-depth analyses of these areas fall beyond the scope of this project.[105] This is not least because these measures are governed by complex statutory and policy schemes, and because restitutionary measures tend to be unidirectional.[106]

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[103] Edwin Cameron and Leo Boonzaier, 'Venturing beyond Formalism: The Constitutional Court of South Africa's Equality Jurisprudence' (2020) 84 Rabel Journal of Comparative and International Private Law 786; *National Union of Metalworkers obo Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd* 2019 ZACC 25.
[104] *Minister of Finance v Van Heerden* 2004 ZACC 3 [32].
[105] See Nomfundo Ramalekana, 'Towards a Transformative Approach to Affirmative Action in South Africa' (University of Oxford 2021) for recent rich scholarship on this question.
[106] Khaitan (n 9).

Fifth, my thesis does not engage with the contested and burgeoning jurisprudence on hate speech. The tension between the prohibition against discrimination on the one hand, and freedom of expression on the other clearly implicates competing rights, typically held and asserted by private persons, but warrants extended and more focused treatment elsewhere. For similar reasons, I do not engage with the clash between the right to equality and the right to culture, aside from in the case of freedom of religious and religious associations.

Sixth, I do not enter the debate on business and human rights, which typically frames the question of non-state obligations at an international level (often with respect to multinational corporations, and the possibility of treaties as well as soft law to regulate these).[107] These changes on the international level are important. It is true that, in terms of section 39(1)(b) of the Constitution, courts must consider international law, and courts have relied on this provision in various cases.[108] But section 39(1)(b) is most powerful where there is clear, binding international law. My focus is on domestic law. I will, however, draw on recent work, including that of Bilchitz, which analyses the implications of imposing obligations on corporate entities for our understanding of horizontal obligations more generally.[109]

Finally, I do not cover private persons' obligations to realise socio-economic rights, aside from briefly in chapter 2 on horizontality more broadly. The Constitution recognises justiciable socio-economic rights partly out of a commitment to substantive equality which requires tackling the radically unequal distribution of resources,[110] and working towards equality of condition. Socio-economic rights, then, are closely linked to the right to equality.[111] However, it is settled that the state is the primary duty-bearer for realising these rights. Private persons do bear some obligations, but the principal mechanism for this is through legislation. In this respect, section 7(2) of the Constitution does much of the heavy lifting, because the state's duty to protect socio-economic rights[112] against powerful private actors translates into the regulation

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[107] United Nations, 'Guiding Principles on Business and Human Rights : Implementing the United Nations "Protect, Respect and Remedy" Framework (the Ruggie Principles)' (2011); Chirwa (n 1); S Deva and D Bilchitz (eds), *Human Rights Obligations of Business* (CUP 2013); B Meyersfeld, 'A Binding Instrument on Business and Human Rights' (2016) 1 Homa Publica 1.

[108] *Glenister v President of the Republic of South Africa* 2011 ZACC 6; *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* 2014 ZACC 30; *Ruta v Minister of Home Affairs* 2018 ZACC 52.

[109] David Bilchitz, *Fundamental Rights and the Legal Obligations of Business* (Cambridge University Press 2021).

[110] Pius Langa, 'Transformative Constitutionalism' (2006) 17 Stell LR 351, 352–353; Albertyn and Goldblatt (n 97).

[111] Liebenberg and Goldblatt (n 97); Sandra Liebenberg, 'Interpretation of Socio-Economic Rights' in Stu Woolman (ed), *Constitutional Law of South Africa* (Juta 2013); Christopher Mbazira, *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (PULP 2009).

[112] Liebenberg and Goldblatt (n 97).

of those private actors' conduct.[113] In some exceptional circumstances, courts have also recognised that private persons can bear obligations that can be construed as positive in nature, even though the courts have been anxious to delineate and limit the extent of these obligations,[114] and to insist that the state must remain the ultimate back-stop.[115] I save an examination of private socio-economic duties for future work. This thesis is instead focused on private anti-discrimination duties rather than duties in respect of socio-economic rights (though, of course, the former can and sometimes should have distributional consequences also).

1.6 RESEARCH METHODOLOGY

The methodology I use in this thesis is principally doctrinal and jurisprudential (examining normative and conceptual accounts). I also advance a number of proposals for adjudication in future cases. I did not undertake any qualitative socio-legal research in the form of questionnaires or interviews. Instead, my research required analysis of philosophy, legal theory, case law and legislation, aside from some archival work (relating to the processes leading to the promulgation of PEPUDA) which I accessed through parliamentary records as well as my supervisor's personal historical papers. In addition to case law and legislation, books, journal articles and doctoral theses inform my research.

Although my project is not primarily a comparative one, in chapter 4 I draw on lessons from comparative law. This is consonant with our own courts' readiness to engage with the approaches taken in other jurisdictions.[116] However, I have attempted to do so with proper caution: as Fredman points out, '[t]o be of deliberative value, foreign judgments must be read and understood in their legal and social context'.[117] I focused this comparative work on the following jurisdictions: the United States (with its significant Civil Rights Act as well as its use of varying standards of review);[118] Canada (which influenced South Africa's constitutional and legislative drafting and legal account of substantive equality);[119] the United Kingdom

[113] Liebenberg (n 111) 33–59.
[114] *Daniels v Scribante* (n 21); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 ZACC 33.
[115] *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* (n 14); *Fischer v Persons listed on Annexure X to the Notice of Motion* 2017 ZAWCHC 99.
[116] *H v Fetal Assessment Centre* 2014 ZACC 34.
[117] Sandra Fredman, 'Foreign Fads or Fashions? The Role of Comparativism in Human Rights Law' (2015) 64 International and Comparative Law Quarterly 631.
[118] Bhatia (n 94); Khaitan (n 9); Fredman, *Discrimination Law* (n 44).
[119] Sheppard (n 96); *Andrews v Law Society of British Columbia* 1989 1 SCR 143.

(which has recent jurisprudence on balancing rights and the possibility of a double proportionality analysis);[120] India (which, like South Africa, is a Global South democracy grappling with the paradox of a transformative constitution and ongoing extensive social inequality);[121] and Kenya (which, in its 2010 Constitution, explicitly provides for the possibility of the horizontal application of anti-discrimination duties and is an important comparator on the continent).[122]

As an additional methodological tool, across the thesis I employ a number of intuition pumps to delineate the boundaries of the anti-discrimination duty. An intuition pump is a thought experiment that is designed to test a reader's immediate or intuitive response to a normative problem.[123] Although this intuitive response cannot be conclusive in itself, it can be helpful for providing a sense of the conceptual and moral stakes. At various points in this thesis, I examine whether the following cases constitute or ought to constitute unfair (that is, unjustified and unlawful) discrimination in South African law and comparative jurisdictions:

1. **Case 1: the B&B owner:** A Black couple attempts to book a bed and breakfast for a weekend away. They receive an email in response, refusing their booking. The email cites a verse from the Bible and notifies them that the guest house does not accept Black guests.[124]
2. **Case 2: the cakeshop:** A cakeshop refuses to bake a wedding cake for a queer couple, citing the shop owner's rights to freedom of expression and freedom of religion.[125]
3. **Case 3: the testator:** A private will provides that only biological grandchildren, and not adopted grandchildren, will inherit the testator's property.[126]
4. **Case 4: the religious institution:** A woman who has trained as a religious leader is not recognised by and is denied access to a religious institution, on the grounds that the religion accepts only male religious leaders. The institution argues that this was

[120] Collins (n 73); Khaitan (n 9); *Bull v Hall* (n 11); *Lee v Ashers Bakery Company Ltd* (n 88).
[121] Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (HarperCollins India 2019); Thulasi K Raj, 'Private Discrimination, Public Service and the Constitution' (2022) 6 Indian Law Review 17.
[122] Victoria Miyandazi, *Equality in Kenya's 2010 Constitution* (Hart 2021); YK Sang, 'Horizontal Application of Constitutional Rights in Kenya: A Comparative Critique of the Emerging Jurisprudence' (2018) 26 African Journal of International and Comparative Law 1.
[123] Daniel Dennett, *Intuition Pumps and Other Tools for Thinking* (WW Norton & Company 2013).
[124] *iSimangaliso Wetland Park v Sodwana Bay Guest Lodge* (n 56).
[125] *Masterpiece Cakeshop v Colorado Civil Rights Commission* (n 11); *Lee v Ashers Bakery Company Ltd* (n 88), dealing with slightly different facts, where the cake in question was not for a wedding, but was commissioned by a gay activist to display a message saying 'support gay marriage'.
[126] *Wilkinson v Crawford NO* (n 24); *Pla and Puncernau v Andorra* [2004] ECHR 334.

warranted, as an exercise of the rights of freedom of association and freedom of religion.[127]

5. **Case 5: the Tinder user:** An individual using Tinder, an online dating app, routinely swipes right to match only with opposite-sex people of the same race and religion.

Some of these intuition pumps draw on existing case law, and three of them deal with the tension between the right not to be discriminated against unfairly, and freedom of religion and association rights. This is not a coincidence: a number of judgments across jurisdictions have grappled in different ways with this tension, which is an important case study for balancing competing rights and interests. I will revisit these intuition pumps at various points in the thesis, but particularly in chapters 4, 5 and 6 (which deal with the doctrinal approaches in domestic and comparative jurisdictions as well as the legal and normative boundaries of anti-discrimination law).

Because the thesis is both theoretical and doctrinal, it is important to examine the interaction between the underlying philosophical and normative conception(s) of equality and the public/private divide, relevant legislative provisions, and the reasoning in judgments that are context-specific. This thesis undertakes an analysis of jurisprudential or philosophical debates, and how these debates crystallise in relevant judgments, particularly those of the Constitutional Court. Admittedly, there are some limitations to this approach. It is not always possible or indeed desirable to distil a comprehensive and coherent unitary account of diverse legislative provisions and judgments. This is in part because the jurisprudence sometimes evades easy normative characterisation – or, at worst, is outright inconsistent or incoherent. Moreover, courts (especially the Constitutional Court) tend to favour outcomes-based casuistic analyses, which necessarily constrain the extent to which one can distil absolute principles that apply uniformly across all cases. Ultimately, any analysis must strike a reflective equilibrium between abstract normative foundations, on the one end, and concrete, descriptive legal principles and rules, on the other.[128] The methodological approach I take in this thesis, then, is an attempt to synthesise the normative foundations with what emerges from doctrine, and to propose a way forward for how doctrine should develop in future cases.

Finally, examining the extent to which private persons bear duties to realise the right to equality involves interrogating my own locus in society and how this has calibrated my lived

[127] *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being* (n 10).
[128] G Rutherglen, 'Concrete or Abstract Conceptions of Discrimination?' in D Hellman and S Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013).

experiences. I am a white South African, who grew up in the fledgling years of constitutional democracy and who has been – and continues to be – privileged in overlapping ways, most obviously (in a society that continues to be characterised by legacies of white supremacy and global capitalism) with respect to race and class. As a queer Jewish woman, I am interested in the tension that emerges between the right not to be discriminated against on grounds of sexual orientation, and the associational rights that vest in religious communities. I have attempted to undertake this project with curiosity and a keen awareness of the many ways in which my own life has been insulated from pernicious forms of disadvantage operating on an intersectional basis – and how this insulation, in turn, may result in gaps in my own understanding.

1.7 CHAPTER OUTLINES

The thesis is divided into seven chapters, as briefly outlined below.

Chapter 1: Introduction

This chapter lays out the background of the thesis, and its nature and scope. It provides an overview of the key questions and themes that are explored in the thesis, explains the significance of the research and its scope and limits, and sets out the research methodology.

Chapter 2: Horizontality

South Africa's transformative Constitution envisages that private persons bear constitutional obligations and so departs from the assumption that constitutions exclusively regulate state power. In this chapter, I examine how courts have approached horizontal application in light of section 8(2) of the Constitution, and attempt to provide an account that explains developing doctrine on this. The horizontality debate in South African jurisprudence turns on two principal enquiries: first, the scope for and justification of horizontality; and, second, the form of horizontal obligations. While private persons are no longer insulated from bearing constitutional obligations, their obligations are not equivalent to those of the state. The nature and extent of obligations borne by private persons is determined by a number of enquiries, many of which are context-sensitive and involve balancing competing rights and interests. Courts typically – but not exclusively – impose these obligations indirectly as mediated through a subsidiary rule, and recent jurisprudence on these questions has favoured a casuistic approach. These developments are informative for how courts treat horizontality in the more specific context of anti-discrimination law, in terms of the private duties established by section 9(4) of the Constitution and PEPUDA.

Chapter 3: Conceptions of (in)equality

Having discussed the courts' approaches to horizontality broadly, chapter 3 draws on theoretical accounts and jurisprudence to analyse varying conceptions of equality. South African law recognises substantive equality in the form of a multidimensional account that is necessarily grounded in context and history. In this chapter, I chart central fault lines in theorising equality or anti-discrimination law within the paradigm of substantive equality. These fault lines include the tension between a transcendental-ideal versus a contextual-historical approach; the imperatives of recognition and redistribution; and individual versus group-oriented accounts. I plot South Africa's approach along those fault lines by examining South African case law and academic writing. I argue that although the paradigm of substantive equality has primarily been developed with the state as duty-bearer, it is salient for private anti-discrimination law too. This is because substantive equality requires addressing systemic disadvantage as created and perpetuated by both public and private actors, and includes relational demands – i.e. that the relationships among individuals, as sites of (in)equality, must be addressed. For these reasons, substantive equality requires that private persons bear duties in respect of equality.

Chapter 4: Comparative approaches to anti-discrimination duties beyond the state

Chapter 4 draws on comparative law to examine some central questions regarding the imposition of anti-discrimination duties on private actors. In this chapter, I consider the approaches in five jurisdictions – the United States, Canada, the United Kingdom, India and Kenya. I discuss how these jurisdictions have answered three key questions: (i) Should anti-discrimination laws apply to all private relations (economic, social and even the intimately personal)? (ii) If there are limits on the scope of application of anti-discrimination laws, how should they be determined? (iii) What role does the public/private divide play in drawing these boundaries? I explore these questions by drawing on the intuition pumps, and show how these cases would be treated in each jurisdiction. I then argue that, aside from Kenya which parallels South Africa's approach in many ways, all the other jurisdictions considered employ a test of publicness to justify the imposition of anti-discrimination duties on private persons, which in turn instantiates a commitment to a form of the public/private divide. Conversely, there are compelling reasons for South Africa not to privilege publicness in determining its class of anti-discrimination duties, even if considerations of privacy and autonomy play a role in

determining the fairness of discrimination (including whether discrimination by a private person is ultimately justified).

Chapter 5: Private anti-discrimination duties in South African law: the doctrine

In contrast to most of the comparative jurisdictions discussed in chapter 4, South Africa has a much broader class of anti-discrimination duty-bearers. In chapter 5, I consider the horizontality of anti-discrimination duties in South African law and how a commitment to substantive equality translates to the private realm. I situate South Africa's approach by discussing the pre-constitutional position and the myriad ways in which the law enacted discrimination in public and private spheres. I turn to historical records to examine the drafting history of section 9 of the Constitution and PEPUDA, which were expressly crafted to regulate private relationships. I then analyse the developing jurisprudential lines on private anti-discrimination duties, returning to the intuition pumps to illustrate South Africa's doctrinal position. Next, I examine two specific doctrinal case studies that, I contend, exemplify key tensions in this area of law: (i) cases on the competing rights to freedom and religion and association, on the one hand, and between LGBTQI+ rights not to be discriminated against, on the other; and (ii) the regulation of private testamentary dispositions. Finally, I clarify the divergent approaches that can be distilled from the doctrine, arguing that these approaches have neglected the important role to be played by section 14 of PEPUDA and the fairness test it sets out in adjudicating private anti-discrimination duties.

Chapter 6: Towards a normative and adjudicative account

In chapter 6, I explore the overlapping normative considerations that underlie the legislative and doctrinal approach discussed in chapter 5 and chart a way forward for the adjudication of private anti-discrimination duties. In the first part of the chapter, I focus on the commitment to context-sensitive substantive equality that is informed by histories of subjugation, oppression and ongoing injustice, and to a form of relational egalitarianism. I then sketch an account that can help to chart the way for future jurisprudential development which captures these imperatives, as well as the normative and conceptual brakes that may apply to the anti-discrimination duty in practice, as the intuition pumps illustrate. In the second half of the chapter, I turn to section 14 of PEPUDA. I make proposals for how its fairness enquiry should be interpreted by courts in balancing these considerations, setting out the impact-oriented complainant-focused factors, on the one hand, and the justification-oriented respondent-

focused factors, on the other hand. I apply this enquiry to the five intuition pumps and consider the role that creative remedies can play in resolving difficult cases.

Chapter 7: Conclusion

In the final chapter, I summarise the arguments advanced in the preceding substantive chapters. I draw together the analysis of doctrine and theory traversed in these chapters to critically engage with South African jurisprudence, and to advance recommendations for how courts should determine whether, when, and to what extent private persons bear duties *vis-à-vis* the right to equality. Finally, I explore which questions remain open and discuss areas that merit further research.

CHAPTER 2

HORIZONTALITY

2.1 INTRODUCTION

What do we owe each other, as legal actors in a shared political community? In this chapter, I lay some groundwork for examining the specific case of horizontal duties in respect of the right to equality in South Africa by taking the enquiry a step back from private anti-discrimination duties, into horizontality more generally.[1] I understand horizontality to mean the operation of the Bill of Rights against private persons[2] by regulating the relationships among, and by imposing duties on, these actors. This is to be contrasted with vertical application, where rights operate to protect against the misuse of state power. Horizontal obligations can be given effect to either directly – that is, by relying on the right in the Bill of Rights itself – or indirectly, with the right mediated through more particularised rules (found in legislation, the common law or customary law).

Horizontality has been contested in South African jurisprudence on two main bases. First, the *scope of* and *justification for* horizontality is the subject of much debate. Several key questions arise here:

- Why should private persons be held to any constitutional duties, not least given that constitutions typically constrain state power?
- Does South Africa's history justify the imposition of these duties, and if so, do these duties simply mirror those borne by the state?
- Unlike the state, private persons have their own individual interests and goals to pursue and are rights-holders as well as potential duty-bearers. Given this, how should these countervailing interests be balanced?

[1] Some of this chapter draws on arguments that I advanced in Meghan Finn, 'Befriending the Bogeyman: Direct Horizontal Application in AB v Pridwin' (2020) 137 SALJ 591.

[2] I use the term 'private persons' rather than the term 'non-state actors' advisedly. Private persons include both natural persons (individual human beings) and juristic persons (including corporations, organisations and so on), whereas the term 'non-state actors' implies that the category is limited to corporate entities and tracks the debate in international law (rather than in domestic jurisdictions).

Second, the *form* of horizontal duties is another important area of enquiry, and one that has preoccupied South Africa's legal academy. Key questions here are:

- Should horizontal duties be imposed by direct reliance on the Constitution, or instead through subsidiary, more specific legal rules?
- How should the relevant constitutional provisions that deal with horizontal application be interpreted?

In this chapter, I examine how South African courts understand horizontality under the Constitution, and the limits of the courts' reasoning on horizontality. I focus my initial discussion on law-making through the courts rather than legislation, because this is the clearest locus of development, and because the reasoning in judgments can be tracked more easily. However, in practice, many of the duties to be borne by private persons are given expression in legislative provisions.

How to regulate private power was a key sticking point in South Africa's political transition, and the negotiating parties ultimately deferred this determination to the 1996 Constitution. As a result, unlike the Interim Constitution, the 1996 Constitution expressly provides for horizontal application; that the judiciary is also bound by the Bill of Rights; and that the Constitutional Court has the jurisdiction and mandate to develop the common law. A number of significant judgments have considered horizontality, but these judgments are sometimes inconsistent, and establishing a clear jurisprudential thread is difficult.

I begin by surveying the theoretical background to these key questions. I consider how rights give rise to duties, examine the public/private divide against traditional conceptions of constitutionalism, and argue that South Africa's Constitution demands a shift away from a traditional conception of the divide. Next, I consider horizontality under the Interim Constitution. I then turn to horizontality under the Constitution and academic debates regarding the merits of the form of horizontal application. I survey how the courts have treated horizontality in a number of key judgments. These judgments show a shift in courts' approaches to the question of horizontality, in favour of a casuistic enquiry that focuses on the identity and nature of the prospective duty-bearer. I briefly consider how courts should resolve clashes of rights in the context of horizontality, contrasting the limitations analysis under section 36 of the Constitution with a broader balancing enquiry. Finally, I contrast the broad horizontal application provision in section 8 of the Constitution with the particular horizontal anti-discrimination duty created by section 9(4) and given effect to in PEPUDA, arguing that

the jurisprudence developed in respect of section 8 shadows the emerging jurisprudence on private discrimination and PEPUDA.

2.2 THEORETICAL BACKGROUND

I begin by sketching out three key theoretical issues regarding horizontality. First, I look at the relationship between rights and duties to advance the argument that there is nothing inherent in the concept of a right that restricts the class of duty-bearers to the state. This leads on to the next theme: given that rights are not inherently held against the state, I explore the grounds for the orthodox conception of vertical application, and why that conception no longer dominates constitutional legal theory. Finally, I consider some principled objections to horizontal application and how those objections can be met.

2.2.1 Rights as grounds for duties

How does a right, held by an individual, translate into a duty that is to be imposed on a duty-bearer? And does the identity of the duty-bearer make a difference to the nature of the duty?

I take as my starting point Raz's prominent interests-based account of the relationship between rights and duties.[3] The account has been influential in providing a philosophical analysis of rights (whether moral or legal),[4] and defines a right as follows:

> X has a right if and only if X can have rights and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.[5]

Raz notes that 'there is no closed list of duties which correspond to the right'.[6] Instead, whether another is held to bear a duty will be determined by a combination of circumstance-specific reasons, themselves informed by individual interests (which may be peculiar to the parties or obtain in society more broadly). A change of circumstances, then, can lead to the imposition of new duties. On this account a right does not, without more, translate into a corresponding duty, nor is there a strict correlation between a right and a duty. Instead, a right can be the foundation of several duties, and even so none of those duties may necessarily be sufficient for

[3] Unfortunately, due to word count constraints, I do not delve into the rich literature on the nature of rights more generally, including whether they are immanent or constructed.
[4] FM Kamm, 'Rights' in Jules Coleman (ed), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2012); Leif Wenar, 'Rights' [2021] Stanford Encyclopedia of Philosophy <https://plato.stanford.edu/archives/spr2021/entries/rights/> accessed 14 February 2023; A Zanghellini, 'Raz on Rights: Human Rights, Fundamental Rights and Balancing' (2017) 30 Ratio Juris 25.
[5] Joseph Raz, *The Morality of Freedom* (OUP 1986) 166.
[6] ibid 171.

fully realising the right, because the duty may be outweighed by conflicting considerations in certain circumstances.[7]

In terms of this framework of rights, the duty-bearer need not necessarily be the state. The pertinent question instead is whether, under the circumstances, the reasons give rise to holding another – either the state or another actor – to a duty. Much of the work in ultimately establishing a duty is in teasing out the conflicting considerations, and the historically contingent circumstances that may warrant the creation of new duties.[8] Rights are thus dynamic in character.[9]

Raz's account is important for horizontality for three reasons. First, on this account there is nothing in principle that precludes private persons from being duty-bearers with respect to rights. This is because whether a right gives rise to a duty depends on circumstance-specific reasons. The account thus counteracts the assumption (discussed below) that rights only operate vertically, against the state. Instead, rights 'are articulated from the beneficiary of the right: the rights-bearer is the normative focus'.[10] Second, the account accommodates historical and societal contingencies in determining whether a right gives rise to a duty and so is important given the context of South Africa's Constitution, and the justification for horizontality (also discussed below). Third, unlike a Dworkinian account that takes rights to be 'trumps',[11] Raz's account of rights is consistent with a constitutional framework that incorporates balancing and proportionality. This is important in the context of horizontality, because typically there will be competing rights held by a private person even where there are reasons for believing that the person may bear putative duties towards another. As a result, a balancing enquiry between those reasons must take place, as I discuss later in this chapter.

2.2.2 Moving away from the orthodox understanding of constitutions

Under a classic liberal conception, a constitution serves to ensure that individuals remain free from interference by the state, and does not impose positive obligations on the state to realise those individual's rights, let alone impose constitutional obligations of any nature on private persons *inter se*. This is underpinned by the idea that individuals must be free to pursue their

[7] ibid. According to Raz, a right need not be limited to constitutional rights but can include broader legal and moral rights.
[8] ibid 184.
[9] ibid 185–186.
[10] David Bilchitz, *Fundamental Rights and the Legal Obligations of Business* (CUP 2021) 62.
[11] R Dworkin, *Taking Rights Seriously* (Harvard University Press 1977).

own conceptions of the good life, and the state should not interfere either in determining that conception or in its pursuit.[12]

If constitutions exclusively restrain vertical exercises of power, then rights can only be claimed against the state.[13] This idea is bound up with the state being the principal repository of power and authority over its subjects.[14] Linked to the idea of exclusive vertical application are two important concepts: first, the public/private divide; and, second, a presumption that private persons exercise equal power in their relations.

Classically, the public sphere is identified as the activities of and regulation by the nation state, while the private sphere is identified with both the free market and the home.[15] Feminist theorists have exposed the artificial divide between the public and private spheres.[16] According to this divide, the private sphere was immune from legal scrutiny. This had egregious consequences. For example, rape within marriage was not legally recognised, in part because the law's reach stopped before the threshold of a private home. The strict divide was also philosophically unsustainable, for in truth the law always purported to regulate aspects of the private sphere.[17] Therefore, the divide does not track how the law functions descriptively, and normatively is recruited to shield private power.[18]

Beyond a more orthodox approach that conceives of rights as only giving rise to negative duties is the recognition that the state 'is not merely [a] threat to freedom but also a potential source of freedom'.[19] This recognition is endorsed across a number of theories, including liberal egalitarianism (and its endorsement of distributive justice); transformative constitutionalism (with its contention that law be employed actively to change society); and even in a number of international law instruments (the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights are two clear examples). The recognition

[12] S Woolman, 'Chapter 31: Application' in S Woolman (ed), *Constitutional Law of South Africa* (Juta 2013).
[13] DM Chirwa, 'Towards Economic, Social and Cultural Rights Obligations of Non-State Actors in International and Domestic Law: A Critical Study of Emerging Norms' (PhD Thesis, University of Cape Town 2005) 37; Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 Yale Law Journal 443; Peter T Muchlinski, 'Human Rights and Multinationals: Is There a Problem?' (2001) 1 International Affairs 31.
[14] Ratner (n 13) 468–469.
[15] A Clapham, *Human Rights in the Private Sphere* (Clarendon Press 1993) 137; Muchlinski (n 13) 33.
[16] Carol Pateman, 'Feminist Critics of the Public/Private Dichotomy' in Carol Pateman (ed), *The Disorder of Women* (Stanford University Press 1989); Chirwa (n 13) 60.
[17] Nicola Lacey, 'Theory into Practice? Pornography and the Public/Private Dichotomy' (1993) 20 Journal of Law and Society 93; Susan Boyd, 'An Overview' in Susan Boyd (ed), *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (University of Toronto Press 1997).
[18] Liebenberg S and Kolabhai RL, 'Private Power, Socio-Economic Transformation and the Bill of Rights' in Z Boggenpoel (ed), *Law, Justice and Transformation* (LexisNexis 2022) 251.
[19] Alistair Price, 'The Influence of Human Rights on Private Common Law' (2012) 129 SALJ 330, 361.

of positive duties of the state thus evinces a global shift in how the regulatory state and constitutionalism are conceived: state power is not only to be restrained, but must be exercised in a way that fulfils subjects' rights.[20]

This extension alone does not address duties to be borne by private persons, and fails to recognise the extent to which power is exercised outside of the state. Power is exercised by a person or entity when it has the ability to control limited resources or another's actions, or exercise authority over another; power is 'the ability to exclude another against their choice from valued resources'.[21] Such power can be exercised by private persons, as well as the state. As Clapham points out, 'the emergence of new fragmented centres of power … has meant that the individual now perceives authority, repression and alienation in a variety of new bodies'.[22] With the rise of globalisation and multinational corporations comes a growing recognition that private persons can exercise extensive power over persons and the exercise of their rights, and also author human rights abuses.[23]

Given that the law is not neutral with respect to relationships among individuals, there is reason to be suspicious of both the presumption that private persons relate to each other with parity of power, and the presumption that the market in which some of the relationships take place is indeed free. Flowing from this, the orthodox conclusion that the law's role in regulating that relationship should be strict non-interference seems unstable.

Chirwa's influential work establishes a basis for the imposition of duties on non-state actors for realising human rights, in both international and domestic law.[24] His argument proceeds from the following premises: first, a strict public/private divide – which supports insulating non-state actors from obligations – is unjustified, as feminist and socio-historical critiques have established. Second, non-state actors increasingly wield significant power, particularly given the privatisation of basic services, and so are in fact involved in providing socio-economic rights. Third, the reductive distinction between negative and positive obligations does not withstand scrutiny.[25] Fourth, there is precedent for applying human rights obligations to non-

[20] Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (McGill-Queen's University Press 2010) 7.
[21] Michael Dafel, 'The Constitutional Rebuilding of South African Private Law' (DPhil Thesis, University of Cambridge 2018) 126.
[22] Clapham (n 15) 137.
[23] Bilchitz (n 10); S Deva and D Bilchitz (eds), *Human Rights Obligations of Business* (CUP 2013); Ratner (n 13).
[24] Chirwa (n 13).
[25] Chirwa draws on H Shue *Subsistence, Affluence and US Foreign Policy* (2nd edn, Princeton University Press 1996) 37; and A Eide 'Realisation of Social and Economic Rights: A Minimum Threshold Approach' (1989) 10 (1–2) *Human Rights Law Journal* 35 at 37.

state actors in other jurisdictions.[26] Chirwa suggests that the following factors are pertinent for determining whether a non-state actor bears obligations: the language used in defining the right; the content of the right itself; whether the right is capable of being violated by non-state actors; the circumstances of the case – including whether there is a nexus or proximity between the non-state actor and the rights-holder; and whether the non-state actor poses a risk to the exercise of socio-economic rights.[27] Some of these factors – specifically, the potential for non-state actors to invade that right, and the broader nature of the right – are now reflected in case law,[28] although the factors do not expressly include countervailing considerations that may militate against the ultimate imposition of a duty.

2.2.3 Objections to horizontality

Horizontality has been resisted in political and legal theory because, unlike the state's vertical relationship to its subjects, private persons are presumed to relate to each other on an equal basis. This presumption of parities of power rests on a theory of formal equality before the law, which warrants equal treatment by the law.[29] In private law, this is expressed also in the idea of transactional equality – 'that, since the plaintiff and the defendant have equal status in their relationship, the decision between them cannot be made on the basis of considerations that reflect the normative position of only one of them'.[30]

In any event, that presumption is outdated – 'individuals live in a "complex web of relations" and … the private sphere is not really composed of free and equal individuals'.[31] Private persons can wield great power and can profoundly impair the realisation of others' rights, including by influencing others' access to goods and services. In contexts of deep structural inequality, certain private persons are in entrenched positions of power that, if unregulated, encourage exploitation and the further entrenchment of extant inequality. Consider the need

[26] Germany imposes these obligations indirectly, through the doctrine of Drittwirkung – *Case 7 BVerfGE* 1958; the Irish Supreme Court has construed the duty to protect (enshrined in the Constitution) broadly, to require the judiciary to find non-state actors accountable for particular rights (*Meskell v C.I.É.* [1973] 1 IR 121); India recognises that private actors have obligations with respect to primary education (*Krishnan v State and Andhra Pradesh* (1993) 4 LRC 231 at 301 and *Society for Un-aided Private Schools, Rajasthan (in Writ Petition (Civil)* 95 of 2010), where the Supreme Court upheld the legislative imposition of a 25% legislative quota requiring private schools to admit disadvantaged students); and the Kenyan Constitution expressly provides for the horizontal application of rights.
[27] Chirwa (n 13) 377, 465–468.
[28] See discussion of *Daniels v Scribante* 2017 ZACC 13 in 2.5.2 below.
[29] D Friedmann and D Barak-Erez, 'Introduction' in D Friedmann and D Barak-Erez (eds), *Human Rights in Private Law* (Hart 2003) 1.
[30] LE Weinrib and EJ Weinrib, 'Constitutional Values and Private Law in Canada' in D Friedmann and D Barak-Erez (eds), *Human Rights in Private Law* (Hart 2003) 58.
[31] Chirwa (n 13) 79.

for regulation regarding, for example, pharmaceutical corporations' ability to set high prices for lifesaving medication; the power of mortgaging banks to repossess homes on the basis of the non-payment of trifling amounts; mining companies' extraction of natural resources on ecologically sensitive land that has indigenous and cultural significance; and holiday resorts designating certain swimming pools as available for white guests only.

Some theorists acknowledge the need for some regulation but argue that, at most, this justifies requiring those entities not to infringe others' rights but does not necessarily require that entities take positive steps to realise others' rights.[32] Their arguments are typically animated by several concerns which are related to the nature of a private person, including feasibility; unjust distribution of burdens; and autonomy.

The feasibility worry is that, unlike the state, a private person may not have the means (including the financial and political power and resources), capacity or expertise to realise another's right.[33] Given this, it is impermissible to place a burden on a private person that is analogous to that borne by the state.

The unjust distribution of burdens concern is that, in the absence of a governing legislative framework, imposing duties on private persons in casuistic litigation is ad hoc.[34] The argument here is that if the right in question is socio-economic, imposing the duty may achieve a form of justice between the private parties in question, but does not address broader, social patterns of distribution. This worry can be raised even by a theorist who is committed in principle to shifting society's distribution of goods. In addition, some (such as Weinrib) argue that it is impermissible to employ the private law to advance any goals of redistributive equality. Instead, private law goals typically embody corrective, rather than distributive, justice.[35] While corrective justice proceeds on the assumption that the existing distribution of resources is fair (and that law's role is to restore the status quo between the parties), distributive justice attempts to alter the allocation of resources.

It may be true, generally, that the state is best suited to put in place measures, including radical ones, for achieving distributive justice. This alone does not necessarily mean that the state is constrained from regulating the private sphere or that there are no distributive justice claims

[32] Chirwa (n 13).
[33] ibid 411; Dafel (n 21).
[34] Edwin Cameron and Leo Boonzaier, 'Venturing beyond Formalism: The Constitutional Court of South Africa's Equality Jurisprudence' (2020) 84 Rabel Journal of Comparative and International Private Law 786.
[35] E Weinrib, 'Corrective Justice in a Nutshell' (2002) 52 University of Toronto Law Journal 349; Weinrib and Weinrib (n 30).

among private persons. Madlanga, writing extrajudicially, makes the point that because the Constitution is transformative, private interactions cannot be left undisturbed as this would preserve 'a perverse status quo which entrenches a social and economic system that privileges the haves, mainly white people in the South African context'.[36] The pattern of distribution of goods among private persons is not neutral, and the presumption that private persons exercise equal power (which sustained the premise that constitutions operate only vertically) must flounder. The demand for horizontality, then, cannot be understood as unmoored either from the Constitution's transformative mandate or from persistent and stark racialised inequality which can result in affecting access to goods and services by others.

Finally, horizontality is seen as a threat to the value of autonomy that is sometimes taken to be at the core of private law.[37] Autonomy-based accounts of private law are understood to endorse the idea of self-authorship: that an individual is the author of her legal obligations.[38] Some theorists extrapolate from this that autonomy requires freedom from any interference.[39] The line of argument is that if the law imposes obligations on private persons that they have not voluntarily assumed themselves, this would undermine their autonomy (and so too undermine the *grundnorm* of private law). Gerstenberg summarises the concerns as follows:

> The extension of fundamental rights between and among private (non-state) actors would thus: (i) pose a threat to private law's libertarian core of private autonomy (by placing private actors, by way of judicial fiat, under the same duties as public bodies acting in the common interest); and at the same time, (ii) result (if carried to its logical endpoint) in a sweeping judicial usurpation of legislative prerogatives in determining the boundaries of spheres of private autonomy, thereby displacing or even overriding the policy choices of statutory legislator; and (iii) shift authority to interpret private law's core concepts … to constitutional (and generalist) courts, and thereby render private law redundant and superfluous.[40]

However, autonomy is a contested (and relatively open) notion, and it does not necessarily follow that autonomy requires non-interference both within private law and more generally. Raz, who famously advances an autonomy-based account of political and legal philosophy,

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[36] Mbuyiseli Madlanga, 'The Human Rights Duties of Companies and Other Private Actors in South Africa' (2018) 29 Stell LR 359, 376.
[37] Oliver Gerstenberg, 'Private Law and the New European Constitutional Settlement' (2004) 10 European Law Journal 766.
[38] D Kimel, 'Promise, Contract, Personal Autonomy and the Freedom to Change One's Mind' (2013) 19 Oxford Legal Studies Research Paper 1.
[39] R Bagshaw, 'Tort Design and Human Rights Thinking' in D Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (CUP 2011); M Kumm, VC Jackson and M Tushnet, 'Is the Structure of Human Rights Practice Defensible?' in VC Jackson and M Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (CUP 2017); Hugh Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law' in Hans Micklitz (ed), *Constitutionalization of European Private Law* (OUP 2014) (discussing but not endorsing these objections).
[40] Gerstenberg (n 37) 769.

argues that autonomy requires both negative and positive freedom, with positive freedom being 'enhanced by whatever enhances one's ability to lead an autonomous life'[41] – even if this entails regulation (rather than strict non-interference). Autonomy need not be understood restrictively to simply require absence from interference. On the contrary, such a conception of autonomy is thin, and presumes that individuals operate in vacuums and are unencumbered by the kinds of power that other individuals exercise, which in turn may facilitate or hamper others' autonomy.[42] A political community is not simply made up of atomistic individuals who interact with each other based on equal power. Instead, we are constituted at least in part through relationships,[43] and the extant power structures that calibrate society. Because of this, private persons and not only the state can wield extensive power – both to enhance or curtail others' autonomy.

The autonomy objection also plays out in South African doctrine, as I discuss later in this chapter. I now turn to discuss the evolution of horizontality under South Africa's Interim and 1996 Constitutions.

2.3 HORIZONTALITY UNDER THE INTERIM CONSTITUTION

Whether, and to what extent, private persons should bear constitutional rights was a hotly debated topic in the constitutional negotiation and drafting processes.[44]

Chirwa argues that the recognition of human rights in South Africa must be situated in the context of struggle, subjugation and insurgence – and so must protect against all abuses of power, not only power exercised by the state.[45] Colonialism was driven not only by empire-seeking nation states but also by companies such as the Dutch East India Company and the British South Africa Company, which 'became the principal agents for the economic exploitation of the colonial territory'.[46] Slavery, too, 'represented, in a sense, the worst form of private enterprise abuse of human rights'.[47] Both before and during apartheid, industry was imbricated with government, and private corporations reaped the benefits of state-sanctioned

[41] Raz (n 5) 407–409.
[42] Raz (n 5); Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (OUP 2011).
[43] Nedelsky (n 42).
[44] Dafel (n 21) 32.
[45] Chirwa (n 13) 65–68.
[46] Ratner (n 13) 453.
[47] ibid 465.

oppression.[48] For decades, white businesses were assisted and enabled by the state, while Black people were barred – *de jure* and *de facto* – from equal participation in many political, economic and social structures. Wealthy white businesses and individuals were able to exploit 'cheap' Black labour.[49] The private sphere was not only racially calibrated, but also operated on stark and unequal, intersecting lines of gender and class. Especially in a South African context, the premise that private parties operate, or historically operated, in a neutral space (that must accordingly be protected from intrusion by the state) is false.[50]

2.3.1 Conception of horizontality in the Interim Constitution

Whether the Interim Constitution should apply horizontally was contentious in the negotiation process.[51] Spitz and Chaskalson note that the negotiating process for the Interim Constitution must be understood as a political power struggle within the Multi-Party Negotiating Forum (with the African National Congress and the National Party as the principal negotiators). This struggle played out in determining whether and how rights – and their scope and application – were included in the text.[52] The Interim Constitution was always conceived of as a transitional document, and this, in turn, meant that certain provisions were not included, based on political expediency or because there was insufficient opportunity to consult with party constituents.[53]

This was true of how the Bill of Rights would apply, with parties diverging on whether the Interim Constitution should only be enforceable against the state or more broadly in respect of private persons.[54] Arguments against horizontal application were principally either that a Bill of Rights should constrain the state only (as advanced by the National Party constituent) or that it would engender uncertainty, and leave the common law's status precarious (as advanced by then-Chief Justice Corbett).[55] Conversely, the argument in favour of horizontality was principally 'that without horizontality, corporations and companies would be able to "privatise" discrimination by keeping it beyond the state'.[56]

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[48] T Bell and D Ntsebeza, *Unfinished Business: South Africa, Apartheid and Truth* (Verso 2003); Beth S Lyons, 'Getting to Accountability: Business, Apartheid and Human Rights' (1999) 17 Netherlands Quarterly of Human Rights 135.
[49] Dafel (n 21) 25.
[50] Woolman, 'Chapter 31: Application' (n 12) 31-5.
[51] Dafel (n 21) 35–40.
[52] R Spitz and M Chaskalson, *The Politics of Transition: The Hidden History of South Africa's Negotiated Settlement* (Hart 2000) 256–258.
[53] ibid 268.
[54] ibid.
[55] ibid 273–274.
[56] ibid 268.

Indeed, the question of horizontality was intimately bound up with the scope of the equality clause, and whether private entities as well as the state are restrained from discriminating against others unfairly. Although ultimately the Interim Constitution was drafted without any general provision governing horizontal application, its limitations clause in section 33(4) tackled the more particular question of discrimination by private entities obliquely:

> This Chapter shall not preclude measures designed to prohibit unfair discrimination by bodies and persons other than those bound in terms of section 7(1) [the application section].

This provision effectively permitted (but did not require) legislative regulation of unfair discrimination by private persons.[57] Even so, this empowerment was not purely horizontal, for it effectively empowered the state (in exercising vertical power) to regulate private persons.

This provision only applied to unfair discrimination. Because the issue of horizontal application more generally was so politically fraught (with even the African National Congress tempering its original position in favour of horizontality[58]), it was ultimately left to a specialised committee to hammer out the Interim Constitution's application clause.[59] And here,

> [u]ltimately, the fact that the Bill of Rights was to be of short-term duration probably swung the outcome in favour of verticality: the practical arguments for legal certainty during the transition outweighed the desirability of exploring academic possibilities surrounding horizontal application.[60]

Section 7 of the Interim Constitution thus provided that the Bill of Rights 'shall bind all legislative and executive organs of state at all levels of government'. Notably, the provision omitted the judiciary as one of the branches of government that was bound by the Bill of Rights. This omission was significant: in other jurisdictions courts had found that because the judiciary is bound by fundamental rights, it is obliged to apply those rights to all disputes (including those between private persons).[61] This roundabout route for horizontality was seemingly closed off for South African courts under the Interim Constitution. This was partly because the judiciary (at the time almost exclusively peopled by white men) was viewed with suspicion as an extension and enabler of the apartheid state, not least because many judges had purported to apply pernicious apartheid laws 'neutrally'. As a result, there were reservations about

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[57] Dafel (n 21) 42.
[58] ibid 35.
[59] Spitz and Chaskalson (n 52) 269–272.
[60] ibid 279.
[61] *Shelley v Kraemer* 334 US 1 1948; Ratner (n 13); S Banda, 'Taking Indirect Horizontality Seriously in Ireland: A Time to Magnify the Nuance' (2009) 31 Dublin University Law Journal 263; Stephen Ellmann, 'A Constitutional Confluence: American "State Action" Law and the Application of South Africa's Socioeconomic Rights Guarantees to Private Actors' (2001) 45 New York Law School Law Review 21.

granting unfettered powers to the courts before their composition changed.[62] In the end, however, 'by itself the idea that courts are bound by human rights resolves very little'.[63]

In addition to sections 7 and 33(4), the other relevant provision in the Interim Constitution was section 35(3), which required a court 'to have regard to the spirit, purport and objects of Chapter 3 in the interpretation of any law and the application and development of the common law and customary law'. Section 35(3) of the Interim Constitution is the precursor to section 39(2) of the 1996 Constitution, though it is formulated in weaker terms ('have regard to' rather than 'promote') and does not include the interpretation of legislation within its ambit. In effect, this meant that relationships that are governed by private law could still be governed by the Bill of Rights, albeit indirectly.[64]

Save for particular rights (such as the section 8(2) right not to be discriminated against by any persons), the Interim Constitution was silent on any other mechanisms for horizontality and contained no equivalent to section 8(2) of the 1996 Constitution.

The Constitutional Court has delivered only one judgment expressly on horizontality under the Interim Constitution: *Du Plessis v De Klerk.*[65] *Pretoria News* had published a series of articles about the supply by air of arms to the Angolan rebel movement, UNITA. The respondents sued for injury to reputation. The newspaper raised as part of its defence that the right to freedom of speech and expression, including freedom of the press in the Interim Constitution, rendered the publication of the articles lawful. In response, the respondents contended that the right did not apply to the dispute, for the Constitution has no horizontal application.

The Constitutional Court was thus called on to decide whether fundamental rights in the Interim Constitution apply to disputes between private persons and, if so, how. A majority of the Court held that the Bill of Rights is not directly applicable to private persons, but allowed scope for horizontality in the form of indirect application.[66] The Court was sharply divided in its reasoning. Kentridge AJ's majority judgment found that the Bill of Rights could not apply directly to disputes between private persons.[67] This does not mean that private relationships are legally unregulated, or that exercises of power by private persons are insulated from legal scrutiny. Instead, the common law governing those relationships could be developed. Prior to

[62] Dafel (n 21) 37.
[63] Price (n 19) 340.
[64] Spitz and Chaskalson (n 52) 276.
[65] *Du Plessis v De Klerk* 1996 ZACC 10.
[66] ibid.
[67] ibid [62].

this judgment, a number of High Court judgments had been divided on the question.[68] The Constitutional Court itself did not speak with a unified voice at all – Kriegler J's dissent remains forceful today. As his blistering judgment argues, the objection is partially based on 'an egregious caricature … that so-called horizontality will result in an Orwellian society in which the all-powerful state will control all private relationships. The tentacles of government will, so it is said, reach into the marketplace, the home, the very bedroom.'[69] Much of the majority's reasoning turned on preserving the distinct jurisdictions of the Constitutional Court and the then-Appellate Division: ultimately, Kentridge AJ held that the development of the common law falls within the Appellate Division's province. This jurisdictional distinction is no longer apt under the 1996 Constitution.

Du Plessis v De Klerk had an initially uneasy influence on the conception and contours of horizontal application.[70] It was interpreted to endorse verticality – that the route to regulation of private spheres had to be through state action. The judgment's ultimate influence was attenuated by the significant textual differences between the Interim Constitution and the 1996 Constitution, with the latter expressly providing for horizontal application. The central kernel, however, is that under South Africa's constitutional order, horizontal application can operate to alter the obligations of private persons even if this is principally or exclusively through indirect application.

2.4 HORIZONTALITY UNDER THE 1996 CONSTITUTION

The question of horizontality was less divisive in the negotiation of the 1996 Constitution – not least because there was a shift in the power dynamics of the Constitutional Assembly, a democratically elected body to approve the 1996 Constitution, and a move away from transitional arrangements towards long-term norm development.[71] With its democratic mandate, the African National Congress was no longer constrained by the need to compromise, and returned to its prior commitment to allowing for fundamental rights to permeate all law, including private law.[72]

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[68] *Mandela v Falati* 1995 (1) SA 251 (W); *Gardener v Whitaker* 1995 (2) SA 672 (E); *Holomisa v Argus Newspapers* 1996 (2) SA 588 (W).
[69] *Du Plessis v De Klerk* (n 65) [120].
[70] Chris Sprigman and Michael Osborne, 'Du Plessis Is *Not* Dead: South Africa's 1996 Constitution and the Application of the Bill of Rights to Private Disputes' (1999) 15 SAJHR 25; Woolman, 'Chapter 31: Application' (n 12) 31-2 onwards.
[71] Dafel (n 21) 48–49.
[72] ibid 49.

As Friedman notes, the Constitution impels South Africa's rebuilding, which requires that 'the pervasive injustices of apartheid not only have to be eliminated from public life, but also have to be rooted out of the private sphere'.[73] Because of gross inequality and the concentration of power, resources and wealth in the private sector, horizontality is an important tool for building this more just society. Accordingly, '[h]orizontality was introduced to secure the capacity of the state to implement an aggressive social reform policy'.[74] As the judiciary was not yet transformed and given that (with important exceptions) apartheid-era judges had tended to reinforce rather than challenge evil legal rules,[75] legislation was intended to be the operative mechanism of social reform policy. There are some important examples where the state has legislated private actors in this way, such as the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, the Rental Housing Act 50 of 1999, the Medical Schemes Act 131 of 1998, the National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2008, to name a few. Although this legislation is not necessarily understood as having horizontal or egalitarian flavours, it can certainly be viewed through this lens.[76]

Nevertheless, even though there was greater agreement among the negotiating parties that the application provision of the 1996 Constitution should be wider than that of the Interim Constitution, there was substantial disagreement on the details.[77] The Panel of Constitutional Experts (an advisory body within the drafting process) counselled the parties to view horizontality on a spectrum, and to draft the horizontality clause to incorporate flexibility and so allow for a context-specific inquiry.[78]

Section 8 of the 1996 Constitution, headed 'Application', provides:

> (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
>
> (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
>
> (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—

[73] Nick Friedman, 'The South African Common Law and the Constitution: Revisiting Horizontality' (2014) 30 SAJHR 63, 67.
[74] Dafel (n 21) 60.
[75] C Forsyth, 'Judiciary Under Apartheid' in M Olivier and C Hoexter (eds), *The Judiciary in South Africa* (Juta 2014).
[76] Sandra Liebenberg, 'Interpretation of Socio-Economic Rights' in S Woolman (ed), *Constitutional Law of South Africa* (Juta 2013) 33–59.
[77] Dafel (n 21) 52.
[78] ibid 53.

> (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
>
> (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).
>
> (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

Most significant is section 8(2), intended to enable protection against private abuses of power.[79] As Meyersfeld notes, section 8(2) 'is a gold-standard constitutional provision to address corporate accountability for human rights violations'.[80] Corporations are a central target of the provision – they frequently occupy positions of power relative to natural persons, and considerations of autonomy and resource constraints are either inapplicable or less apt when determining the duties they owe to others. But they are not the only target of the provision, which applies in principle to all private persons. While the provision authorises the application of rights to private persons, it does not give any guidance as to *whether*, or *how*, a particular right would be binding.[81] Indeed, 'the main determinate as to whether the rights apply is their applicability and this is clearly circular'.[82] Notwithstanding its 'studied ambiguity',[83] this provision provides a textual indication that horizontality is both permitted and, in some instances, required[84] by the 1996 Constitution.

Section 8 of the Constitution works in conjunction with section 39(2), which provides that:

> [w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

The relationship between sections 8 and 39(2) is deeply contested in South Africa's legal academy.

2.4.1 Scope and justification versus form

The textual shift between the application provisions of the Interim Constitution and the 1996 Constitution heralded an extended debate within the South African legal academy that turned

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[79] Ellmann (n 61) 23.
[80] Bonita Meyersfeld, 'The South African Constitution and the Human-Rights Obligations of Juristic Persons' (2020) 137 SALJ 439, 440.
[81] Dafel (n 21) 86.
[82] D Bilchitz, 'Corporate Law and the Constitution: Towards Binding Human Rights Responsibilities for Corporations' (2008) 125 SALJ 754, 775.
[83] Ellmann (n 61) 23.
[84] ibid 35.

on *how* horizontality would be expressed (the form question) but devoted less attention to *whether* or *why* horizontal obligations should be imposed (the scope and justification questions). As Bhana observes,[85] initial commentary principally turned on which form of horizontal application is most appropriate.[86]

To a certain extent, the initial line of case law also turned more on the form question than the scope and justification questions. Rather than section 8 governing horizontality in general (in both direct and indirect forms), many commentators have understood horizontality in a bifurcated way, postulating that section 8(2) governs *direct* application, while section 39(2) governs *indirect* application,[87] with two provisions operating mutually exclusively.[88] This view has been perpetuated by the courts.[89] Direct and indirect application are typically distinguished on the basis that the former applies to private conduct, while the latter to the legal rules that regulate that conduct.[90] In the case of indirect application, the cause of action is sourced in the subordinate or subsidiary legal rule (often, in private law) which must be consistent with the Constitution, rather than in the Constitution itself.[91]

Friedman aptly calls this misunderstanding the dichotomy thesis, and trenchantly criticises it as being premised on a fundamental misreading of the provisions.[92] Sections 8 and 39(2) are not mutually exclusive but must work in concert. Contrary to the dominant understanding in South Africa's legal academy[93] (and reflected in recent jurisprudence[94]), section 39(2) is not the central mechanism for horizontal application (albeit in indirect forms). Instead, section 8 governs both direct and indirect horizontal application, while section 39(2) is targeted at a

[85] Deeksha Bhana, 'The Horizontal Application of the Bill of Rights: A Reconciliation of Sections 8 and 39 of the Constitution' (2013) 29 SAJHR 351.
[86] Woolman, 'Chapter 31: Application' (n 12); I Currie and J de Waal, *Bill of Rights Handbook* (Juta 2013); Sprigman and Osborne (n 70); Johan van der Walt, 'Blixen's Difference: Horizontal Application of Fundamental Rights and the Resistance to Neo-Colonialism' (2003) 2 TSAR 311.
[87] Woolman, 'Chapter 31: Application' (n 12). See the extensive discussion in the appendix to this chapter.
[88] Stu Woolman, 'The Amazing, Vanishing Bill of Rights' 21; Currie and De Waal (n 86).
[89] *Barkhuizen v Napier* 2007 ZACC 5; *AB v Pridwin Preparatory School* 2020 ZACC 12; *Beadica 231 CC v Trustees for the time being of the Oregon Trust* 2020 ZACC 13.
[90] Alison Young, 'Mapping Horizontality' in D Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (CUP 2011).
[91] Dafel (n 21) 76.
[92] Friedman (n 73).
[93] Woolman, 'Chapter 31: Application' (n 12).
[94] *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies intervening)* 2001 ZACC 22 [56]; *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being* 2015 ZACC 35 [77]; *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd* 2015 ZACC 34; *H v Fetal Assessment Centre* 2014 ZACC 34 [47].

different piece of the constitutional framework: it sets out courts' mandatory duty to 'build a coherent constitutional jurisprudence'.[95]

Section 8 provides the impetus and justificatory basis for a more discrete legal rule. This is true of legislation as well as the common law and customary law. In the context of legislation, section 8(2) operates as a shield, justifying legislative provisions that restrict some private persons' rights in favour of realising others' rights – and safeguarding the legislature's law-making authority from constitutional challenge.[96] To put this more concretely, if the legislature passes a provision that imposes a horizontal obligation on a private person with respect to another private person and that provision is challenged, the provision could be partially defended on the basis that section 8(2) mandates, in certain instances, the imposition of such obligations.[97] As far as the common law and customary law are concerned, section 8(3) impels legal development where specific rules fall short of what the Constitution mandates. The effect of section 39(2) is that whenever a court interprets legislation, or develops the common law or customary law, the court must do so in accordance with the Bill of Rights.[98] Section 8, then, is about horizontality. Section 39(2) is about the courts' role.

Bhana contends that the horizontality debate, which has largely turned on the *form* question – i.e. whether direct or indirect application is preferable – is misplaced. Instead, she suggests that courts' enquiry should be about the *scope* of application of the Bill of Rights (that is, the content of the Bill of Rights that applies to the law), rather than the form of that application.[99] In practice, both direct and indirect application 'eventually funnel towards the same dilemma [how to resolve conflicting rights] without providing a solution'.[100]

Both the scope and the form of application are important enquiries. It is true that academic commentary has at times overly focused on the latter, to the exclusion of the former. The scope of horizontality is informed by the normative and jurisprudential backdrop (sketched earlier in this chapter), as well as by context- and right-specific enquiries. In my later chapters, I will

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[95] Friedman (n 73) 77.
[96] Dafel (n 21) 59. See discussion above in 2.4 for some examples of statutes that impose horizontal obligations.
[97] To my knowledge, section 8 has not been relied on expressly by a court when applying a limitations analysis to determine the constitutionality of impugned legislation. However, in *Jaftha v Schoeman, Van Rooyen v Stoltz* 2004 ZACC 25 the Court declared unconstitutional a legislative provision which entitled a creditor to initiate a sale in execution, potentially rendering a person homeless, on the basis of a trivial debt. Although the case did not expressly draw on section 8, in effect it affirms that debtors bear horizontal obligations in respect of the right to housing in section 26 of the Constitution.
[98] *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews* 2009 ZACC 6 [215] (O'Regan ADCJ's judgment).
[99] Bhana (n 85).
[100] Dafel (n 21) 73.

specifically turn to why South Africa's legal, political and moral order impels the horizontal application of the right to equality in particular. But that does not mean that the form of application is obsolete: we care about both the normative underpinnings of legal rules (which informs the scope question), and how those legal rules operate in practice.

On the form enquiry, are both direct and indirect application envisaged by the Constitution and, if so, is there any reason to generally prefer one over the other? Cheadle and Davis argue that private conduct will always be tested against a legal rule (sourced in legislation, the common law or customary law), and so section 8(2) can only ever give rise to indirect horizontal duties.[101] On this view, direct application is necessarily precluded. This somewhat overstates the position. Because of the expansive remedial powers in sections 38 and 172 of the Constitution (which, in other contexts, have underpinned awards of constitutional damages[102]) a court does have residual powers to apply rights directly in the private sphere, but should do so only exceptionally.[103]

This is because indirect application will almost always be able to provide a constitutional solution.[104] Indirect application is simply an instantiation of the doctrine of subsidiarity: 'the more particular norms must first be exhausted before resort is had to the more general norms'.[105] The Constitutional Court has not only accepted this doctrine, but insisted on it in various contexts.[106] The doctrine of subsidiarity requires that more specific legal rules first apply – whether these rules are sourced in legislation, the common law or customary law. It is also important for anti-discrimination duties, which have their constitutional source in section 9, but are given more concrete legislative effect in PEPUDA.

Indirect application does not commit any court to conservativism, as Chirwa notes.[107] On the contrary, the Constitution envisages the 'rebuilding' of legal rules which are constitutionally

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[101] H Cheadle and DM Davis, 'The Application of the 1996 Constitution in the Private Sphere' (1997) 13 SAJHR 44.
[102] *MEC for the Department of Welfare v Kate* 2006 ZASCA 49; *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 ZASCA 70.
[103] See *Ramakatsa v Magashule* 2012 ZACC 31; Michael Dafel, 'The Directly Enforceable Constitution: Political Parties and the Horizontal Application of the Bill of Rights' (2015) 31 SAJHR 19.
[104] See, however, Bilchitz (n 10) 16, who argues that indirect application always collapses into a form of direct application.
[105] M Murcott and W van der Westhuizen, 'The Ebb and Flow of the Application of the Principle of Subsidiarity – Critical Reflections on Motau and My Vote Counts' (2018) 3 CCR 25, 52.
[106] *My Vote Counts NPC v Speaker of the National Assembly* 2015 ZACC 31; *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being* (n 94).
[107] Danwood Mzikenge Chirwa, 'The Horizontal Application of Constitutional Rights in a Comparative Perspective' (2006) 9 LDD 21, 46.

deficient[108] – indirect application simply provides a tool for that. Some may worry that indirect application, which targets a legal rule, is more incremental than direct application (operating on the right itself). But this worry is counterbalanced by how the Court tends to reason horizontality cases: as casuistic and context-sensitive. Given this, there is reason to think that, in practice, indirect application will often have more far-reaching effects. Importantly too, the worry is counterbalanced by the Constitution's supremacy and the requirement that constitutional values inform and influence subsidiary legal rules. First resort to direct horizontality (rather than reliance on a subsidiary legal rule) paradoxically undermines the important idea of constitutional diffusion across all areas of law. Instead, '[i]ndirect horizontal application can and should be understood and employed as a hermeneutic device as progressive as any possible interpretation of direct horizontal application'.[109]

2.5 HORIZONTALITY IN CASE LAW

I now turn to examine how the courts have treated horizontality in several significant judgments.

2.5.1 The initial trio

The initial trio of judgments decided under the 1996 Constitution, *Khumalo v Holomisa*, *Barkhuizen* and *Juma Musjid* interpreted section 8 'in a way that minimizes direct horizontal effect',[110] preferring instead indirect application as mediated through more concrete legal rules. Another key theme, most strongly stated in *Juma Musjid*, is a concern that the imposition of horizontal duties should not restrict a private person's autonomy (with the implicit conception of autonomy as negative freedom).

Khumalo v Holomisa, decided in 2002, is significant as the Constitutional Court's first use of section 8's horizontality provisions.[111] Bantu Holomisa (head of the political party, the United Democratic Movement) sued the persons responsible for publishing an article in the *Sunday World* newspaper, claiming that the article was defamatory. In defence, the respondents excepted on the basis that section 16 of the Constitution (the right to freedom of expression) applied directly to the dispute, or alternatively, that the common law should be developed in

[108] Dafel (n 21).
[109] Johan van der Walt, 'Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Co-Operative Relation between Common-Law and Constitutional Jurisprudence' (2001) 17 SAJHR 341.
[110] S Gardbaum, 'Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?' in VC Jackson and M Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (CUP 2017) 238.
[111] Currie and De Waal (n 86) 46.

line with section 39(2), and thus that they were immune from damages. The Constitutional Court found that, in principle, the Bill of Rights must be applied directly when appropriate,[112] but that in this particular case the law of defamation was consistent with the Constitution.[113] The Court set out three factors for determining the horizontal applicability of a right: first, the intensity of the right; second, the potential invasion of the right by non-state actors; and third, the nature of the parties.[114] The Court structured its analysis as, first, an enquiry into whether the right is of direct horizontal application and, second, whether the common law unjustifiably limits the right. If the second question is answered affirmatively, the common law ought to be developed in line with section 8(3) of the Constitution.[115]

Currie and De Waal interpret the judgment as one of the few examples of direct horizontal application.[116] However, this is a misattribution; ultimately, the Court did not rely on direct horizontal application when determining and applying the applicable legal rule to resolve the dispute. Instead, *Khumalo* 'is an instance of … a court relying on the interpretive injunction in section 8(2) to determine whether the law is in accordance with the demands of the Bill of Rights'.[117]

Five years later, in *Barkhuizen v Napier*, the Constitutional Court declined to employ section 8(2) to *directly* challenge a contractual term between private persons.[118] A contract between an insurance company and Mr Barkhuizen provided that any summons must be served within 90 days of the insurance company rejecting a claim. When Mr Barkhuizen sued two years after the insurance company had rejected his claim, the company raised the time-limitation clause as a defence. In turn, Mr Barkhuizen argued that the contractual term was at odds with the right to access courts in section 34 of the Constitution. While the High Court had applied section 34 directly to invalidate the contractual term, the Constitutional Court took a different route. A majority of the Court held that the Bill of Rights should apply indirectly: the proper approach is to test whether a contractual provision contravenes public policy, as informed by the Constitution (section 39(2)). Ngcobo J's majority judgment sets out a two-stage enquiry: first, whether the term itself is unreasonable and, second, whether the term, even

[112] *Khumalo v Holomisa* 2002 ZACC 12 [33].
[113] ibid [45].
[114] ibid [33].
[115] ibid [31]–[33].
[116] Currie and De Waal (n 86).
[117] Friedman (n 73) 72.
[118] *Barkhuizen v Napier* (n 89).

if objectively reasonable, should be enforced, given the (subjective) circumstances.[119] Both Moseneke J and Sachs J dissented on the basis that the test should be purely objective, with Sachs J emphasising that standard-form contracts are constitutionally suspect, and that contracts are no longer wholly private. Instead, the state has an interest in regulating contracts.[120] Langa DCJ wrote a concurring judgment but, unlike the majority, held that section 8 allows for both direct and indirect application (including, in principle, in the realm of contract law). Langa DCJ noted that the distinction between the two forms of application 'will seldom be outcome determinative'.[121]

Some academic commentators worried that *Barkhuizen v Napier* had the effect of rendering section 8(2) nugatory,[122] and that it is guilty of perpetuating the bifurcation between sections 8(2) and 39(2) of the Constitution.[123] *Barkhuizen* has had an 'uneasy legacy'.[124] Ally and Linde argue that the judgment suggests that section 8(2) is ordinarily 'not a viable route by which to assess a constitutional challenge to contractual provisions'.[125] This has had the unfortunate effect of further entrenching the sense that contractual and constitutional disputes operate in parallel and undermining the doctrine of subsidiarity.

Following *Barkhuizen*, the next significant Constitutional Court judgment to tackle horizontality in explicit terms is *Juma Musjid*.[126] There, the Court ultimately granted an eviction order to a trust that owned property housing a public school. The Court held that, although the primary positive duty to fulfil learners' right to a basic education is borne by the state, a private trust is, at the very least, obliged not to infringe learners' rights. Before it can apply to evict a school, a trust must engage meaningfully with the school governing body and the relevant Member of the Executive Council. However, Nkabinde J's unanimous judgment emphasised that:

> the purpose of section 8(2) of the Constitution is *not to obstruct private autonomy* or to impose on a private party the duties of the state in protecting the Bill of Rights. It is rather to require private parties not to interfere with or diminish the enjoyment of a right. Its application also depends on the 'intensity' of the constitutional right in

[119] ibid [56]–[59].
[120] ibid [149].
[121] ibid [186].
[122] Currie and De Waal (n 86) 47; S Woolman, 'The Amazing, Vanishing Bill of Rights' (2007) 124 SALJ 762.
[123] N Ally and D Linde, 'AB v Pridwin Preparatory School: Private School Contracts, the Bill of Rights and a Missed Opportunity' (2021) 11 CCR 275.
[124] ibid.
[125] ibid.
[126] *Governing Body of Juma Musjid Primary School v Essay NO* 2011 ZACC 13.

> question, coupled with the potential invasion of that right which could be occasioned by persons other than the State.[127]

The Court in *Juma Musjid* was at pains to avoid the imposition of any positive duties on private persons, exactly because doing so would threaten their autonomy. As Liebenberg and Kolabhai point out, this subverts the order of the enquiry, which is that autonomy should play a role 'not in terms of the application analysis, but rather in terms of the substantive balancing between various rights'.[128] The judgment thus applied socio-economic rights to private persons in an attenuated way,[129] and is a 'double-edged sword', for it suggests that horizontal obligations can only be negative in nature.[130] Overall, this initial trio of judgments decided under the 1996 Constitution took a relatively incremental, casuistic approach and – in *Juma Musjid* – a restrictive one, emphasising a negative conception of autonomy as freedom from state interference.

In addition to this trio, in practice, South African courts impose constitutional obligations on private persons more regularly than much of the commentary would suggest – but often this occurs implicitly and through legislative interpretation or values-driven common law development, rather than by virtue of explicit reliance on section 8 of the Constitution.[131] An in-depth discussion of these instances falls outside the remit of this thesis, which focuses instead on the initial and sequel trio of judgments as instances where the courts have expressly grappled with the scope and form of horizontality.

2.5.2 The sequel trio

In recent years, important developments in the Constitutional Court's jurisprudence on horizontality have occurred. The principal trends are, first, that the Court has more readily imposed horizontal duties on certain private persons and has done so in express terms. Second, the Court has retreated from the restrictive approach, most stridently endorsed in *Juma Musjid*, that horizontal obligations ought only be negative in nature and should not restrict the autonomy of private persons. Third, even though some jurisprudential lines can be distilled, the Court's treatment of horizontality has emphasised that it is a casuistic and context-sensitive

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[127] ibid [58] (emphasis added).
[128] Liebenberg and Kolabhai (n 18) 263.
[129] Meyersfeld (n 82) on the grounds for holding private persons to socioeconomic duties.
[130] Michael Bishop and Jason Brickhill, 'Constitutional Law' (2011) 2 Juta's Quarterly Review.
[131] Meghan Finn, 'Organs of State: An Anatomy' (2015) 31 SAJHR 631; *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2; *Ramakatsa v Magashule* (n 103); *Mayelane v Ngwenyama* 2013 ZACC 14; *Botha v Rich NO* 2014 ZACC 11.

determination, which cuts against there being clear guidance for how the Court is likely to decide future horizontal disputes.

These trends manifest in a trio of recent Constitutional Court judgments.[132] First is the Constitutional Court's judgment in *Daniels v Scribante.*[133] Ms Daniels, a worker living on a farm owned by a private company, planned to make basic improvements to her home. She approached the private company for consent to make these changes at her own cost. The private company did not reply, so she started making the changes and then received a letter demanding that she stop. She approached the court to determine whether she was entitled to make improvements without the owner's consent, in terms of her constitutional and legislative rights (under the Extension of Security of Tenure Act 62 of 1997 (ESTA)).

The Constitutional Court found that she did have the right to make improvements and that the company had a corresponding duty to allow her to do so, by interpreting the legislative provisions of ESTA in light of section 8(2). The Court handed down five judgments, some of which were devoted to reflections on the history of land dispossession of Black people in South Africa.

Madlanga J's majority judgment linked the right to security of tenure to human dignity, emphasising that Ms Daniels was entitled to live in conditions consonant with dignity. For this reason, he held that Ms Daniels had the right to make improvements to her dwelling without that being contingent on procuring consent from the landowner. What is required is a process of meaningful engagement between the owner and occupier, in order to balance the competing rights and interests. Madlanga J found that the private owner, in addition to being bound by ESTA, was bound by section 8(2) of the Constitution, which can give rise to *both* positive and negative duties. The positive duty is that, in exceptional circumstances, an owner may be ordered to compensate an occupier for the improvements that she made.[134] This is not to say that the duties that a private person bears mirror those of the state, not least because the state is funded by the public purse and motivated by the public good.[135] Whether exceptional circumstances are established turns on a number of factors,[136] including the nature of the right; the history behind the right; what the right seeks to achieve; how best that can be achieved; the

[132] These trends also appear in two judgments that deal specifically with horizontal anti-discrimination duties, *King NO v De Jager* 2021 ZACC 4 and *Wilkinson v Crawford NO* 2021 ZACC 8. As I deal with these two judgments in depth in chapter 5, I do not discuss them in detail here.
[133] *Daniels v Scribante* (n 28).
[134] ibid [40].
[135] ibid [39].
[136] See discussion of the factors proposed by Chirwa (n 13) above in 2.2.2.

'potential of invasion of that right by persons other than the State or organs of state'; and whether failing to impose a duty on the private person would negate the essential content of the right.[137]

The majority judgment is in stark contrast to the Court's judgment in *Juma Musjid*, which was at pains to clarify that section 8(2) does not impose positive obligations on private persons, for doing so would undermine their autonomy. Instead, the judgment is 'an inflection point where, for the first time, the court held that there is a *possibility* that private persons may have positive obligations'.[138] Madlanga J's judgment attempts to distinguish *Juma Musjid* on the nature of the right in question:[139] in *Juma Musjid*, the right to basic education was at issue, whereas *Daniels v Scribante* turned on the rights to dignity and to property. This attempt to distinguish *Juma Musjid* falls short. In truth, in both instances the Court should have accepted that horizontality is implicated, and that at question is how the conflicting rights should be balanced. *Juma Musjid* was overly restrictive, and Madlanga J's judgment ought to have confronted this head on.

Jafta J dissented to hold firm the *Juma Musjid* line and to express scepticism that horizontal obligations can ever be positive in nature. His judgment makes much of the fact that no constitutional provision expressly imposes any positive duty on private persons in the text.[140] As a result, he would have found that, at most, the landowner had a negative obligation.

Baron v Claytile, the second case in the sequel trio, is a step further away from the *Juma Musjid* approach. A company that owned a brick-operating business and farm sought to evict former employees of the business who lived on the farm. As the occupiers' housing was linked to their prior employment on the farm, the dispute was again governed by ESTA. After years of silence, a few days before the Constitutional Court hearing, the municipality made an offer of alternative accommodation, which the occupiers rejected because of the distance to their places of employment and their children's school. The company offered to transport the children to school for the duration of the academic year. The Constitutional Court was approached to determine, among other questions, the scope of the company's constitutional obligations.

A majority of the court found that the city has a constitutional duty to provide suitable alternative accommodation to the occupiers, in part because landowners have a right to apply

[137] *Daniels v Scribante* (n 28) [39].
[138] Meyersfeld (n 80) 441.
[139] *Daniels v Scribante* (n 28) [45].
[140] ibid [162].

for eviction under the circumstances. The company, said the Court, could not be expected to grant free accommodation to the occupiers indefinitely. While ESTA (as constitutionally interpreted in light of section 8) can place positive obligations on private landowners, these obligations are not equivalent to those borne by state entities.[141] However, in truly exceptional circumstances, a private landowner may be duty-bound to provide suitable alternative accommodation. Rather than expressly restrict horizontal obligations to those that are negative in character (on the basis of a narrow account of autonomy), the Court employed a single-stage balancing enquiry with an all-things-considered approach. The Court noted that the horizontality question can be reduced to whether 'a greater give' is required from certain parties. Whether this duty should be imposed is a contextual enquiry.[142] Although the outcome of the judgment upheld the company's rights as landowners, the Court suggested a broad test for the determination of horizontal obligations. On the facts of this case, the Court confirmed the eviction order and directed the company to transport the children to school for the remainder of the academic school year.

The context-oriented and outcomes-based jurisprudential trend was reinforced in the third judgment in the sequel trio, *AB v Pridwin*.[143] The Constitutional Court was charged with determining whether children can enforce their constitutional rights against an independent school, and if so, how the duties that the school bears in respect of those rights should be given legal effect. After months of flagrant parental misconduct, an independent school terminated its contract with the parents of two children, without affording a hearing to the children. The school relied on a clause in its contract with the parents which afforded it the right to cancel the contract at any time, for any reason, on a full term's notice. Both the High Court and a majority of the Supreme Court of Appeal affirmed the school's entitlement to do so, finding that it did not bear any constitutional duties to the children.

The Constitutional Court disagreed. All four judgments of the Constitutional Court found that independent schools do bear constitutional duties, but differed substantially on how those duties should be given legal effect.

Theron J's majority judgment applied direct horizontality, to find that the school bears negative obligations to a basic education (section 29(1) of the Constitution) and that, in line with

[141] Zondo DCJ wrote a qualified concurrence, preferring not to express any view regarding the duties of a private landowner under ESTA.
[142] *Baron v Claytile (Pty) Limited* 2017 ZACC 24 [37].
[143] *AB v Pridwin Preparatory School* (n 89); Finn, 'Befriending the Bogeyman' (n 1).

section 28(2) of the Constitution, the children's best interests are of paramount importance. What this means practically is that the school's decision to terminate – which did not afford the parents any right to make representations on what would best serve the children's interests – was declared invalid.

As I have argued elsewhere,[144] by rejecting the idea that the independent schooling sector is insulated from constitutional duties, the Constitutional Court's majority judgment achieves a vital outcome. It recognises that private persons can wield great and entrenched power, and thus profoundly impair the realisation of rights.[145] The Constitutional Court judgment is thus an important corrective to the restrictive approach taken by the Supreme Court of Appeal. However, while the Court's outcome is correct, its reasoning rests on shaky foundations.

First, the Court inadvertently perpetuates the idea that, contrary to *Pharmaceutical Manufacturers*,[146] there are parallel systems of law, with the law of contract governed by the common law and direct application governed by the Constitution. This concern is thrown into relief by Theron J's majority judgment in *Beadica*, handed down on the same day as *Pridwin*, which took a starkly different approach to how the Constitution interacts with contract law.[147] In this respect, the *Pridwin* majority judgment sets up a binary: on the one hand, Theron J says, is a claim directed at the school's enforcement of the clause which is contractual in nature; on the other is the claim relating to the constitutional validity of the decision to terminate the contract, which turns on the children's constitutional rights.[148] But this binary is a false one. It conflates the question of the *origin* of the rights in question (here, the rights are sourced in and derive their force from the Constitution) with the mechanism for *how* those rights are to be given expression, and so also subverts the doctrine of subsidiarity. Put differently, it is entirely possible for a right to be sourced in the Constitution, but to be given effect in the common law (or in legislation, as in the right to equality and PEPUDA).

Second, partially because of *dicta* in *Juma Musjid*, the Court mischaracterises Pridwin's duties as negative, when in truth they are positive in character. This is not to say that the Constitution necessarily precludes the imposition of positive duties on private persons. However, when a

[144] Finn, 'Befriending the Bogeyman' (n 1).
[145] Madlanga (n 36) 376; Clapham (n 15).
[146] *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 ZACC 1.
[147] *Beadica 231 CC v Trustees for the time being of the Oregon Trust* (n 89).
[148] *AB v Pridwin Preparatory School* (n 89) [103].

Court finds that such duties apply in the circumstances, it should do so expressly, rather than contort the relevant duties to appear negative.

Third, the majority endorsed the standard of 'appropriate justification' for testing whether private persons have failed in their constitutional duties, which is a departure from the existing jurisprudence on balancing.[149]

The sequel trio of judgments is in many respects welcome – the judgments retreat from a narrow conception of autonomy and affirm that private persons are not shielded from constitutional duties. However, in these judgments we see that the Court has a great appetite for making sweeping legal pronouncements, and then purportedly limiting their precedential effects by claiming that judgments turn on context-specific inquiries.[150] Theron J does exactly this in *Pridwin* – she asserts that her judgment is limited to the facts, and reasons that both *Juma Musjid* and *Daniels* were similarly casuistically determined.[151] *Baron v Claytile* did the same – it reduced the enquiry to an all-things-considered determination of the facts. This is unfortunate. It makes the precedential effect of the judgment limited and uncertain, and calls into question the 'demand for harmonization of the country's ordinary, private law with constitutional value-orderings'.[152] This, in turn, cuts against the stated commitment that horizontal application must progressively transform the law.

2.5.3 Private persons: a variegated approach

A final doctrinal trend to comment on is that, increasingly, courts do not treat the category of private persons as monolithic. Instead, the particular function that a private person performs, whether that function is for profit, whether the function is performed in parallel to, or in place of, the state performing it, and the nexus between the entity and other private persons have all been factored into a horizontality calculus. This is important, because it reflects a recognition that private persons range from natural persons to entities that exercise powers equivalent to those of the state, and that the degree of obligation is partially (though not entirely) related to this. In chapter 5, I return to these considerations in the context of positive anti-discrimination duties, which turn on the size, resources and influence of the private person in question.

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[149] See Finn, 'Befriending the Bogeyman' (n 1) for an extended argument on this point; and Liebenberg and Kolabhai (n 18) on how this test subverts the structure of section 8.
[150] Woolman, 'The Amazing, Vanishing Bill of Rights' (n 123).
[151] *AB v Pridwin Preparatory School* (n 89) [184]–[186].
[152] FI Michelman, 'Constitutions and the Public/Private Divide' in M Rosenfeld and A Sajó (eds), *Oxford Handbook on Comparative Constitutional Law* (OUP 2012) 9.

A number of judgments demonstrate this variegated approach. In *AllPay* the Constitutional Court found that, to the extent that a private corporation performs a fundamental state function (in that case, administering the social grants payment system), it is considered an organ of state in terms of section 239 of the Constitution, and so bears duties accordingly.[153] The corporate entity in question was thus not taken to be private at all – instead, the Court expanded its conception of the state to include private entities, to the extent that they perform quintessentially public functions to the exclusion of the state.[154] For this reason, considerations of its private autonomy were not apposite; it could not simply walk away, it had to continue to ensure that social grants were paid, and it had to account for any profits made from the unlawful contract.[155] As I have argued previously,[156] the *AllPay* judgment leaves open some significant questions: are private hospitals, private security companies or privatised prisons to be regarded as organs of state on the basis that they perform public functions? Or does the fact that they perform those functions in parallel to, rather than to the exclusion of, formal state entities insulate them from such a finding? Either way, the Court opted for grounding the corporation's obligations in section 239 and not section 8 of the Constitution, opening another route for the imposition of obligations on putatively private persons.

Elsewhere, the Constitutional Court has recognised that private entities' interests must yield to other interests, albeit without always explicitly reasoning whether this constituted an instance of horizontality. *Blue Moonlight* concerned whether 86 impoverished residents, who were unlawfully occupying property owned by a private corporation in the inner city of Johannesburg, should be evicted.[157] The Constitutional Court noted that '[t]o the extent that eviction may result in homelessness, it is of little relevance whether removal from one's home is at the instance of the City or a private property owner.'[158] The Court concluded that the city bears the primary obligation to provide temporary, emergency accommodation to the residents and that the private corporation was entitled to be granted an eviction order. But, the Court cautioned, the private corporation must be patient, and can be expected to continue to house

[153] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 ZACC 12.
[154] Finn, 'Organs of State' (n 132); Bilchitz (n 10) 17.
[155] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* (n 153) [51]–[55], [66].
[156] Meghan Finn, 'AllPay Remedy: Dissecting the Constitutional Court's Approach to Organs of State' (2016) 6 CCR 258.
[157] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 ZACC 33.
[158] ibid [95].

the occupiers while the City complies, not least because the property was serving commercial interests.

There seem to be two considerations at play in the development of this trend. First, the Constitutional Court seems readier to impose obligations where the private person in question is a corporation, rather than an individual (or, indeed, another kind of organisation such as a religious or non-governmental one). As Ellmann suggests, this is a form of 'diagonal' application, as the actors in question are semi-private.[159] This again reflects that the character of private persons is not uniform, and that there is not a sharp division between the state and non-state entities. Instead, there is a continuum of privateness: at one extreme is a corporate entity that has assumed public functions to the exclusion of traditional state entities; at another extreme is a natural person, operating within the traditional private sphere. Various points can be plotted along this continuum: the for-profit corporation providing housing in inner-city Johannesburg; a constituted religious organisation; a natural person offering goods and services to the general public, and so on. Disambiguating the category of private persons and the functions that they perform may assist in striking the balance between conflicting rights, including where the right not to be discriminated against unfairly (which unambiguously applies to private persons) is implicated.

Second, the Constitutional Court is more likely to impose horizontal obligations where there is already a nexus between the private duty-bearer and the rights-holder. This is consistent with Ratner's argument that while the state owes obligations to everyone, private persons owe obligations only to a circumscribed set of other persons, and whether these obligations arise at all is partially dependent on whether there are 'special associative ties'.[160] While this may be relevant in the context of horizontality more broadly, as I discuss in chapters 4 and 5, different considerations are apposite in the case of the anti-discrimination duty.

[159] S Ellmann, 'A Constitutional Confluence: American State Action Law and the Application of Socio-Economic Rights Guarantees to Private Actors' (2001) 45 New York Law School Law Review 21.
[160] Ratner (n 13) 508; Meyersfeld (n 80) 444, who argues that where there is this special relationship between one private person (in her argument, corporate entities are the paradigmatic case) and another, section 8(2) will apply, including to impose socioeconomic duties.

2.6 STRIKING A BALANCE BETWEEN COMPETING RIGHTS

In this section, I consider how a balance can be struck between competing rights. This is helpful conceptual background for an argument developed later in this thesis (especially in chapters 5 and 6) on balancing in the context of unfair discrimination claims.

Earlier, I contended that section 8 has the effect that disputes among private persons must be tested against the Bill of Rights.[161] Unlike when a claim is made against the state, disputes between private people involve at least two direct rights-bearers. It is true that the state can raise legitimate interests as a justification for infringing individual rights – section 36 is simply 'the state's promotion of aggregated individual interests'.[162] So long as this passes the limitations analysis put in place in section 36, this may pass constitutional muster. But the operative mechanism is quite different: the state does not put forward that justification on the basis of its *own* rights and interests. This is not to say that the limitations analysis is never useful for resolving the competing rights of private persons. Section 8(3) sets out that when a court develops a common-law rule with the effect of limiting a right, that limitation must comply with section 36. Similarly, if a right is limited by legislation, that limitation will need to pass the test put in place by section 36. However, this analysis is pertinent when the state has put in place legal rules and must provide justifications for those rules. Unlike the state, private persons do not create such rules, and cannot proffer justifications for them based on evidence.[163]

Because constitutional rights are formulated abstractly, and because a single right may give rise to different entitlements among multiple individuals, clashes between rights are inevitable.[164] At what point does one person's exercise of her rights unduly encroach on the rights of another? And when are obligations borne?

Whether a duty is to be imposed under the circumstances requires courts to balance competing rights and interests. As a general point, balancing need not necessarily be mysterious: the common law has long employed balancing as a process for resolving competing legal interests.[165] While the Constitution does provide guidance on how to test rights and state

[161] Friedman (n 73) 79.
[162] ibid 85.
[163] Dafel (n 21).
[164] F du Bois, 'Rights Trumped? Balancing in Constitutional Adjudication' (2004) 1 Acta Juridica 155, 155.
[165] Friedmann and Barak-Erez (n 29) 2; A Barak, 'Constitutional Human Rights and Private Law' in D Friedmann and A Barak (eds), *Human Rights in Private Law* (Hart 2001) 33.

interests against each other in the form of section 36's limitations analysis, it does not provide a systematised set of rules or factors for balancing competing rights.[166] Instead, at least with respect to broad horizontal application, section 8(2) and any relevant subsidiary rule in common law, customary law or legislation would govern this balancing act – and requires that courts balance the nature of each right, and the extent to which each right imposes a limitation on the other right. Much of the work happens in how courts will strike a balance between competing private persons' interests. As Van der Westhuizen J noted in a separate judgment on the extent to which the Dutch Reformed Church is proscribed from discriminating against a lesbian minister, '[t]o some extent, the balancing exercise is also what the so-called horizontality debate is about'.[167]

Alexy's work on balancing has been significant for constitutional jurisprudence and has lent credence to balancing as a feature of rights-adjudication.[168] Alexy provides a structured proposal for a balancing enquiry, arguing that balancing involves seeking the optimisation of principles through application. Alexy understands rights not as conclusive commands but instead as optimisation requirements to be fulfilled to the greatest possible extent, while simultaneously being balanced against competing rights and values. He thus suggests a mathematical weight formula to determine the outcome of a balancing test. However, his weight formula is needlessly restrictive, and its 'technocratic calculus'[169] provides the false impression that there is an objectively determinable outcome to any balancing process. In truth, when courts embark on balancing enquiries, they necessarily engage in value judgments which are not especially susceptible to translation into mathematical formulae, and reasonable judges may reasonably differ on the ultimate outcome of the balancing exercise. This does not mean, however, that the exercise is purely subjective or unmoored from justification. Instead, judges must provide public reasons for the exercise and outcome – and this process of reasoning is fundamental to a culture of constitutionalism and for facilitating a dialogic exchange.[170]

I discuss and reject three objections to balancing: first, that the exercise denudes rights of their content or normative force; second, that the enquiry is a non-starter because it involves

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[166] Friedmann and Barak-Erez ibid 2; Barak ibid 33.
[167] *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being* (n 94) [77]; Friedman (n 73) 85.
[168] R Alexy, *A Theory of Constitutional Rights* (OUP 2010) partem.
[169] Kumm, Jackson and Tushnet (n 39) 64.
[170] FI Michelman, VC Jackson and M Tushnet, 'Proportionality Outside the Courts with Special Reference to Popular and Political Constitutionalism' in VC Jackson and M Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (CUP 2017); Nedelsky (n 42) 232; Woolman, 'The Amazing, Vanishing Bill of Rights' (n 88).

incommensurable values; and third, the institutional objection that the legislature, and not courts, should determine how rights should be balanced. These general objections are pertinent for balancing as a general practice of constitutional adjudication, and also for when I turn to balancing within the context of section 14 of PEPUDA's fairness enquiry later in this thesis.

The first objection, sounded by Habermas and, to an extent, Dworkin, is that balancing strips rights of their normative force.[171] If rights are trumps, as Dworkin posits, then they cannot be outweighed by other considerations or subjected to a cost-benefit analysis. Put differently, balancing should be anathema to the idea that rights are trumps, for balancing requires courts to operate on the premise that the mere assertion of a right does not settle the matter. This, worries Habermas, ultimately denudes rights of their content and special power, and so balancing should be rejected as an approach on these grounds.

However, this objection assumes a 'conceptual wedge'[172] between rights and collective goals and does not account for the historical and factual contingencies that may legitimately constrain the full realisation of a right in practice. Properly understood, and as discussed earlier, rights are not trumps in the Dworkinian sense. Instead, rights are a bundle of interests that constitute sufficient reasons for the imposition of duties on another. Given this, we are not committed to accepting that simply because rights can be justifiably restricted or limited, their status as rights is hollowed out. More importantly, even if we were to agree with a Dworkinian approach that takes rights to be trumps, we would still come up against the problem that rights do conflict: asserting one trump over another will not by itself resolve that conflict.

A second objection to balancing is that it involves comparing incommensurable values and so is impossible.[173] For example, the right to freedom of religion (and, perhaps, the autonomy interests that underpin this right) and the right to equality (including not to be discriminated against unfairly) may both be recognised in a constitutional system but are incommensurable and so incapable of being weighed against each other, or so the argument goes. Chang answers that objection by pointing out the conflation of incommensurability – that is, items that cannot be precisely measured by a common scale – with incomparability – that is, items that cannot be compared.[174] While it is true that, say, freedom of religion and equality cannot be measured

[171] J Habermas, *Between Facts and Norms* (W Rehg tr, Polity Press 1996) 258-261; Dworkin (n 11) 200-201.
[172] Joseph Raz, 'Professor Dworkin's Theory of Rights' (1979) 26 Political Studies 123, 128.
[173] Woolman and Botha (n 167).
[174] Ruth Chang, *Making Comparisons Count* (Routledge 2002).

on a common scale, it does not follow from this that they cannot be compared.[175] Da Silva notes that, in practice, balancing takes place between concrete alternatives, rather than abstracted values.[176] This makes it easier to compare relevant trade-offs and takes the sting out of the concern that basic values cannot be set off against each other.

A third, institutional objection is that, by having the courts decide whether a private person is bound by a right, the law-making powers of Parliament are usurped.[177] Courts have long struck balances between competing rights in the common law and in customary law. For this reason, the objection to balancing in the context of horizontality on the basis that 'the enterprise of ranking rights requires a political choice, and political choice in a democracy is the terrain of legislatures, not courts'[178] is not sustainable. Instead, as Ellmann points out, 'to fail to undertake the application of the Bill of Rights that the Constitution envisages would itself be an affront to democratic principles'.[179]

It may be that, in some instances, the legislature is better positioned to be the engine of change, particularly for reconstituting how private persons relate to each other. As Dafel notes, there are two rights that explicitly impose horizontal obligations on private persons (the right to equality and the right to access information) and, in both instances, the Constitution requires that Parliament passes legislation to give effect to the right (and any concomitant duties).[180] PEPUDA does this – but even so, the broad framework that it sets out (for example, in section 14) still needs to be given interpretive content by courts. That deals with three primary objections to balancing but does not answer how balancing works in adjudication.

Currie points out that, in South African law, balancing involves three stages: first, establishing the degree of detriment to the first principle; second, establishing the importance of satisfying the principle that is competing; and third, establishing whether the importance of the latter justifies the detriment to the former.[181] This guards against balancing boiling down to an all-things-considered, unreasoned analysis. I return to balancing considerations (particularly focusing on the enquiry under section 14 of PEPUDA) in chapter 6 of this thesis.

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[175] VA Da Silva, 'Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision' (2011) 31 Oxford Journal of Legal Studies 273.
[176] ibid 286.
[177] Ellmann (n 61) 40.
[178] Sprigman and Osborne (n 70) 43.
[179] Ellmann (n 61) 42.
[180] Dafel (n 21) 12.
[181] Iain Currie, 'Balancing and the Limitation of Rights in the South African Constitution' (2010) 25 SAPL 408, 418.

In practice, how the Constitutional Court has balanced competing rights with respect to horizontality has tended to be under-reasoned. Where the Court has devoted its attention instead has been in striking a balance at the remedial level, by emphasising equitable outcomes for the competing parties. Section 172 of the Constitution has been significant in this respect as a mechanism for creative remedies.[182] Another area of remedial innovation (particularly in eviction and education litigation) has been a reliance on ordering the parties to meaningfully engage with each other.[183] This takes components of the dispute somewhat outside the judicial arena, placing them instead in the hands of the parties (although, typically, while retaining some form of judicial oversight).[184] As I discuss in chapter 6, remedies will also play an important role in resolving the tension between competing rights in the context of anti-discrimination claims.

2.7 CONTRASTING SECTION 8'S BROAD HORIZONTALITY PROVISION WITH THE SPECIFIC HORIZONTAL ANTI-DISCRIMINATION DUTY

As this chapter has demonstrated, there is increasing recognition that abuses of private power can threaten human rights as violations by the state do. Although the state is the principal duty-bearer of constitutional rights, South Africa's constitutional scheme envisages that, in appropriate circumstances, private persons bear constitutional obligations. This is in terms of section 8(2) of the Constitution. However, this is not the only constitutional provision that envisages the application of constitutional duties to private persons. Section 9(4) of the Constitution sets out that 'no person' may unfairly discriminate, directly or indirectly, against anyone on protected grounds, and requires the creation of national legislation. In this final section, I will argue that there are important lessons to be learned from contrasting the courts' general approach to broad horizontality in terms of section 8 of the Constitution and the more specific horizontal anti-discrimination duty set out in section 9(4) and given legislative effect in PEPUDA.

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[182] *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2009 ZACC 32; *Fose v Minister of Safety and Security* 1997 ZACC 6.

[183] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 ZACC 1; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 ZACC; *Head of Department, Department of Education, Free State Province v Welkom High School* 2013 ZACC 25; *Daniels v Scribante* (n 28); *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* (n 183).

[184] S Liebenberg, 'Remedial Principles and Meaningful Engagement in Education Rights Disputes' (2016) 19 PELJ 1; B Ray, 'Proceduralisation's Triumph and Engagement's Promise in Socio-Economic Rights Litigation' (2011) 27 SAJHR 107.

Unlike section 8, the anti-discrimination duty on private persons is not textually qualified in terms of possible duty-bearers and has been given force in legislation. Although I deal with this point in more detail in chapter 5, the legislative history of both section 9(4) and PEPUDA shows that the drafters expressly considered and rejected the possibility of formulating the anti-discrimination duty in a caveated way that mirrors section 8 of the Constitution. Instead, the private anti-discrimination provisions create a universal class of duty-bearers, and then set out the fairness test as a downstream enquiry. This is underpinned by a number of normative commitments, most principally to substantive equality.

Nevertheless, there are important convergences in the approach taken by the courts in respect of broad horizontality, and the emerging jurisprudence on regulating discrimination in the private sphere. Earlier, I traced several dominant trends emerging from a recent trio of Constitutional Court judgments on horizontality: a greater readiness to impose obligations on private persons; a retreat from the restrictive line in *Juma Musjid* that seemed to limit horizontality to negative obligations alongside a continued and sometimes contested role accorded to autonomy in constraining the ambit of horizontal duties; variegated treatment of private persons that accounts for the differences between actors; tussles between members of the Court on the correct form of horizontal application; and a casuistic, outcomes-oriented approach that means that the precedential effect of any one judgment is uncertain. These trends also exert influence on the development of private anti-discrimination doctrine, as I discuss in more detail in chapter 5. The growing willingness to impose horizontal obligations is consistent with a recognition of private power and the realities of inequalities that mark South African society. These considerations are apposite both for horizontality more generally, and of course for the specific instantiation of horizontality in the form of the private anti-discrimination duty.

Relatedly, these duties are no longer taken to be strictly negative in character. Instead, the Court has recognised that, in certain circumstances, private persons ought to be held to positive duties even sometimes in socioeconomic rights cases, although it seems to be more ready to do so where the private person in question is a corporate entity with commercial interests at stake. This reflects something of a variegated approach that distinguishes between different kinds of private persons. Similarly, and as I will discuss later in chapter 5, PEPUDA envisages that private persons are held to some positive duties, including the duty to prepare equality plans, conditional on the size, resources and influence of the persons in question. These duties remain inchoate, however, as the provision in question requires ministerial regulation and, in any

event, the provision has yet to come into force and is currently subject to possible legislative amendment.

In determining the ultimate scope of horizontal duties, autonomy continues to play an important role, albeit a contested one. There is some inconsistency in the Court's treatment of autonomy. Some judgments suggest that autonomy must be understood as protecting negative freedom and constraining state interference in private decisions, while others endorse a thicker conception of autonomy which is not necessarily inconsistent with holding private persons to duties in particular circumstances. In the context of anti-discrimination duties, autonomy also factors into the balancing enquiry, as a possible normative brake, as I detail later in this thesis.

The judgments on the section 8 duty discussed earlier in the chapter, as well as academic commentary, show that the *form* of horizontality continues to be a point of dispute, with the Court increasingly split on whether a horizontal duty should be applied through direct application rather than indirectly as mediated through a subsidiary legal rule. These considerations are pertinent for the private anti-discrimination duty too, which is constitutionally recognised in section 9(4) but given more specific effect in PEPUDA. Notwithstanding this, courts have tended to avoid giving interpretive content to PEPUDA'S provisions, favouring either direct application or development of the common law instead (as I discuss later in chapter 5). This is a missed opportunity and subverts the doctrine of subsidiarity.

The jurisprudence on broad horizontal application is also in keeping with a now well-documented trend of the Court to favour 'outcomes-based decision-making, and a concomitant lack of analytical rigour'.[185] This is not to say that the Court's judgments should be insensitive to context and the distinct factual circumstances. However, at minimum, its adjudication should provide some guidance to litigants and the public, especially regarding how a right might operate in future: '[i]t is impossible to create a more coherent jurisprudence without identifying the rules, and the reasons, that ground decisions'.[186] This trend is also reflected in the Court's more recent cases on private anti-discrimination duties, which have resisted creating consistent and clear tests in favour of more flexible, context-dependent reasoning.

[185] Woolman, 'The Amazing, Vanishing Bill of Rights' (n 123).
[186] ibid 787.

2.8 CONCLUSION

Rights have historically been conceived as defensive mechanisms, wielded against the state (and so vertical in character). Horizontality goes beyond this: it envisages rights operating among private parties *inter se*. State entities are not generally understood to have fundamental rights. Contrarily, private individuals have fundamental rights, and one individual's exercise of her private rights may be in tension with another's.

As I have discussed in this chapter, historically it was accepted that the private sphere, by and large, was a 'constitution-free' zone. On a proper construction of section 8 of the 1996 Constitution, this premise no longer holds. Nor should it, given the extensive power that can be yielded by private persons, and the fraught history of South Africa's private sphere. Instead, human rights permeate all spheres – but whether a private person is found to bear a legally binding obligation will ultimately depend on the weighing of competing interests.

In sum, the 1996 Constitution recognises that human rights apply in disputes between private persons. Both natural and juristic persons may bear obligations in respect of these rights, depending on the nature of the right and the duty in question. No longer are private persons, or the private sphere generally, presumed to be insulated from these obligations. However, this alone does not mean that private persons bear the same kinds of obligations as the state. Instead, the nature and extent of such obligations are determined by a number of enquiries, some of which are factually sensitive. The obligations will typically be given expression indirectly, through a more discrete, subsidiary legal rule as instantiated in legislation, the common law or customary law. When a court holds that a private person has a horizontal obligation, that legal rule may be used – or developed – to give effect to the obligation. Finally, courts have not sufficiently recognised the importance of balancing competing rights or legal interests as a vital part of the horizontality enquiry. Ultimately, both in the case of broad horizontal constitutional duties and in the case of the specific private anti-discrimination duty, much of the required jurisprudential work is in developing a thicker and more substantive balancing jurisprudence. This is vital conceptual background to the kinds of duties that private persons bear in respect of the right to equality.

CHAPTER 3

CONCEPTIONS OF (IN)EQUALITY

3.1 INTRODUCTION

As a social and political rallying point, the call for equality is potent.[1] The assertion that all are equal has been a bulwark of movements dismantling oppression and injustice. Philosophically, however, equality is a notoriously difficult concept.[2] This is reflected in the 'equality of what?' debate,[3] with some writers arguing that equality has no intrinsic value (even if it has instrumental value),[4] or is an empty concept.[5]

My thesis examines the extent to which private persons bear duties to realise the right to equality, and the legal and normative justifications for such duties. Any duties borne by private people must be understood within South African law's conceptual and doctrinal framework of equality and anti-discrimination law. In this chapter I take a step back and look at the conceptual approach(es) to equality in South African law. The chapter therefore constitutes a broad excursus on competing (and, sometimes, complementary) conceptions of equality. However, as I will argue, these conceptions are principally state-centric, and one of the themes I will explore is the extent to which the conceptions can be applied to the private sphere. Ultimately, I will draw on well-established literature to demonstrate that South Africa endorses substantive equality, and I will explore a number of fault lines in the jurisprudence. I will argue that private anti-discrimination duties must be understood within the theoretical and legal framework of substantive equality. Although this framework was developed (in academic

[1] For an exploration of the contested archive of equality, as well as its historical role within struggle movements, see Catherine Albertyn, 'Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion towards Systemic Justice' (2018) 34 SAJHR 441.
[2] Beverley McLachlin, 'Equality: The Most Difficult Right' (2001) 14 SCLR 11; TM Scanlon, 'Why Does Inequality Matter?' (2019) 130 Ethics 259; T Nagel, *Mortal Questions* (CUP 1979); S Gosepath, 'Equality', *Stanford Encyclopedia of Philosophy* (2021) <https://plato.stanford.edu/entries/equality/> accessed 15 February 2023.
[3] Amartya Sen, 'Equality of What?' in S McMurrin (ed), *Tanner Lectures on Human Values,* vol 1 (CUP 1980); GA Cohen, 'Equality of What? On Welfare, Goods, and Capabilities' (1990) 56 Louvain Economic Review 21; Gosepath (n 2).
[4] Joseph Raz, 'On the Value of Distributional Equality' (2008) 41 Oxford Legal Studies Research Paper 21; Derek Parfit, 'Equality and Priority' (1997) 10 Ratio 202.
[5] Peter Westen, 'The Empty Idea of Equality' (1982) 95 Harvard Law Review 537.

commentary and doctrine) with the state as the primary duty-bearer, it is critical for theorising the role of private persons and the private sphere in addressing systemic disadvantage.

This chapter's task is to set up the theoretical backdrop for these debates. In it, I chart central lines of divergence in theorising equality or anti-discrimination law, and plot South Africa's approach along those lines. Ultimately, the chapter advocates for a multidimensional account of substantive equality that is necessarily grounded in context and history. That account will then inform the more concrete considerations that are brought to bear when determining the scope of, justification for, and boundaries of the imposition of equality duties on private persons.

3.1.1 Equality and anti-discrimination law

A preliminary point must be made on the distinction between theories of political philosophy more broadly, theories of equality, and theories of anti-discrimination law. Anti-discrimination law is, as Fredman explains, 'a response to particular manifestations of inequality'.[6] Anti-discrimination law, then, can be understood as a more subsidiary legal instantiation of the broader ideals of equality – as 'a bridge between concrete rules and abstract ideals'.[7] In this respect, anti-discrimination law does not cover the field regarding ideals of equality for at least two reasons. First, it is specifically about a certain kind of *legal* response to (in)equality, and so is concerned with the content and distribution of legal rights and duties (which, because of the nature of legal regulation and its limits, is typically more narrow than moral and political commitments to equality).[8] Second, as a result of the nature of adversarial litigation, anti-discrimination law is more centrally concerned with responses to instances of inequality brought by specific litigants (even if its demands, as I will argue, are not only negative in character). Khaitan calls this attribute of anti-discrimination law the eccentric distribution condition: 'duty-imposing norms in discrimination do not, on their own, *guarantee* access to the substantive or tangible burden or benefit whose distribution is in question to any particular individual'.[9] This is in contrast to distributive schemes or policies which confer universal benefits.

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[6] Sandra Fredman, *Discrimination Law* (2nd edn, Clarendon 2011) 27.
[7] G Rutherglen, 'Concrete or Abstract Conceptions of Discrimination?' in D Hellman and S Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013) 116.
[8] Henk Botha, 'Equality, Plurality and Structural Power' (2009) 25 SAJHR 1 on the limits of the law in addressing structural disadvantage.
[9] Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) 39.

In this chapter, I traverse debates that arise more broadly in conceptions of equality, as well as in the jurisprudence on anti-discrimination law. The two bodies of thought (theories of equality and anti-discrimination law) are obviously related and partially co-extensive, though the former has a broader ambit, and the latter is constrained by certain considerations that are distinctive to the project of legal regulation.

3.1.2 Fault lines

I will discuss the key contestations in the literature and the case law along a number of significant fault lines. I do so, however, within the overarching framework of substantive equality, and use the fault lines to make more express the varying principles that substantive equality embodies and mandates. In broad terms, South African law has endorsed a conception of substantive equality. The exact content of substantive equality is contested, but some overlapping characteristics emerge from judgments and academic writing which I review in the first section of this chapter. In brief, however, I will contend that substantive equality is centrally aimed at remedying inequality, rather than simply at ensuring equal treatment against a presumed neutral background.[10]

Within this overarching framework, I extract a number of important fault lines. These fault lines track certain normative commitments, and sometimes the commitments operate in tension with each other. This tension can, however, be overstated in certain instances (for example, in the debate between recognition claims versus redistributive claims). The fault lines that I consider at length in this chapter are as follows:

- a transcendental-ideal approach versus a contextual-historical approach;
- recognition claims versus redistributive claims;
- individual claims versus group-oriented claims.

Further, and as I will demonstrate, some commitments also cut across various fault lines, even if they are framed slightly differently. For example, a concern with dignity as the possible answer to the 'equality of what' question is relevant both to the fault line between recognition and redistributive claims, and to the fault line between individual and group-oriented claims.

[10] Catherine Albertyn and Beth Goldblatt, 'Equality' in S Woolman (ed), *Constitutional Law of South Africa* (Juta 2013) 35-6; *President of the Republic of South Africa v Hugo* 1997 ZACC 4 [41]: 'We need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved.'

An approach that is contextually and historically rooted, as opposed to abstract and transcendental, also informs centring substantive, rather than formal, equality.

I begin by setting out the overarching framework of substantive equality. While formal equality foregrounds consistency of treatment as the guiding aim of equality, substantive equality is more outcomes-oriented and accepts that differential treatment is sometimes warranted and required by equality.[11] Because of South Africa's endorsement of substantive equality, I argue in favour of a multidimensional approach rather than a unitary conception of what equality, and anti-discrimination law, demand. This emerges from how various commitments within the fault lines play out.

I then turn to the first fault line, considering whether the conception(s) of equality take(s) a transcendental-ideal approach, or whether South African law instead embodies a contextual-historical approach. I explain how the post-Second World War Western liberal egalitarian philosophical tradition favoured an abstracted understanding of equality, and consider some objections to this approach. I discuss how the debate is similarly reflected in accounts of anti-discrimination law. I then turn to South African doctrine, which reveals that while certain transcendental ideals remain important and operate as conceptual tools, they are typically applied in a less abstracted manner. As a whole, the jurisprudence demonstrates that a contextual-historical approach is the dominant paradigm for conceiving of equality.

A related fault line is whether equality, and anti-discrimination law in particular, is concerned with recognition claims (which are centrally about status, and could also be understood as expressive or dignitarian claims to equal worth), or instead with redistribution claims (typically understood as claims to a particular allocation of material and social goods, although sometimes they can encompass redistribution of intangible goods such as power). I draw on the influential work by Fraser (as well as Honneth) on this to resist a false binary – any comprehensive account of equality must reflect both of these claims (though, even so, these claims are not exhaustive of equality's demands).

The final fault line I study is that between individual claims and group-oriented claims. I explain that although some other jurisdictions primarily understand anti-discrimination law through the individual (and here, both the complainant and the wrongdoer, in circumstances

[11] *MEC for Education: KwaZulu-Natal v Pillay* 2007 ZACC 21 [15]. The Court in *Pillay* highlights the important role that differential treatment can play in vindicating equality. There, a seemingly neutral rule had a marginalising impact – it was the 'failure to treat [Ms Pillay] differently from her peers' that constituted indirect discrimination.

where the latter's intention is relevant to liability), South African law situates the group, and patterns of group disadvantage, in the heart of its anti-discrimination law. This does not mean, however, that the individual is irrelevant, as the debate about the role of dignity in the conception of equality reveals. This fault line has some clear pertinence for how equality plays out in the private sphere, concerned as it is with balancing competing claims made by private persons. Those claims, however, do not operate without some attenuation. Indeed, a burgeoning site of development in South African law is in the articulation of a relational conception of equality. This articulation sees South African law as being tasked, at least in part, with repairing the ruptured relations between private persons.

Having charted these fault lines, I conclude the chapter with a discussion of whether a unitary or multidimensional account of equality and anti-discrimination is jurisprudentially and doctrinally preferable. Ultimately, the chapter advocates for a multidimensional account that is necessarily grounded in context and history. Descriptively, South African law embodies a multidimensional approach to substantive equality, as can be traced through the case law and legislative provisions. Normatively, this is justified by equality's diffuse demands, which ought not to be reduced to a unitary account.

3.2 SUBSTANTIVE EQUALITY

It is by now trite to observe that South African law has endorsed substantive equality, rather than formal equality, as the core conception of equality. As a conceptual starting point, then, it is useful to first explain how formal equality is typically understood, for substantive equality is at least partially conceived in the negative – that is, as a rejection of the idea that formal equality covers the field.

3.2.1 Conceptual background

Formal equality, or 'equality as consistency',[12] requires that individuals in like situations or circumstances are treated alike.[13] In anti-discrimination law, this seemingly requires a symmetrical approach:[14] when assessing whether law or conduct is discriminatory, the

[12] Fredman, *Discrimination Law* (n 6) 7.
[13] T Ngcukaitobi, I Currie and J de Waal, 'Equality' in I Currie and J de Waal, *Bill of Rights Handbook* (6th edn, Juta 2013) 213; Gosepath (n 2). This conception of equality has its roots in Aristotelean philosophy.
[14] Khaitan (n 9) 61–62.

protection afforded to all groups is the same, regardless of whether certain groups experience patterns of disadvantage.

Formal equality captures an intuitive aversion to unjustifiable different treatment. In the context of South Africa's history, this is a baseline articulation of one facet of the wrong of racial subordination and oppression. Nevertheless, as a comprehensive equality norm, formal equality is questionable: it presumes that the background or default distribution of rights and goods is just, and that what equality requires is equal treatment. Put differently, it is 'concerned with the way that people ought to be treated, irrespective of the consequences or how they are currently situated'.[15] This fails to account for existing disadvantage and structural or systemic inequality, which often requires difference in treatment.[16] For this reason, those committed to formal equality as a comprehensive norm are often suspicious of affirmative action or restitutionary measures, and positive reasonable accommodation duties.

Substantive equality, conversely, is responsive to existing systemic inequalities and requires that these be dismantled.[17] In part for this reason, substantive equality mandates a context-sensitive and historically rooted approach. Further, and unlike formal equality, substantive equality is more outcomes-oriented than treatment-driven.[18] It takes equality to exert not only status-oriented demands but also distributive ones, and, in line with section 9(2) of the Constitution,[19] links the achievement of equality to the fulfilment of other rights (including socio-economic rights).[20] These measures cannot exclude socio-economic concerns, because ensuring the enjoyment of all rights and freedoms necessarily encompasses distributive dimensions.[21] Substantive equality is also understood to require positive action from the state, as well as other actors.[22] A substantive conception of equality is also structural and institutionally oriented.

Fredman provides an influential account of substantive equality (both as a theoretical approach and within a South African context). Her account of substantive equality constitutes four

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[15] Chris McConnachie, 'What Is Unfair Discrimination? A Study of the South African Constitutional Court's Unfair Discrimination Jurisprudence' (DPhil Thesis, University of Oxford 2014) 76.
[16] Albertyn and Goldblatt (n 10) 35-6.
[17] ibid 35-4; P Shin, 'Is There a Unitary Concept of Discrimination Law?' in D Hellman and S Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013) 180.
[18] McConnachie (n 15) 76.
[19] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 ZACC 15 [62].
[20] Zak Yacoob, 'Some Perspectives on the Movement Towards and the Struggle for Equality in Our Context' in S Jagwanth and E Kalula (eds), *Equality Law: Reflections for South Africa and Elsewhere* (Juta 2001) 2; *South African Police Service v Solidarity obo Barnard* 2014 ZACC 23 [35].
[21] Yacoob (n 20) 2.
[22] *Minister of Finance v Van Heerden* 2004 ZACC 3 [31].

overlapping dimensions of equality: redistribution, recognition, transformation and participation. The redistributive dimension of substantive equality aims at disrupting and dismantling existing disadvantage. The recognition dimension aims at redressing stigmatic harms which undermine the dignity of members of an identity group. Her characterisation of the transformative dimension is that conformity ought not to be demanded – instead, equality requires the accommodation of difference. The final dimension of substantive equality is participative, in that full social and political participation should be facilitated.[23]

Fredman's account is helpful, for dislodging the assumption that equality can and should be reduced to a single value. Instead, the dimensions must be understood to operate in synergy. Her recognition dimension also includes some relational components – individuals are constructed by social norms, and 'the right to equality aims to address its social consequences through its focus on the ways in which people relate to each other'.[24] Her theorising of substantive equality has been vital in providing conceptual content to the development of jurisprudence both in South Africa and elsewhere, particularly where the state is the duty-bearer. This conception has important consequences, too, for the imposition of duties on private persons.

Several accounts identify the importance of participation to substantive equality (or justice more generally). One of Fredman's four dimensions (redressing disadvantage; addressing stigma, stereotyping, prejudice and violence; enhancing voice and participation; and accommodating difference) already incorporates participatory, procedural concerns. This echoes Fraser's work developing a conception of justice, which I discuss later in this chapter. Notably, Fraser's theory draws on participative parity: 'justice requires social arrangements that permit all to participate as peers in social life'.[25] Participative parity requires both that material resources are distributed to enable individuals to express their voice (a redistributive dimension) and that individuals engage as peers from a position of equal respect (a recognition dimension).[26] It is thus concerned with injustice in social relations and arrangements. In a Canadian context, Sheppard proposes a theory of inclusive equality, which requires tackling inequality through substantive, procedural and relational tools, with an emphasis on the

[23] Fredman, *Discrimination Law* (n 6) 23; Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 ICON 712.
[24] Fredman, 'Substantive Equality Revisited' (n 23) 731.
[25] Nancy Fraser, 'Reframing Justice in a Globalizing World' (2005) 36 New Left Review 69, 73.
[26] Nancy Fraser and Axel Honneth, 'Introduction: Redistribution or Recognition?' in Nancy Fraser and Axel Honneth, *Redistribution or Recognition? Political-Philosophical Exchange* (Verso 2003) 36.

importance of political participation.[27] She notes the importance of foregrounding marginalised and excluded voices, but her account also incorporates relational ethics – that systemic change requires not only the state's positive conduct but also the reconstitution of relationships among individuals and groups.[28]

Albertyn delves into the 'contested archive of equality', tracing the historical evolution of equality in the struggle against apartheid and the constitutional settlement. She characterises legal substantive equality as being centrally concerned with harm that results from the impact of particular social and legal stratification, and so as inherently context-oriented. Ultimately, she argues that what substantive equality demands is a shift towards 'equality of condition', which entails a transformative approach to tackling systemic justice.[29] Her account is an outcomes-oriented one: 'the idea of anti-disadvantage … should be recognised as a cross-cutting principle to ensure just outcomes'.[30] It is clear that Albertyn's account includes that equality makes some material, redistributive demands, although she does not prescribe a specific pattern of goods per se. Albertyn stresses the difference between legal substantive equality (which must reflect multiple values that a legal system may recognise) and substantive equality as a broader value or idea, connecting the latter to the conditions that are required for self-determination and substantive freedom. Her account is thus in clear conversation with the accounts of both Fraser and Fredman, even if it differs slightly in emphasis.

Whether a formal or substantive conception of equality is preferred has some important consequences for the scope of, and justification for, private persons' duties in respect of equality. Formal equality is premised on the background or default position of persons as equal – on this understanding, equality acts as a corrective when the default status quo is violated. This in turn presumes that individuals exercise a parity of power *inter se*. Substantive equality, conversely, first requires an assessment of the status quo positions of *in*equality.

In the remainder of this chapter, I will chart some fault lines that cut across various conceptions of substantive equality. First, however, I briefly discuss how a commitment to substantive equality has played out in South African legal doctrine.

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[27] Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (McGill-Queen's University Press 2010).
[28] ibid 125–126.
[29] Albertyn, 'Contested Substantive Equality in the South African Constitution' (n 1).
[30] ibid 26.

3.2.2 South Africa's doctrinal approach

Formal equality could be understood to be reflected in section 9(1) of the South African Constitution, which provides that '[e]veryone is equal before the law and has the right to equal protection and benefit of the law'. This broadly tracks formal equality's commitment to equal treatment, although substantive equality can in some instances also require equal treatment for an excluded group, and so section 9(1) should not be taken as solely the preserve of formal equality. The provision has been interpreted to protect against irrational differentiation, with *Prinsloo* and subsequent cases imposing a test of rationality as a threshold protection flowing from section 9(1),[31] rather than the more fulsome context-oriented approach of substantive equality.

South African legal doctrine has rejected formal equality as the *core* of equality: 'equality should not be confused with uniformity; in fact, uniformity can be the enemy of equality'.[32] South Africa's conception of equality is thus one 'that goes beyond mere formal equality and mere non-discrimination which requires identical treatment, whatever the starting point or impact.'[33] Instead, difference and diversity should be welcomed,[34] including in determining what treatment is required by equality.

This is not to say that formal equality – or, at least, the imperative of equality before the law – has no role to play whatsoever.[35] In *Prinsloo*, the Court affirmed the basic rule-of-law tenet of equality before the law – that is, that 'no-one is above or beneath the law and that all persons are subject to law impartially applied and administered'.[36] In *Ngewu*[37] (regarding the payment of divorced spouses' pension interests) and *Sarrahwitz*[38] (regarding the protection of vulnerable persons in the context of transfer in terms of the Alienation of Land Act 68 of 1981) equal treatment before the law played a central role. Similarly, in *Mahlangu*, for example, where the Constitutional Court found that the exclusion of domestic workers from the Compensation for Occupational Injuries and Diseases Act 130 of 1993 was unconstitutional,

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[31] *Prinsloo v Van der Linde* 1997 ZACC 5 [22].
[32] *National Coalition for Gay and Lesbian Equality v Minister of Justice* (n 19) [132]; see also *City Council of Pretoria v Walker* 1998 ZACC 1 [73]; *Volks NO v Robinson* 2005 ZACC 2 [163]; *Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association* 2018 ZACC 200 [61]–[63].
[33] *Minister of Finance v Van Heerden* (n 22) [26].
[34] *Minister of Home Affairs v Fourie* 2005 ZACC 19 [47]; *MEC for Education: KwaZulu-Natal v Pillay* (n 11) [77].
[35] McConnachie (n 15) 79 identifies two dimensions here – equality as consistency and equality as rationality – and posits both provide a minimum floor, but not a ceiling, with respect to the content of section 9(1).
[36] *Prinsloo v Van der Linde* (n 31) [22].
[37] *Ngewu v Post Office Retirement Fund* 2013 ZACC 4.
[38] *Sarrahwitz v Maritz NO* 2015 ZACC 14.

part of the equality claim (on the differentiation leg) considered by the Court was that domestic workers were not treated equally before the law.[39]

As I trace in more detail in chapter 5, PEPUDA's definition of equality evinces a substantive conception that incorporates a concern for outcomes. Equality 'includes the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes'.[40] While PEPUDA recognises that formal equality may have some distinctive role to play in the constitutional scheme, however, it is far from exhaustive of equality.[41]

Courts have recognised that equality, as both a right and a value, operates in context: '[t]he meaning of equality in any jurisdiction is influenced by the historical, sociopolitical and legal conditions of the society concerned'.[42] In South Africa, equality is necessarily understood against the backdrop of the colonial and apartheid systems,[43] with race as the organising principle of subjugation,[44] and patriarchy running through both public and private life with capitalist classist structures working in lockstep. The role of law is to be responsive to the patterns of disadvantage entrenched by these systems,[45] and by the ways in which those systems (as well as emerging forms of inequality) exert persistent power today.[46]

Because of this, as the Constitutional Court has noted, 'the guarantee of equality lies at the very heart of the Constitution [and] permeates and defines the very ethos upon which the Constitution is premised'.[47] A more recent Constitutional Court judgment echoed this:

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[39] *Mahlangu v Minister of Labour* 2020 ZACC 24. Jafta J's separate judgment would have limited the Court's finding to just this basis.

[40] Formal and substantive equality are sometimes differentiated respectively as *de jure* and *de facto* equality, although this terminology is not typically used in South African case law. See, however, Victor AJ in *King NO v De Jager* 2021 ZACC 4 [195].

[41] *Minister of Finance v Van Heerden* (n 22) [31]: 'Equality before the law protection in section 9(1) and measures to promote equality in section 9(2) are both necessary and mutually reinforcing but may sometimes serve distinguishable purposes.'

[42] Albertyn and Goldblatt (n 10) 35-3; Andrew Altman, 'Discrimination Debated: A Review of Deborah Hellman and Sophia Moreau (Eds), Philosophical Foundations of Discrimination Law' (2015) 6 Jurisprudence 156, 157: 'Even if not every philosophical discussion of discrimination must explicitly adopt a socio-historically orientation, it seems to me that the power of theorizing to illuminate the concept is substantially weakened if the relevant history is set aside.'

[43] Ngcukaitobi, Currie and De Waal (n 13) 211; A Chaskalson, 'Equality as a Founding Value of the South African Constitution', Olive Schreiner Lecture, University of Witwatersrand (2001).

[44] Joel M Modiri, 'The Grey Line In-between the Rainbow: (Re)Thinking and (Re)Talking Critical Race Theory in Post-Apartheid Legal and Social Discourse' (2011) 26 SAPL 177.

[45] Fredman, *Discrimination Law* (n 6) 38; Pierre de Vos, 'Equality for All: A Critical Analysis of the Equality Jurisprudence of the Constitutional Court' (2000) 63 THRHR 62.

[46] David Francis and Edward Webster, 'Poverty and Inequality in South Africa: Critical Reflections' (2019) 36 Development Southern Africa 788.

[47] *Fraser v Children's Court Pretoria North* 1997 ZACC 1.

'[e]quality is a fundamental organising principle of the Constitution and the kind of society it seeks to bring into being'.[48]

South Africa's approach to (in)equality, then, is at least in part oriented towards addressing historical and existing disadvantage. It is 'situation-sensitive',[49] rooted in addressing systemic inequality, and eschews an assumption that the existing social and economic structures are neutral, or that they should be assessed in a normative vacuum.

I now turn to a more focused discussion of how this overarching commitment to substantive, rather than formal, equality plays out across a number of more specific fault lines. Overwhelmingly, the jurisprudence has developed within the state paradigm. Although later chapters will delve into this in far more detail, I will also make brief observations regarding how these fault lines can inform the theoretical approach to private persons' duties.

3.3 TRANSCENDENTAL-IDEAL APPROACH / CONTEXTUAL-HISTORICAL APPROACH

3.3.1 Conceptual background

The first fault line that I examine within the overarching commitment to substantive equality is the divergence between transcendental-ideal and contextual-historical approaches. I argue that, by and large, South African courts have favoured the latter. This does not mean, however, that there are no tools to be drawn from the former, which may be particularly helpful when delineating the duties borne by private persons.

A key debate in both equality and justice theories more generally[50] is whether a transcendental or contextual approach is preferred. In the liberal egalitarian tradition, engagement with Rawls' *Theory of Justice* exemplifies this.[51] Rawls constructs a transcendental, institutional account of what justice requires by positing an original position which abstracts out all contextual characteristics of individuals and society behind a veil of ignorance and assumes people are equals, and then determines what principles a just society under such abstracted conditions

[48] Victor AJ's separate judgment in *King NO v De Jager* (n 40) [221].
[49] *Minister of Finance v Van Heerden* (n 22) [27].
[50] Christopher Ake, 'Justice as Equality' (1975) 5 Philosophy & Public Affairs 69, on the relationship between justice and equality.
[51] J Rawls, *A Theory of Justice* (Harvard University Press 1971); Gosepath (n 2). Rawls' account is egalitarian as he recognises equal human worth in abstracted terms, including that people are taken to be equals in the original position; endorses equality of opportunity; and suggests a certain kind of equalised allocation of goods in accordance with the difference principle.

would embody. In this regard, there are some obvious parallels with formal equality which, too, proceeds on the premise that people occupy positions as equals *ex ante*. Other philosophers suggest accounts with differing mechanisms but similarly abstracted contexts: Dworkin suggests a hypothetical auction system that aims to eliminate envy,[52] while Cohen[53] and Arneson's[54] accounts of luck egalitarianism posits that equality aims at compensating individuals for undeserved bad luck. This tradition takes equality principally to require distributive action by institutions, and has been subject to a number of criticisms, which I discuss below.

Sen argues that transcendental institutionalism falters in two crucial ways: it constructs the principles by which a perfectly just society would operate, identifying the absolute just 'rather than relative comparisons of justice and injustice',[55] and it is overly 'arrangement-focused', emphasising institutions as mechanisms of justice and assuming ideal behaviour by agents who slot into this arrangement. Instead of a transcendental system, Sen urges a realisation-focused comparison. This approach compares two or more real-world societies to determine how to 'remov[e] manifest injustice'.[56] The focus, then, is not on attaining perfect or absolute justice in a vacuum, but rather on minimising injustices. Key to this is looking at societies that actually exist or could feasibly emerge, 'rather than transcendental searches for a perfectly just society',[57] and making a case for a particular process or policy based on the actual behaviour of people, rather than the ideal conduct of a reasonable agent.[58]

Anderson, too, offers a ringing rebuke to transcendental-ideal theories for wholesale failing to capture the real-life dimensions of inequality, being more concerned with archetypes of thought experiments ('beach bums, the lazy and irresponsible, people who can't manage to entertain themselves with simple pleasures' etc) than with 'the politically oppressed'.[59]

This, she posits, stems from a misconception of the point of inequality – the aim of egalitarian justice, Anderson argues, is to address the social imposition of oppression. Tracing Canada's legal conception of substantive equality (and ultimately arguing for a more fulsome account that incorporates procedural, participative dimensions), Sheppard emphasises the important

[52] R Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 1981).
[53] Cohen (n 3).
[54] Richard Arneson, 'Equality and Equal Opportunity for Welfare' (1989) 56 Philosophical Studies 77.
[55] Amartya Sen, *The Idea of Justice* (Penguin 2009) 6.
[56] ibid 7.
[57] ibid.
[58] ibid 67.
[59] Elizabeth S Anderson, 'What Is the Point of Equality?' (1999) 109 Ethics 287, 288.

task of translating the meaning of human rights, equality, justice and democracy 'into the concrete contexts of everyday injustices' for effecting social change.[60]

Relatedly, the transcendental approach has been criticised for failing to engage with specific central drivers of inequality and injustice: white supremacy and patriarchy. Mills criticises Rawls and others' transcendental approach on the specific basis that it does not confront the social reality of white racial domination, instead bracketing out the role of racism through abstraction.[61] A number of feminist scholars similarly take issue with the transcendental liberal egalitarian approach for failing to address or account for deep gender inequalities and the power relations conditioned by this.[62] Because of these failings, transcendental-ideal theories of equality afford us imperfect tools for addressing the injustices presented in the real world.

Echoing Mills' critique, in South Africa one clear imperative required by our context is for equality to address persistent racial inequality and systemic racism. Modiri employs a theory of Black Consciousness to analyse the continued role that race and racism play in constituting institutions and relationships, arguing that white supremacy still shapes the South African legal system and society more broadly.[63] Rather than the constitutional order eradicating racism, racial inequalities and social hierarchies persist and, in some respects, have escalated.[64] Accordingly, 'the terrors and tremors of white supremacy still define and structure the psyche and social reality of all South Africans in different ways'.[65] As race was the 'central logic' of colonial and apartheid rule, the constitutional dispensation must confront ongoing lived experiences in a race-conscious manner to have any hope of dismantling structures of oppression; otherwise, it will reconfigure racism in multifarious forms. Legal scholarship must confront race and racism as an ongoing 'symbolic and material reality'.[66] Modiri's analysis, which draws on literature developed in the context of the United States' formal equality jurisprudence, is cogent with respect to theorising inequality, rejecting colour-blind and symmetrical tests in the unfair discrimination enquiry, and providing a partial justificatory basis for the imposition of broad duties against discrimination in South Africa. The analysis is not at

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[60] Sheppard (n 27) 1.
[61] Charles Mills, *Black Rights / White Wrongs* (OUP 2017).
[62] Susan Okin, *Justice, Gender and the Family* (Basic Books 1989); Carol Pateman, 'Feminist Critics of the Public/Private Dichotomy' in Carol Pateman (ed), *The Disorder of Women* (Stanford University Press 1989); Kimberly A Yuracko, 'Toward Feminist Perfectionism: A Radical Critique of Rawlsian Liberalism' (1995) 6 UCLA Women's Law Journal 49.
[63] Joel M Modiri, 'The Jurisprudence of Steve Biko: A Study in Race, Law and Power in the "Afterlife" of Colonial Apartheid' (PhD Thesis, University of Pretoria 2017).
[64] ibid.
[65] ibid 3.
[66] Modiri, 'The Jurisprudence of Steve Biko' (n 63).

odds with the broad approach taken by South African courts (although Modiri argues that this approach does not go far enough, advocating for radical constitutional scepticism).[67] However, while the analysis is a necessary corrective it is, arguably, an insufficient one, for it foregrounds a single axis of disadvantage – race – rather than multiple, and intersecting, forms of disadvantage.

Rich and extensive debates on intersectionality in Black feminist movements[68] were introduced into legal discourse by Crenshaw. In the context of civil rights litigation in the United States, Crenshaw takes issue with feminist movements for centring and privileging white women, and the civil rights movement for focusing on Black men in dismantling antiracist frameworks.[69] Black women were crucially missing from the discourse, in part because their disadvantage cannot be reduced to a single, abstracted ground. Instead, 'people's disadvantage is composed of multiple and interlocking systems of power'.[70] Discrimination on intersecting grounds is thus distinctive and cannot simply be reduced to the additive disadvantage of more than one ground. Like critical race theory, intersectionality necessarily requires a contextually grounded analysis of equality.

Broader debates about transcendentalism play out in anti-discrimination jurisprudence. Both Hellman and Moreau, for example, offer relatively abstract theories to explain the philosophical foundations of anti-discrimination law: Hellman suggests that wrongful discrimination is a form of demeaning conduct,[71] while Moreau posits that it is an infringement of deliberative freedom.[72] Both of these accounts are relatively abstract, and propose a unitary basis for anti-discrimination law. However, and as I discuss in my concluding section in this chapter, there is good reason to be sceptical that any abstract or unitary account would sufficiently capture the complex (and sometimes competing) demands of equality.

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[67] Joel M Modiri, 'Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence' (2018) 34 SAJHR 300.

[68] See, for example, bell hooks, *Ain't I a Woman: Black Women and Feminism* (South End Press 1981); Akasha Gloria Hull, Patricia Bell-Scott and Barbara Smith (eds), *All the Women Are White, All the Blacks Are Men, But Some of Us Are Brave* (Feminist Press 1982); Angela Davis, *Women, Race and Class* (Vintage Books 1983); Audre Lorde, *Sister Outsider* (Crossing Press 1984); Angela Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 Stanford Law Review 581.

[69] K Crenshaw, 'Demarginalising the Intersection of Race and Sex' (1989) 1 University of Chicago Legal Forum 139.

[70] Shreya Atrey, 'The Intersectional Case of Poverty in Discrimination Law' (2018) 18 Human Rights Law Review 411, 416.

[71] D Hellman, 'Equality and Unconstitutional Discrimination' in D Hellman and S Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013).

[72] Sophia Moreau, 'What Is Discrimination?' (2010) 38 Philosophy & Public Affairs 143.

This does not mean that there is no meaningful role to be played by more abstracted principles. Commenting on the tension between abstract and concrete accounts of anti-discrimination law, Rutherglen notes that if a theory is too abstract, it is likely to be unhelpful in resolving actual disputes, whereas if it is too concrete it will simply replicate the existing law without explanation. Accordingly, 'a theory of discrimination, we might say, has to be at the right distance from anti-discrimination law to bring its subject into focus: too close and it is just a heap of doctrinal fragments without any internal coherence; too far away and it is just a blur of idealized goals without the means of being realized'.[73]

For this reason, it would also be too quick to reject all contributions of transcendental theory-building. While it is not sufficient to have a transcendental vision, it can provide useful normative values which form part of a 'toolbox of principles' that cannot be generated from a contextual analysis alone. After all, a contextual analysis of the wrongs of inequality as manifested in a particular society itself depends on anterior conceptions – even if not fully realised – of what would constitute disadvantage that warrants moral or legal correction, and indeed of the claims to justice that an individual or group can assert. Rather than employing those normative tools in the abstract, however, they must be put to use in concrete, lived realities. I turn, now, to discuss how this plays out in South African doctrine.

3.3.2 South Africa's doctrinal approach

In South Africa's legal scheme, the fault line between transcendental-ideal theories on the one hand, and contextual-historical theories on the other, falls out on a strong emphasis on a contextual approach and a rejection of an overly abstracted conception of equality, as I discuss below. A value-based and purposive approach has been critical to South African jurisprudence, with the challenge being how to give meaning and content to abstract principles in the context of concrete equality claims.

One consequence of South African law's endorsement of a substantive conception of equality is that the jurisprudence tends towards a contextual and historical approach. Moseneke J's judgment in *Van Heerden* captures the context-sensitive demands of substantive equality, which requires dismantling levels and forms of systemic disadvantage in a 'situation-sensitive' approach.[74] Equality is central to South Africa's constitutional order. Given South Africa's

[73] Rutherglen (n 7) 125.
[74] *Minister of Finance v Van Heerden* (n 22) [27]:

history, the legal framework reflects a contextually rooted approach, and is mandated by jurisprudence and also the legislative scheme. PEPUDA's preamble, for example, clearly frames the equality legislation in a historical context, and emphasises redressing systemic, structural and embedded inequalities. The grounds on which discrimination are prohibited include the listed grounds and, among others, any other ground where discrimination on that ground 'causes or perpetuates systemic disadvantage' (section 1's definition of 'prohibited grounds'). The determination of whether discrimination is unfair in section 14 of PEPUDA is highly context-sensitive. In fact, the first factor in this determination is 'the context' (section 14(2)(a)), and the various additional factors set out in section 14(3) include 'the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage' (section 14(3)(c)), and 'whether the discrimination is systemic in nature' (section 14(3)(e)).[75]

That line is present across the Constitutional Court's judgments. As examples of the Court's earlier jurisprudence, in *Brink v Kitshoff*, one of the first judgments on unfair discrimination, the Court emphasised that the prohibition of unfair discrimination must be understood 'in the light of history and the enduring legacy that it bequeathed'.[76] *Harksen*, the Court's *locus classicus* on unfair discrimination, establishes the importance of attention to context and impact.[77] Similarly, in *Bel Porto*, the Court reiterated 'the need to eradicate patterns of racial discrimination and to address the consequences of past discrimination which persist in our society'.[78] In *National Coalition* too, the Court emphasised the dimension of equality which is aimed at historical redress.[79] This dimension is also vividly illustrated in the legislative scheme, and doctrinal content, of affirmative action.[80] In *Walker*, the Court noted that an equality

> 'This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but "situation-sensitive" approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society.'

[75] Section 14 of PEPUDA is provided in full as an annexure to this thesis.
[76] *Brink v Kitshoff NO* 1996 ZACC 9 [40].
[77] *Harksen v Lane NO* 1997 ZACC 12.
[78] *Bel Porto School Governing Body v Premier of the Western Cape Province* 2002 ZACC 2 [153].
[79] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 1999 ZACC 17 [60].
[80] Nomfundo Ramalekana, 'What's So Wrong with Quotas? An Argument for the Permissibility of Quotas under s 9(2) of the South African Constitution' (2020) 10 CCR 251; *Minister of Finance v Van Heerden* (n 22); *South*

analysis cannot be abstract or neutral, but requires dismantling existing structures and practices of inequality.[81] In *Rustenburg*, on racist speech, the Court emphasised that one cannot determine whether a statement is racist 'from a presumption that the context is neutral – our societal and historical context dictates the contrary'.[82] Doctrinally, then, a contextually rooted approach is preferred,[83] and an overly abstracted approach eschewed.

This plays out in the Court's jurisprudence, which foregrounds the extent to which racial inequality persists, in historical and contemporary contexts.[84] But while the Court has articulated that 'the most visible and most vicious pattern of discrimination has been racial', it also recognises that 'other systematic motifs of discrimination were and are inscribed on our social fabric'.[85] From almost the inception of constitutional equality law, South African law has recognised the possibility of multiple, overlapping grounds of discrimination, as reflected in section 9 of the Constitution[86] and PEPUDA.[87]

However, it is important to note that the Court has not always been consistent in favouring a contextually rooted approach. This is evident in its somewhat patchy track record on claims on the basis of multiple grounds (which necessarily requires a contextual analysis).[88] True, in its early equality jurisprudence,[89] there is some articulation of multiple grounds of discrimination. In *National Coalition*, for example, Ackermann J for a unanimous court emphasised that 'nuanced rather than categorical approaches would be appropriate'.[90] Similarly, in *Hassam*, involving a successful constitutional challenge to legislative provisions that excluded Muslim widows in polygynous marriages from inheriting intestate, the Court adopted a contextual

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African Police Service v Solidarity obo Barnard (n 20); *Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association* (n 32); *Solidarity obo Members v Minister of Small Business Development, Afriforum v Minister of Tourism* 2020 ZAGPPHC 133.

[81] *City Council of Pretoria v Walker* (n 32) [109].

[82] *Rustenburg Platinum Mine v SAEWA obo Bester* [2018] ZACC 13 [48].

[83] Pierre de Vos, 'Grootboom, the Right of Access to Housing and Substantive Equality as Contextual Fairness' (2001) 17 SAJHR 258, 259.

[84] *Brink v Kitshoff NO* (n 76); *City Council of Pretoria v Walker* (n 32); *Minister of Finance v Van Heerden* (n 22); *Daniels v Scribante* 2017 ZACC 13; *Mwelase v Director-General for the Department of Rural Development and Land Reform* 2019 ZACC 30.

[85] *Brink v Kitshoff NO* (n 76) [41].

[86] Subsections (3) and (4) of section 9 prohibit discrimination 'on one or more grounds', and this language is also captured in PEPUDA (definition of discrimination in section 1; burden of proof in section 13(1)(b); determination of unfairness in section 14).

[87] Subsections (3) and (4) of section 9 both prohibit unfair discrimination 'on one or more grounds', while the definition of discrimination in PEPUDA similarly provides that discrimination may occur on one or more grounds.

[88] Marius Pieterse, 'Finding for the Applicant? Individual Equality Plaintiffs and Group-Based Disadvantage' (2008) 24 SAJHR 397.

[89] Shreya Atrey, 'Comparison in Intersectional Discrimination' (2018) 38 Legal Studies 379. Atrey points out that South African anti-discrimination law has not taken comparators to be critical to establishing discrimination, which has enabled it to move away from single-axis grounds of discrimination.

[90] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (n 79) [113].

approach.[91] The Court held that the provisions constituted unfair discrimination on the intersecting grounds of gender, marital status and religion.[92]

However, as Cameron and Boonzaier note, the Court has sometimes eschewed a nuanced approach in favour of categorical, non-contextually centred reasoning, failing to strike a balance between the 'moral relevance of seeming "choice", and the realities of its exercise in a world of gender-based power imbalance'.[93] Indeed, one way of understanding the much-maligned *Volks* and *Jordan* judgments is that the Court adopted an abstracted, single-axis view of discrimination.[94] In both *Volks* and *Jordan*, the Court failed to consider in its unfair discrimination analysis the complex gendered relations at the heart of the claim, let alone the intersections of economic disadvantage, sex and gender-based disadvantage (and the tight imbrications of economic disadvantage and race) as conditioning and constraining the real choices available to women.[95] Instead, in *Jordan*, the Court rejected the unfair discrimination claim on the basis that the provision is (facially) gender-neutral,[96] and sex workers voluntarily assumed the risks attendant to their profession. As others have pointed out,[97] in its analysis the majority of the Court assumed a privileged complainant on an abstracted basis, whereas the Court's minority judgment focused on the real-world constraints confronting women in vulnerable positions.[98] Even so, the *Jordan* dissent of O'Regan and Sachs JJ problematically posited that sex workers 'knowingly accept the risk of lowering their standing in the eyes of the community', and that 'in using their bodies as commodities in the marketplace, they undermine their own status and become vulnerable'.[99] In *Volks* the majority found that because women could have chosen to marry and did not, they should not benefit from the attendant legal protections, ignoring the contextually rich information before the Court on the very real gendered inequalities that constrain these choices. Happily, the Court has recently departed

[91] *Hassam v Jacobs* 2009 ZACC 19.
[92] Atrey, 'Comparison in Intersectional Discrimination' (n 89). Atrey praises the judgment as an exemplar of intersectional analysis that emphasises contextual comparison to address systemic structures of power and disadvantage.
[93] Edwin Cameron and Leo Boonzaier, 'Venturing beyond Formalism: The Constitutional Court of South Africa's Equality Jurisprudence' (2020) 84 Rabel Journal of Comparative and International Private Law 786, 797.
[94] In 2021, the Court was expressly asked to overturn *Volks* in *Bwanya v Master of the High Court*, partially on the basis of intersectionality theory.
[95] Atrey, 'The Intersectional Case of Poverty in Discrimination Law' (n 70) 418.
[96] *S v Jordan (Sex Workers Education and Advocacy Task Force)* 2002 ZACC 22 [18].
[97] Pieterse (n 88); Albertyn and Goldblatt (n 10).
[98] Pieterse (n 88) 412.
[99] *S v Jordan (Sex Workers Education and Advocacy Task Force)* (n 96) [66].

from *Volks*, declaring unconstitutional the exclusion of heterosexual life partners from benefiting under the Maintenance of Surviving Spouses Act.[100]

In recent years, voices within the Court have reaffirmed a contextually rich and sometimes even expressly intersectional approach (particularly analysing the intersection of race, gender and class).[101] In *Tshabalala*, a judgment on whether the criminal law doctrine of common purpose could be extended in the context of gang rape, Khampepe J's judgment recognised 'intersections of oppressed identities'[102] that operate specifically in respect of Black women, noting that a failure to account for this results in deficient, under-inclusive social and legal responses. In *Mahlangu*, the Court found that the exclusion of domestic workers from the statutory scheme of occupational compensation was unconstitutional, on the basis that it constitutes indirect unfair discrimination on the intersecting grounds of race, sex and gender (as well as an unjustifiable infringement of the rights to social security and dignity).[103] Both Victor AJ's majority judgment and Mhlantla J's separate judgment emphasise an intersectional approach. The majority judgment notes that a single-axis assessment of discrimination would fail to capture the full extent of disadvantage, which 'multiplies the burden on the disfavoured group' in a way that is 'qualitatively different'. For this reason, Victor AJ endorses intersectionality as a 'useful analytical tool to understand the convergence of sexism, racism and class stratification'.[104] Atrey argues that while intersectionality theory has had an extensive influence across multiple academic disciplines, its influence on anti-discrimination law across other jurisdictions has been more incremental and limited, and that in this respect the burgeoning South African intersectionality jurisprudence is welcome.[105]

While the development of a more contextually oriented approach has mostly played out in litigation involving the state as duty-bearer, this does not mean that there are no important lessons to be drawn for the private sphere. Most obviously, in South African law, a baseline assumption that the position of private persons *inter se* can be assessed without accounting for existing patterns of inequality is overly blunt. However, important tools can be pulled out of a transcendental theory box – particularly when it comes to theorising how to adjudicate a clash

[100] *Bwanya v Master of the High Court, Cape Town* 2021 ZACC 51.
[101] *Tshabalala v S; Ntuli v S* 2018 ZACC 40; *Mahlangu v Minister of Labour* (n 39).
[102] *Tshabalala v S; Ntuli v S* (n 101) [29 fn 38].
[103] *Mahlangu v Minister of Labour* (n 39).
[104] ibid [102].
[105] Shreya Atrey, *Intersectional Discrimination* (OUP 2019).

between equality/anti-discrimination and liberty/autonomy claims. I flesh this out in later chapters.[106]

3.4 RECOGNITION / REDISTRIBUTION

3.4.1 Conceptual background

A key fault line for mapping theories of equality is whether the theory dominantly asserts recognition, as opposed to redistribution, claims. Fraser and Honneth famously characterised this divide, with recognition claims concerning status hierarchy, and redistribution claims concerning the material allocation of goods and class hierarchy.[107] Any egalitarian account must, at minimum, be dualist in the sense that it must account for both recognition and redistribution claims.[108]

This is consistent with prevailing accounts of substantive equality – recall, for example, that Fredman's account of the four dimensions of substantive equality, which directly draws on Fraser's work, includes both recognition and redistributive aspects. In this next section, I chart the differences between recognition and redistributive claims, track how this has played out in South African doctrine, and extract some relevant points for application in the private sphere.

A recognition claim is concerned with whether an individual is afforded social status, including in relation to other social actors.[109] Put differently, recognition claims involve recognising an individual as having equal worth and status. Some theories of anti-discrimination law centre recognition claims. Hellman, for example, argues that the core wrong of discrimination is that it is demeaning.[110] On such accounts, anti-discrimination law is concerned with expressive meanings, that is, the message conveyed by the discriminatory law or conduct.[111] Such expressive concerns also substantially overlap with dignitarian considerations, for the claim to dignity could be characterised as a claim to the recognition of an individual's worth. I discuss dignity in more detail in the next section on the fault line between individual and group claims.

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[106] See especially discussion in 4.4, 5.5, 5.6 and 6.3.
[107] Unlike Fraser, Honneth argues that recognition is the overarching moral category, with distributive claims as derivative on this. Fraser resists subsuming distribution under recognition, instead arguing that the two are equally fundamental.
[108] Fraser and Honneth (n 26).
[109] Sandra Fredman, 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23 SAJHR 214, 215.
[110] Hellman (n 71).
[111] McConnachie (n 15) 92.

Conversely, redistribution claims are principally concerned with the material, socio-economic allocations of goods in society.[112] As I discussed earlier, much of the transcendental-ideal liberal egalitarian tradition in political philosophy is centred on redistributive dimensions of equality. A redistributive claim need not, however, be entirely limited to material or tangible goods; for example, an argument that the allocation of political power must be shifted is also a redistributive demand. Nevertheless, as it has manifested in doctrinal developments, redistributive claims have principally been made in respect of socio-economic goods and so I draw my focus in this chapter from that.

Classically, anti-discrimination law is more concerned with recognition claims than with redistributive ones, partly on the basis that such claims are principally determined by courts, which are generally not well placed to determine programmatic, distributive policies. This consideration should not preclude courts from enquiring into the distributive aspects of discrimination, however, particularly given poverty and socio-economic status.

Finally, while Fraser and Honneth correctly argue that an egalitarian account must capture both recognition and redistribution claims, these two dimensions are not exhaustive of egalitarian accounts. What is not explicitly captured by these two dimensions?[113] Some candidates include the structural and systemic dimensions of discrimination (which are captured in some conceptions of substantive equality, particularly where those conceptions are contextually rooted as well as in the transformative iterations of Fraser's own work); the group disadvantage dimension of anti-discrimination law (as I discuss in the section that follows); concerns of social and political inclusion that go beyond particular status claims, but assert proactive demands for reconstituting society (including in the form of Fraser's participative parity, and both Fredman and Sheppard's emphasis on participation); and specific corrective or redress dimensions (pertinent in the context of affirmative action or restitutionary measures) that centre historical wrongs. Arguably, on a broad conception of both recognition and redistribution these dimensions could be captured, but conceptually it is perhaps more compelling to articulate that these are independent – or rather, interdependent – norms. I now turn to a discussion of how recognition and redistribution claims have developed in South African doctrine.

[112] Fredman, 'Redistribution and Recognition' (n 109).
[113] See discussion in Fredman, *Discrimination Law* (n 6); Albertyn, 'Contested Substantive Equality in the South African Constitution' (n 1).

3.4.2 South Africa's doctrinal approach

In the context of South Africa's history, the recognition dimension of equality plays a critical function. The effect of pervasive state and societal discrimination is not simply that those who were advantaged benefited extensively from the regime, and continue to do so. (Any cursory examination of the patterns of inequality and distribution of goods in South Africa shows that the distribution of wealth and, more broadly, social goods remains highly racialised and stratified.) The effect of this was also widescale stigmatisation and denigration, on the basis that the equal status and worth of the majority of South Africans were denied by the law.

The listed prohibited grounds in section 9 of the Constitution, and section 1 of PEPUDA, track both existing patterns of disadvantage (as I argue in a later section), and historic bases for denying equal status. Section 9(3) of the Constitution proscribes discrimination on the grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Section 1 of PEPUDA defines the prohibited grounds as:

> (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or
>
> (b) any other ground where discrimination based on that other ground—
>
> (i) causes or perpetuates systemic disadvantage;
>
> (ii) undermines human dignity; or
>
> (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).

Recognition claims have also been accepted in jurisprudence. The Constitutional Court has affirmed the expressive, status-oriented dimension of the right to equality, rejecting distinctions that are demeaning or stigmatising.[114] In the second *National Coalition* judgment, for example, the Court emphasised that denying same-sex partners the benefit of joining their partners in the country sends a message that queer people lack inherent humanity, which in turn perpetuates and reinforces prejudices and stereotypes.[115] In *Fourie*, the recognition dimension of equality was foregrounded, because excluding same-sex couples from marriage 'represents a harsh if

[114] *National Coalition for Gay and Lesbian Equality v Minister of Justice* (n 19) [28]; *Harksen v Lane NO* (n 77) [50]; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (n 79) [44]; *Minister of Home Affairs v Fourie* (n 34) [50]; *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* 2004 ZACC 11 [74]; see also discussion in McConnachie (n 15) 90–92.
[115] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (n 79) [54].

oblique statement by the law that same-sex couples are outsiders … [and] reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings'.[116] In *Hoffmann*, the Court recognised that discrimination against HIV-positive people constitutes 'a fresh instance of stigmatisation' and thus 'an assault on their dignity'.[117] (The Court also linked this status-oriented claim to social and economic exclusion – because of unfair discrimination in the context of employment, HIV-positive individuals are precluded from earning a living.) In *Bhe*, the customary law rule of male primogeniture 'conveys a message that women are not of equal worth as men'.[118] In *Khosa*, too, the Court was concerned with the expressive dimensions of excluding foreigners from social assistance programmes – this 'not only operates to stamp them with a "badge of inferiority" but marginalizes them by sending a message of second-class status'.[119]

South African doctrine has more readily – though not exclusively – affirmed recognition claims over redistributive ones. This is in part animated by procedural and institutional concerns, as I explain below. There are some footholds, however, for anti-discrimination law to be used to further redistributive aims. Both particular provisions of PEPUDA and a number of core judgments (in particular, *Khosa*,[120] *Social Justice Coalition*,[121] *Mahlangu*,[122] and *King v De Jager*[123]) reflect a concern for both recognition and redistributive claims even in the context of anti-discrimination litigation, which is classically more oriented towards the former.

It is true that neither section 9 of the Constitution nor PEPUDA recognise socio-economic status as a specifically protected ground against discrimination. However, section 34 of PEPUDA contains a directive principle setting out that the Minister of Justice and Constitutional Development must give special consideration to including socio-economic status as within the definition of 'prohibited grounds', along with other grounds such as HIV status, nationality and family responsibility, in light of the 'overwhelming evidence of the importance, impact on society and link to systemic disadvantage and discrimination' of such grounds. Judicial development has preceded legislative change in this instance. In *Social Justice Coalition v Minister of Police*,[124] the Equality Court found that poverty (rather than the

[116] *Minister of Home Affairs v Fourie* (n 34) [71].
[117] *Hoffmann v South African Airways* 2000 ZACC 17 [28].
[118] *Bhe v Khayelitsha Magistrate* 2004 ZACC 17 [187] (Ngcobo J's concurring judgment).
[119] *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* (n 114) [74].
[120] *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* (n 114).
[121] *Social Justice Coalition v Minister of Police* 2018 ZAWCHC 181.
[122] *Mahlangu v Minister of Labour* (n 39).
[123] *King NO v De Jager* (n 40).
[124] *Social Justice Coalition v Minister of Police* (n 121).

arguably broader ground of socio-economic status) constitutes an analogous (unlisted) protected ground, linking the aims and procedural mechanisms of anti-discrimination law to distributive imperatives.

Recognition and redistribution claims thus can be co-extensive.[125] However, to the extent that the Court has ordered redistributive outcomes, this is often hinged to an underlying recognition-linked consideration. A clear example is *Khosa*, where the denial of social assistance entitlements to permanent residents involved both a 'strong stigmatising effect' and the 'allocation of public benefits'.[126] As a result of the judgment, non-citizens are equally entitled to access social security, but it was not their redistributive claim that did the conceptual work in the judgment, but rather a more 'straightforward' (though still potent) unfair discrimination recognition-styled claim.[127] In *Hassam*, too, the Court found that the discrimination against widows in Muslim polygynous marriages was unfair because the claimants experienced both 'significant and material disadvantage' and 'serious effects of non-recognition'.[128] More recently, in *King v De Jager*, two of the Court's separate judgments sounded the call for the more radical redistributive impetus of section 9 of the Constitution.[129]

The extent to which the Court has incorporated redistributive claims along with recognition ones should not be overstated, however. As Fredman notes, anti-discrimination law by itself 'cannot address the primarily economic manifestations of poverty', but can 'add a "recognition" dimension' to addressing socio-economic disadvantage'.[130] In general, the Court has tended to foreground the recognition dimensions of the right to equality over the redistributive ones – and where it does link socio-economic rights with equality, it is often in a procedural rather than substantive sense.[131]

This is in part underpinned by institutional separation of powers concerns. While the Court has expressly acknowledged the gaping material inequalities in South Africa, in its orders it has tended to hesitate to legislate solutions on behalf of other state entities. In *Soobramoney*, for example, the Court declined to find that the right to access healthcare services entails an

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[125] Nancy Fraser, 'Redistribution or Recognition?' in Nancy Fraser and Axel Honneth, *Redistribution or Recognition? Political-Philosophical Exchange* (Verso 2003); Fredman, 'Redistribution and Recognition' (n 109).
[126] *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* (n 114) [74].
[127] *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* (n 114).
[128] *Hassam v Jacobs* (n 91) [34], [36], [37], [42]; Atrey, 'Comparison in Intersectional Discrimination' (n 89) 390.
[129] *King NO v De Jager* (n 40).
[130] Fredman, 'Redistribution and Recognition' (n 109) 228.
[131] Albertyn, 'Contested Substantive Equality in the South African Constitution' (n 1).

absolute entitlement to specific services on the basis that the state has legitimate resource constraints, but nevertheless acknowledged that as long as conditions of poverty and great disparities in wealth persist, the aspirations of dignity, freedom and equality 'will have a hollow ring'.[132] To be fair, some of the far-reaching redistributive policies that are possible for addressing structural inequality (that manifests in massive material discrepancies in ownership, income, wealth and access to a range of material goods that are significant for living an autonomous life) fall more obviously within the purview of the legislature and the executive rather than to the judiciary.[133]

This is not to say that the courts play no role. Instead, their role is threefold. First, courts may be called on to test and defend such measures and ultimately to uphold rights. Second, courts give normative content to the right to equality, which in turn can inform the conceptual underpinnings of policy and legislative measures. And third, redistributive claims are more frequently instantiated in socio-economic jurisprudence rather than 'pure' anti-discrimination or equality law doctrine, even though of course both give legal life to substantive equality.

What are the implications of all of this for the private sphere? The courts' readiness to affirm recognition claims over redistributive ones, even within the state paradigm, certainly translates into a heightened hesitation to order a reallocation of goods as they manifest in the private sphere. Recognition claims in many respects are far easier to adjudicate and regulate, especially as they manifest among private persons. Where courts have made orders with redistributive effects for private persons, this is typically mediated indirectly, rather than by reliance on the direct right. However, increasingly we see that courts are willing to subject the private sphere to constitutional scrutiny, including where doing so has distributive consequences – as in *King v De Jager*,[134] *Daniels v Scribante*[135] and *Pridwin.*[136] However, classically this will either be because the redistributive claim is contingent on a more primary recognition-oriented claim (as in *King v De Jager*), or where a particular socio-economic right is centred (as in *Daniels v Scribante* and *Pridwin*).[137]

[132] *Soobramoney v Minister of Health* 1997 ZACC 17 [8].
[133] W Freedman, 'Understanding the Right to Equality' (1998) 115 SALJ 243, 251.
[134] *King NO v De Jager* (n 40).
[135] *Daniels v Scribante* (n 84).
[136] *AB v Pridwin Preparatory School* 2020 ZACC 12.
[137] See discussion in 2.5.2 and 5.5.2.

3.5 INDIVIDUAL CLAIMS / GROUP DISADVANTAGE

The final fault line I consider for tracing substantive conceptions of equality is the individual claim versus the claim of the group. While anti-discrimination litigation is typically brought to vindicate an individual's claim, that 'individual is simply considered to be an instrument who brings the group's concerns to the courtroom'.[138] I am not particularly concerned with this aspect in this section. Instead, I look at various dimensions of whether the wrong of discrimination is determined by either individual intention (in the case of a wrongdoer) or individual impact (in the case of a complainant), including to an individual's autonomy or dignity.

I then consider the group-oriented aspects of anti-discrimination law – particularly the account that anti-discrimination law targets patterns of group disadvantage. I finally turn to social accounts with a particular focus on relational egalitarianism.

3.5.1 Individual-oriented accounts

Reasons of the individual wrongdoer

Some theorists have argued, in the context of anti-discrimination law, that the wrongfulness of discrimination lies in the attitudes of the wrongdoer. Gardner posits that direct discrimination is the paradigm case of discrimination (as opposed to indirect discrimination, which is much more impacts-oriented). The wrong of direct discrimination, in his view, is that a protected ground plays a role in the operative premises of a discriminator's reasoning.[139] This rationalist account centres not the complainant, but rather the wrongdoer.[140] Alexander initially took a similar view that the wrong of discrimination comprises the wrongdoer's expressive attitude of judging another person to be of lesser worth.[141] Significantly, Alexander has since disavowed that view, now arguing that 'all mental state accounts of the wrongfulness of wrongful

[138] Freedman (n 133) 251.
[139] John Gardner, 'On the Ground of Her Sex(uality)' (1998) 18 Oxford Journal of Legal Studies 167.
[140] Sandra Liebenberg and Beth Goldblatt, 'The Interrelationship Between Equality and Socio-Economic Rights under South Africa's Transformative Constitution' (2007) 23 SAJHR 335, 342, noting:

> 'Substantive equality thus requires a dismantling of structural inequality and necessarily focuses on patterns of group-based disadvantage, rather than seeing discrimination as an individual infraction in an otherwise equal social order.'

[141] L Alexander, 'What Makes Wrongful Discrimination Wrong?' (1992) 141 University of Pennsylvania Law Review 149.

discrimination are doomed to failure',[142] and that instead the wrong consists of contingent consequences, or because there is a breach of a fiduciary duty.

Substantive equality demands a contextual analysis of the impact of discrimination, and the concomitant harms that flow from disadvantage. It is consistent with a shift away from situating the wrong of discrimination in the wrongdoer, as opposed to in the perpetuation or entrenchment of extant systems or structures of inequality. However, it would be wrong to jettison the attitudes of the wrongdoer entirely from any enquiry. As I will argue in later chapters, a discriminator's reasons may factor into determining whether the discrimination can be justified as fair, and so may be relevant for balancing competing rights and interests as they play out in the private sphere.

Dignity, autonomy, and the individual rights bearer

Another individual-oriented framing of equality and anti-discrimination law is the focus of discriminatory law or conduct on an individual *qua* individual. One prevalent argument is that the purpose of equality law is to protect and facilitate an individual's autonomous life – understood to be a 'life substantially lived through the successive valuable choices of the person who lives it, where valuable choices are choices from among an adequate range of valuable options'.[143] The wrong of discrimination, according to this argument, is that it undermines an agent's autonomy by depriving her of valuable choices (or, on Moreau's account, her deliberative freedoms[144]) or conveys to an agent that her life is not valuable. On this account, the protected grounds on which discrimination is prohibited – such as race, religion, sexuality and disability – are protected either because they stem from a fundamental choice, or from an immutable status.

Dignitarian accounts have been heavily influential not only in the realm of academic theory, but in guiding judicial decision-making across jurisdictions. Réaume sketches the role of dignity in the jurisprudence of the Supreme Court of Canada,[145] which shifted from endorsing

[142] L Alexander, 'Book Review: Philosophical Foundations of Discrimination Law' (2015) 125 Ethics 872, 873.
[143] Gardner (n 139); Moreau (n 72); Khaitan (n 9).
[144] Moreau (n 72). On Moreau's account, deliberative freedom is the freedom to have our decisions about how to live insulated from the effects of normatively extraneous features. One difficulty of this account is that it cannot mediate between clashing deliberative freedoms – under the account, both the decision maker within a religious institution and the lesbian minister within a religious institution have deliberative freedom stakes. Without a historical, context-sensitive account of patterns of discrimination it is not clear how these competing claims should be adjudicated.
[145] Denise G Réaume, 'Discrimination and Dignity' (2003) 63 Louisiana Law Review 645.

dignity as central in discrimination law[146] to ultimately rejecting dignity as a constitutive component of the test for whether discrimination has occurred.[147]

In South African academic writing, dignity is one frontrunning answer to the 'equality of what' question. The former Constitutional Court Justice Ackermann has penned the leading work articulating this view. Ackermann contends that dignity is critical for our conception of equality more broadly and the prohibition against unfair discrimination.[148] He argues for a broad understanding of human dignity, which at its core instantiates the Kantian notion that every person has equal moral worth,[149] and is entitled to treatment that is consistent with that worth. As McCrudden points out, a broad account of dignity has an ontological dimension (that individuals have inherent value) and a relational dimension (that individuals have equal worth, and forms of treatment that are inconsistent with this are proscribed).[150] As I noted earlier in my discussion of recognition claims, dignity also encompasses the expressive, recognition or status-oriented dimensions of equality law. Fredman, however, argues that the recognition and dignity are distinct because recognition is relational: 'rather than regarding each person as an isolated individual to whom dignity is attached, it regards individuals as constructed in many ways by society and social norms'.[151]

Ackermann is optimistic that human dignity provides determinative, and practically helpful, guidance for adjudication in unfair discrimination cases. This, however, is questionable – both because dignity is an open-textured concept,[152] and because some difficult cases involve competing dignitarian claims. A number of academic commentators are thus critical of the over-reliance on dignity in an equality or unfair discrimination analysis.[153] The objections to dignity include the following: it is too vague to determine or provide content to an equality analysis; on an analysis of the Court's judgments, dignity does little of the actual normative work; and dignity alone is insufficient for addressing systemic inequality, not least because its

[146] *Law v Canada* 1999 1 SCR 497.
[147] *R v Kapp* 2008 SCC 41 [22].
[148] Laurie Ackermann, *Human Dignity: Lodestar for Equality in South Africa* (Juta 2012).
[149] Gosepath (n 2).
[150] C McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 European Journal of International Law 655, 667; discussed in McConnachie (n 15) 62.
[151] Fredman, 'Substantive Equality Revisited' (n 23) 731.
[152] McConnachie (n 15) 61.
[153] Cathi Albertyn and Beth Goldblatt, 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 SAJHR 278; DM Davis, 'Equality: The Majesty of Legoland Jurisprudence' (1999) 116 SALJ 398; Albertyn and Goldblatt (n 10); McConnachie (n 15); Catherine Albertyn, 'Contested Substantive Equality in the South African Constitution' 463; Ramalekana (n 80).

focus is on the individual, rather than on the structural (political, social and economic) conditions of inequality.

Cowen attempts to meet this last objection, arguing that 'dignity can serve both individual and collective or group-based concerns, and … it can therefore justify measures that both constrain and enhance liberty, as well as require steps to advance material well-being'.[154] However, even if one accepts that dignity captures both individual and collective concerns (and so does not *necessarily* entail brute individualism),[155] that gives rise to two separate worries: that as a concept dignity is unhelpfully indeterminate and vague; and that by hinging equality to dignity, equality as a right and value is not afforded enough of a distinctive role.[156] Davis, for example, contends that by rendering equality secondary to a more foundational dignity claim, the Court's jurisprudence has rendered equality obsolete, as no more than 'an empty value which can only be understood by reference to some other value – in this case, dignity'.[157] Cowen unsuccessfully attempts to counter this criticism by suggesting that the value of dignity, rather than the right to dignity, informs the equality analysis,[158] but this only sets the obsolescence objection back one step. It does not resolve it.

Cameron's position on the role of dignity links dignity with recognition concerns. The former Constitutional Court Justice argues that the link between equality and dignity in the Court's jurisprudence (which I discuss later in this section) is appropriate and symbolically potent:[159] 'the denial of equality under apartheid was distinctive in that it stigmatised those who were Black, in deliberately "placing a mark of shame on their race"; it was thus the distinctive mission of the Constitution's equality clause to undo that past of racial stigma and indignity.'[160] Notwithstanding this role afforded to dignity, it should not be accepted as the unitary or comprehensive content for the right to equality. On this account, dignity as a component of the unfair discrimination enquiry is both practicable and historically salient, even if it is not self-executing or exhaustive of the content of equality.

I now turn to consider group-oriented accounts of equality and anti-discrimination law.

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[154] Susie Cowen, 'Can "Dignity" Guide South Africa's Equality Jurisprudence?' (2001) 17 SAJHR 34.
[155] See also Botha (n 8).
[156] McConnachie (n 15); Rósaan Krüger, 'Equality and Unfair Discrimination: Refining the Harksen Test' (2011) 128 SALJ 479.
[157] Davis (n153) 412.
[158] Cowen (n 154).
[159] Edwin Cameron, 'Dignity and Disgrace – Moral Citizenship and Constitutional Protection' in C McCrudden (ed), *Understanding Human Dignity* (OUP 2013).
[160] Cameron and Boonzaier (n 93) 801.

3.5.2 Group-oriented accounts

Some theorists argue that the imperatives of equality, as translated into law, require the elimination of patterns of group disadvantage.[161] This is, of course, a clear instantiation of the commitment to substantive equality, which requires the dismantling of existing, systemic inequality. Group-oriented accounts emerge from feminist and critical theorists' work on anti-subordination and anti-disadvantage: rather than focus on the impact of discrimination on an individual, instead the account recognises that particular groups have been subject to societal disadvantage, exclusion, marginalisation and subjugation.[162] As MacKinnon puts it, commenting on the development of group-oriented understandings of anti-discrimination law that emerge from substantive equality, 'this analysis defines inequality not in terms of sameness and difference, but in terms of historic group disadvantage based on concrete grounds'.[163]

Khaitan posits that groups – rather than individuals – are salient for at least three reasons.[164] First, membership of a group (say, on the basis of shared religion, race or sexual orientation) can impact a person's ability to exercise her autonomy and access goods. Second, group membership on the basis of these grounds can mean that an individual is 'more likely to suffer abiding, pervasive and substantial disadvantage'.[165] Third, because equality is partly a comparative enterprise, group membership is one way of making a relative assessment as to disadvantage.

A concern with patterns of group disadvantage is also played out in whether anti-discrimination law's protections are symmetrical or not. The claim of symmetry is that the moral wrong of discrimination does not vary on the basis of whether the conduct or rule discriminates against a protected group[166] (i.e. a group that suffers historic or current patterns of disadvantage, also referred to in the literature as a cognate group[167]) or an unprotected group (i.e. a group that is privileged or advantaged). Some jurisdictions have adopted an overtly symmetrical approach

[161] Owen Fiss, 'Groups and the Equal Protection Clause' (1976) 5 Philosophy & Public Affairs 107; Ruth Colker, 'Anti-Subordination Above All: Sex, Race and Equal Protection' (1986) 61 New York University Law Review 1003; Sheppard (n 27); Catharine MacKinnon, 'Equality' (2020) 149 Daedalus 213.
[162] Colker (n 161) 1009.
[163] MacKinnon (n 161) 215.
[164] Khaitan (n 9) ch 5.
[165] Tarunabh Khaitan, *Theory of Discrimination Law* (OUP 2015) 119.
[166] L Blum, 'Racial and Other Asymmetries: A Problem for the Protected Categories Framework for Antidiscrimination Thought' in D Hellman and S Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013).
[167] Khaitan (n 9).

to anti-discrimination law.[168] On this view, discrimination against white people is an equivalent wrong to discrimination against Black people; discrimination against women has the same valence as discrimination against men;[169] discrimination against heterosexuals is normatively comparable to discrimination against queer people.[170] (I should pause to note that jurisdictions that do endorse a symmetrical approach struggle to coherently account for disability as a protected ground – here there is presumed asymmetry, and what is frequently required by anti-discrimination law is positive action, typically in the form of reasonable accommodation.)

There are good reasons, however, to reject a strict symmetrical approach to anti-discrimination law, particularly given a commitment to substantive equality. First, it assumes a neutral status quo, and an individual legal subject situated within that status quo who is *de facto* equal with other subjects.[171] Second, and relatedly, it fails to be responsive to the contextual imperatives borne out of existing structures and systems of inequality. Third, as Lacey points out, it implies 'that discrimination is something unusual, pathological, abnormal'[172] as opposed to woven into social norms and institutions (and so requiring active dismantling). As such, a (partially) asymmetrical approach tracks the same features that differentiate substantive from formal equality and justify a contextual approach.

3.5.3 Relational equality

At the intersection of individual and group accounts of equality is a relational account of equality, which posits that the aim of equality is for persons in a society to relate to each other as equals – with some competing accounts of what exactly 'relating as equals' entails.[173] I

[168] Sandra Fredman, 'Direct and Indirect Discrimination: Is There Still a Divide?' in Hugh Collins and Tarunabh Khaitan (eds), *Foundations of Indirect Discrimination Law* (Hart 2018). Fredman discusses the approach of the US Supreme Court, and notes also that the UK has endorsed some symmetrical premises, although it has eschewed intention as a central component of the test for discrimination. See, however, Canada as a counter-example.
[169] See, for example, *James v Eastleigh Borough Council* [1990] 2 AC 751 for a comparative UK law approach, which endorses a symmetrical approach.
[170] On this, see *Bwanya v Master of the High Court, Cape Town* 2021 ZACC 51, where the Court departed from its earlier judgment in *Volks* and found that permanent life partnerships must be accorded legal protection. Part of the applicant's argument was that, as a result of *Gory v Kolver NO* [2006] ZACC 20, same-sex couples in life partnerships were protected by the Intestate Succession Act 81 of 1987, while opposite-sex couples in life partnerships were not.
[171] Nicola Lacey, 'From Individual to Group' in B Hepple and E Szyszczak (eds), *Discrimination: The Limits of Law* (Mansell Publishing Limited 1992) 115.
[172] ibid.
[173] Anderson (n 59); Kasper Lippert-Rasmussen, *Relational Egalitarianism: Living as Equals* (CUP 2018); Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (OUP 2011); Samuel Scheffler, 'What Is Egalitarianism?' (2003) 31 Philosophy and Public Affairs 5.

return to this account again in later chapters, for it has some obvious salience for the scope of and justification for private persons' duties.

Anderson's influential 1999 paper set its face against egalitarian writing that was concerned with eliminating undeserved bad luck, and constructed accounts based on increasingly abstracted theoretical scenarios.[174] Instead, she argues, egalitarian justice has two aims: its negative aim is to eliminate oppression (echoing the earlier discussion of substantive equality), while its positive aim is a community of people who stand in relations of equality. However, this positive aim is ambiguous (and perhaps also liable to being overly abstracted): what does it mean to stand in relations of equality? Anderson suggests that relating as equals requires both recognition and redistribution.[175] Individuals ought to be able to access the social conditions of freedom (which requires certain distributions of goods, although on Anderson's account does not require total income equality) and to make 'expressive demands of equal respect'.[176] For this reason, Anderson posits that relational equality permeates both the political and private spheres, as in both spheres persons should have the capacity to interact as equals.

Nedelsky brings together a relational account with considerations of autonomy. Law structures relations – even if it has some limits in its ability to regulate a fundamental overhaul of 'relational habits of thoughts'.[177] For this reason, rights must be understood in terms of how they structure relations. When determining the extent to which the right to equality (and more particularly, anti-discrimination law) imposes obligations on private persons, then a relational account is helpful for understanding how legal regulation structures relationships, and for justifying such obligations.[178] Nedelsky's argument is also important for articulating that the law always has the effect of structuring relationships (among strangers as well as among intimates). The law is not neutral regarding, or separate to, the relational self. Instead, law is a central mechanism for shaping the relationships which include nested relationships along a continuum of intimacy – from family and lovers to the structural economic relations and the relation between subject and state. Those relationships in turn are conditions for (or sometimes obstacles to) autonomy.

[174] Anderson (n 59).
[175] This echoes the discussion earlier in the chapter on participatory parity – see, for example, Fraser (n 125).
[176] Anderson (n 59) 289.
[177] Nedelsky (n 173) 4.
[178] I will therefore return to this argument in a subsequent chapter.

The relational account advocated by Nedelsky and others resonates with South African law's endorsement of the indigenous value of ubuntu.[179] The value of ubuntu (*umuntu ngumuntu ngabantu* i.e. 'a person is a person through other people') is relational. It recognises that the individual is not an isolated unit but instead is constituted through relationships with others.[180] These relationships in turn place moral and social demands on individuals.[181]

Relational egalitarianism has not played an extensive role in South African doctrine to date, at least in terms of courts' express reasoning. In chapters 5 and 6, I return to relational egalitarian arguments in much more detail, as they are informative for giving content to the scope and substance of private anti-discrimination duties.

One final group-oriented framing of the content of equality is that of diversity, participation and social inclusion. In the literature, Collins is a major proponent of the social inclusion view that discrimination law aims at mitigating social exclusion, including exclusion on the basis of socio-economic status.[182] Social inclusion, then, is linked to the idea of participation,[183] with participation extending to social, political and economic inclusion. This resonates again with work on participatory parity traced earlier in this chapter.[184]

Albertyn sounds the concern that a social inclusion-based account is premised on retaining a status quo, albeit by extending the benefits of that status quo to those who are currently excluded from accessing those benefits.[185] For this reason, she is circumspect about the extent to which inclusion-based accounts can tackle deep-running structural or systemic barriers to equality. This concern is particularly acute in a South African context, which historically was predicated on excluding the majority of the population.

I now turn to a brief discussion of how the fault line of individual, group and social understandings of equality manifests in South African doctrine.

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[179] See further discussion below and also in 6.2.3.
[180] Drucilla Cornell and Nyoko Muvangua, *Ubuntu and the Law – African Ideals and Postapartheid Jurisprudence*, vol 72 (Fordham University Press 2012); John Murungi, *African Philosophical Currents* (Routledge 2018); JY Mokgoro, 'Ubuntu and the Law in South Africa' (1998) 1 PELJ 15.
[181] Cornell and Muvangua (n 180) 8.
[182] Hugh Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66 Modern Law Review 16.
[183] Fredman, 'Redistribution and Recognition' (n 109) 227.
[184] Fraser (n 125); Fredman, *Discrimination Law* (n 6); Sheppard (n 27).
[185] Albertyn, 'Contested Substantive Equality in the South African Constitution' (n 1).

3.5.4 South Africa's doctrinal approach

Insofar as some theoretical accounts foreground the individual wrongdoer, doctrinally and legislatively, South African law has rejected this approach. Discrimination's wrongfulness is not determined by the subjective mental state of the discriminator but is an objective determination, albeit one that is historically and contextually contingent. This position is confirmed in case law. As the Court put it in *Walker*, the prohibition against both direct and indirect discrimination 'evinces a concern for the consequences rather than the form of conduct'.[186] Accordingly, the constitutional right to equality does not call for proof of intention, and determining whether discrimination is unfair must be objective, without factoring in the subjective mental state of the wrongdoer.[187] And, unlike in other jurisdictions where indirect discrimination (or disparate impact discrimination) is seen to be ancillary, in South Africa indirect discrimination is a core component of the prohibition against discrimination, and it can be established without any legal relevance afforded to intention or the subjective state of the wrongdoer's mind.[188]

It is evident, then, that the intention of the alleged discriminator is not a component of whether discrimination has taken place or not. The definition of discrimination in PEPUDA, too, omits any reference to intention. Intention might have a role to play in the downstream remedial inquiry, however, in a court's determination of the appropriate remedy in terms of section 21 of PEPUDA. The reasons and attitude of a discriminator may be relevant when delineating the duty borne by a private person in a specific instance and, specifically, how that person's competing interests and rights ought to be factored into that enquiry. The same may be true of the state as duty-bearer – where the purpose of and justification for discriminatory conduct or rules factor into the fairness enquiry and section 36 limitations analysis, rather than whether discrimination has occurred in the first place.

An individual-oriented approach is, however, expressly endorsed in the South African jurisprudence on dignity. The South African Constitution enshrines dignity as both a founding value and a self-standing right. The Constitutional Court has noted that dignity's centrality exists 'to contradict our past in which human dignity for Black South Africans was routinely

[186] *City Council of Pretoria v Walker* (n 32) [31].
[187] ibid [43].
[188] Hugh Collins and Tarunabh Khaitan, 'Indirect Discrimination Law: Controversies and Critical Questions' in Hugh Collins and Tarunabh Khaitan (eds), *Foundations of Indirect Discrimination Law* (Hart 2018) 2.

and cruelly denied'.[189] At minimum, dignity exerts important rhetorical force.[190] Ackermann's understanding of dignity has received some judicial recognition.[191] In fact, the Court has on numerous occasions expressed that '[a]t the heart of the prohibition of unfair discrimination is the recognition that … all human beings, regardless of their position in society, must be accorded equal dignity'.[192]

In *Harksen v Lane*, the Constitutional Court places dignity at the heart of its two-part test for unfair discrimination (first, whether there is discrimination; and second, whether that discrimination is unfair).[193] Further, the listed grounds are protected because discrimination on the basis of these grounds has the potential to violate human dignity, and discrimination is unfair if it actually violates dignity. Section 1(xxii)(ii) of PEPUDA stipulates that discrimination on a ground is prohibited if, among other factors, it undermines human dignity.

Dignity's predominance in South African doctrine is in part attributable to the influence of Canadian constitutional law:[194] the Supreme Court of Canada initially centred dignity in the test for discrimination,[195] though the Court has since rejected dignity as a constitutive component of equality on the basis that it is an indeterminate concept.[196]

Notwithstanding some theorists' contention that dignity need not be solely individualist, doctrine does bear out a more atomistic understanding. In *Harksen v Lane*, whether a complainant's dignity was infringed is determined by whether the complainant feels less worthy of respect,[197] arguably conditioning an individualistic conception.[198] In South Africa's burgeoning affirmative action jurisprudence, there are also suggestions that the role of dignity is predominantly to centre an individual's experience (and in that context, often the typically

[189] *Dawood v Minister of Home Affairs* 2000 ZACC 8 [35].
[190] Pierre de Vos, 'Substantive Equality after Grootboom: The Emergence of Social and Economic Context as a Guiding Value in Equality Jurisprudence' in S Jagwanth and E Kalula (eds), *Equality Law: Reflections from South Africa and Elsewhere* (Juta 2001) 63.
[191] *President of the Republic of South Africa v Hugo* (n 10) [41]; *Harksen v Lane NO* (n 77) [86]; *South African Police Service v Solidarity obo Barnard* (n 20) [172]; *National Coalition for Gay and Lesbian Equality v Minister of Justice* (n 19) [28]; *Minister of Home Affairs v Fourie* (n 34) [15], [50].
[192] *Hoffmann v South African Airways* (n 117) [27]; see also *National Coalition for Gay and Lesbian Equality v Minister of Justice* (n 19) [120]; *President of the Republic of South Africa v Hugo* (n 10) [41]; *Prinsloo v Van der Linde* (n 31) [32].
[193] *Harksen v Lane NO* (n 77) [41], [46], [50].
[194] Réaume (n 145).
[195] *Law v Canada* (n 146).
[196] *R v Kapp* (n 147) [22].
[197] *Harksen v Lane NO* (n 77).
[198] Albertyn and Goldblatt (n 153); Albertyn and Goldblatt (n 10) 35-9–10.

white individual who has not benefited from an affirmative action measure).[199] This reinforces a conception of dignity that is, at its heart, individualistic in operation.[200] Even so, however, I should note that the Constitutional Court has not been consistent on this question, and that some argue that dignity as a concept extends beyond the individual. Van der Westhuizen J's separate judgment in *Barnard,* for example, rejects a purely individualistic conception of dignity, instead drawing links between its 'collective impulses' and the value of ubuntu.[201]

Turning to an approach that contends that, in practice, the Court's jurisprudence is driven by patterns of group disadvantage, McConnachie argues that while the Constitutional Court purports to place dignity at the heart of its anti-discrimination jurisprudence, a careful analysis of relevant judgments reveals that, as a concept, dignity does little work.[202] Instead, he argues that the factors that inform the Constitutional Court's enquiry as to whether there has been unfair discrimination are whether there is (i) unfavourable treatment on the basis of protected grounds; (ii) that threatens to create or perpetuate patterns of group disadvantage; and (iii) that lacks justification. He suggests that the Constitutional Court should jettison dignity from the unfair discrimination enquiry, and instead foreground discrimination that entrenches existing patterns of disadvantage. The protected grounds of discrimination track 'long-established and ongoing patterns of oppression, degradation and marginalization',[203] and this is partly what makes anti-discrimination law distinctive.[204]

Indeed, as McConnachie points out, sometimes the Court's dignity conception is itself determined by patterns of disadvantage.[205] Importantly, anti-discrimination law must not only address historic patterns of disadvantage, but also, as Moseneke DCJ put it in *Van Heerden*, 'prevent the creation of new patterns of disadvantage'.[206] This impulse is also partially reflected in PEPUDA's definition of the grounds on which discrimination are prohibited in

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[199] Sandra Fredman, 'Gender and Transformation in the South African Constitutional Court' in Oscar Vilhena, Upendra Baxi and Frans Viljoen (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (PULP 2013); Ramalekana (n 80).
[200] Ramalekana (n 80).
[201] *South African Police Service v Solidarity obo Barnard* (n 20) [174]:

> 'The individual, as the bearer of the right to dignity, should not be understood as an isolated and unencumbered being. Dignity contains individualistic as well as collective impulses. Its collectivist attributes, including that we are "social beings whose humanity is expressed through ... relationships with others", find resonance in the South African idea of Ubuntu, which foregrounds "interdependence of the members of a community"'.

[202] McConnachie (n 15).
[203] Pieterse (n 88) 401.
[204] Atrey, 'Comparison in Intersectional Discrimination' (n 89).
[205] *Mabaso v Law Society of the Northern Provinces* 2004 ZACC 8 [38]; *City Council of Pretoria v Walker* (n 32) [109].
[206] *Minister of Finance v Van Heerden* (n 22) [27].

section 1(xxii)(b)(i) as including any ground which causes or perpetuates systemic disadvantage. Addressing patterns of group disadvantage has the effect that individuals are understood within a particular context, as opposed to being positioned as occupying equal positions in an original, abstract position.[207] In this respect, patterns of group disadvantage also track the contextual approach of South African law. This has obvious links to a commitment to contextualised, substantive equality.

However, McConnachie's claim that 'a necessary condition for the Court to conclude that discrimination violates dignity is that it must threaten to create or perpetuate patterns of group disadvantage'[208] risks overstating the position. Albertyn cautions that an overemphasis on defining groups exclusively by their position of disadvantage risks obscuring how people exercise agency and autonomy, even within constraints.[209] This is true, though subject to important caveats, of course. In this regard, it is significant, too, that the definition of the prohibited grounds in section 1(xxii) of PEPUDA accommodates both patterns of group disadvantage and dignity as stand-alone sufficient conditions for the grounds, and that both dignity and patterns of disadvantage figure in PEPUDA's test for determining the fairness or unfairness of discrimination in section 14.

Finally, I turn to the doctrinal approach to relational equality, ubuntu, and the social and participative dimensions of equality. In *Khosa*, for example, a majority of the Court held that the exclusion of permanent residents from accessing social security was a violation of the right to equality.[210] Mokgoro J's judgment noted:

> 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.[211]

This passage articulates both that individuals' personal well-being is bound up with collective well-being, and that this, in turn, is underpinned by a recognition of everyone's equal worth and equal social membership. Similarly, PEPUDA's preamble notes that the legislation is intended to 'facilitate the transition to a democratic society … marked by human relations that are caring and compassionate'.

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[207] Lacey (n 171).
[208] McConnachie (n 15) 74.
[209] Albertyn, 'Contested Substantive Equality in the South African Constitution' (n 1) 27–28.
[210] *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* (n 114).
[211] ibid [74].

While the concept of ubuntu is not reflected expressly in the 1996 Constitution, it was included in a postscript to the Interim Constitution, on National Unity and Reconciliation.[212] The Constitutional Court has repeatedly relied on the concept of ubuntu, most famously in *S v Makwanyane*, which found the death penalty to be unconstitutional,[213] but also in a number of other judgments.[214] There has been a recent resurgence of reliance on ubuntu in Constitutional Court judgments,[215] particularly in the realm of contract law[216] and, more recently, in the intersection of freedom of testation and anti-discrimination law.[217] Price cautions that because the concept of ubuntu operates at a 'high level of abstraction', its role in the concrete adjudication of disputes is uncertain.[218] In this respect, ubuntu faces similar difficulties as those confronting the right to dignity. Nevertheless, this does not render the concept unhelpful. On the contrary, it remains a home-grown articulation of significant relational dimensions of law and may play an increasing role in justifying the growing regulation of spaces previously thought to be private and thus insulated from the law.

In case law, the Constitutional Court has recognised aspects of social inclusion, and associated values of diversity and participation. *National Coalition* captures an aspect of social (or at least political) inclusion – discriminatory prohibitions on sex between men have a dignitarian impact as they stigmatise gay men, and men who have sex with men, but are also problematic because LGBTQI+ people 'are a political minority not able on their own to use political power to secure favourable legislation'.[219] So, equality embodies some democratic imperatives too.

To have normative force, however, social inclusion must accommodate the idea of difference – otherwise, all that social inclusion would demand is the integration or assimilation of disadvantaged groups into a homogeneous society. The Court has emphasised the importance of difference and diversity in its conception of equality. *Fourie* emphasises that equality 'means equal concern and respect across difference. It does not presuppose the elimination or

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[212] Alistair Price, 'Review: Ubuntu and the Law – African Ideals and Postapartheid Jurisprudence (Cornell and Muvangua (Eds))' (2013) 72 Cambridge Law Journal 464, 464.
[213] *S v Makwanyane* 1995 ZACC 3 [204], [208].
[214] *Azanian People's Organisation v President of Republic of South Africa* 1996 ZACC 16 [19]; *Port Elizabeth Municipality v Various Occupiers* 2004 ZACC 7 [37]; *Bhe v Khayelitsha Magistrate* (n 118) [163]; *Shibi v Sithole* 2004 ZACC 18 [163]; *Dikoko v Mokhatla* 2006 ZACC 10 [68].
[215] However, often the concept is expanded on in a separate judgment, rather than in the majority's judgment. Victor AJ in particular has employed the notion of ubuntu in her separate judgments while acting on the Court.
[216] *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2011 ZACC 38 [23], [71]–[72]; *Beadica 231 CC v Trustees for the time being of the Oregon Trust* 2020 ZACC 13 [72], [205]–[221].
[217] *King NO v De Jager* (n 40) [237]–[245].
[218] Price (n 212) 465.
[219] *National Coalition for Gay and Lesbian Equality v Minister of Justice* (n 19) [25].

suppression of difference.'[220] *Pillay*, where a learner successfully challenged her school's refusal to allow her to wear a nose stud, is a powerful judgment on social inclusion.[221] The Court held that this constituted unfair indirect discrimination on the grounds of religion and culture, because the school's code of conduct imposed a rule that, while facially neutral, had discriminatory impact. Instead, the Court found, the school had an active duty to affirm and reasonably accommodate difference, and social diversity should not merely be tolerated but should be promoted and celebrated.[222] Diversity and difference is thus a distinctive and important dimension of equality, which is incorporated within a broad, substantive account.

3.6 CONCLUSION: THE CASE FOR A MULTIDIMENSIONAL APPROACH

In this chapter, I have charted a number of fault lines cutting through competing conceptions of equality and anti-discrimination law. I have discussed South African law's commitment to substantive equality and its endorsement of a contextual and historically rooted approach, which eschews an overly abstracted assessment of equality's demands. What that requires in practice, however, is often highly contested, and a number of critical Court judgments are deeply problematic in both the outcomes they reach, and the reasoning that they employ. I explained that recognition and redistribution claims need not operate in tension, though within an adjudicative system that is constrained by the institutional role played by courts, judgments tend to favour claims that are framed more narrowly in recognition terms. I then discussed the extent to which South African doctrine situates the individual, or the group, at the centre of anti-discrimination law, exploring dignity-oriented accounts, and the role that patterns of group disadvantage (which can operate intersectionally, along multiple axes) play in the jurisprudence. Ultimately, these discussions reinforce the case for a multi-dimensional approach to equality and anti-discrimination law.

There are two final important points to distill. The first is the danger of any univocal theory.[223] Fraser, Fredman, Albertyn, Cameron and Boonzaier[224] all resist this draw, instead recognising that any account of equality must be multidimensional (given that 'equality', broadly construed, has many ends): 'In other words, there is no simple answer to the "equality of what"

[220] *Minister of Home Affairs v Fourie* (n 34) [60].
[221] *MEC for Education: KwaZulu-Natal v Pillay* (n 11).
[222] ibid [65].
[223] Hugh Collins, 'Comments Made at a Book Launch: Review of a Theory of Discrimination Law by Tarunabh Khaitan' (2015) <https://www.law.ox.ac.uk/content/labour-law-0/blog/2015/10/review-theory-discrimination-law-tarunabh-khaitan-0> accessed on 15 February 2023.
[224] Cameron and Boonzaier (n 93).

question.'[225] Any attempt to reduce the core of equality to a single value or principle is doomed. Equality, broadly construed, has many ends and a number of commentators underscore the danger of any univocal theory.[226] Accordingly, discrimination need not be understood as comprising a single central wrong, but instead as 'a plurality of wrongs'.[227]

Second, the theoretical accounts of substantive equality dealt with in this chapter, and how these are reflected in South African doctrine, have developed principally (though not exclusively) within the paradigm of a state duty-bearer. Part of the task of the rest of this dissertation, then, is to pull out the theoretical threads that will be woven into an account of substantive equality and anti-discrimination law as applied to private persons. Given that equality, as a right and value, is plastic in this way, and encompasses a plurality of ideas, some of which may at times be in tension with each other, how should an individual case be adjudicated where the actors are both private? This is ultimately determined at the level of more subsidiary rules, enforcement and remedy, and the balance struck between competing interests in the circumstances. In determining this, context matters. Processes of contestations are also critical[228] – not least because equality is not at heart a legal concern, but a social and political one.[229] This is consistent with a view of the constitutional project as providing 'scaffolding'[230] for political and legal activities, but leaving the space for democratic participation open.[231]

[225] Albertyn, 'Contested Substantive Equality in the South African Constitution' (n 1).
[226] Collins (n 223); Fredman, *Discrimination Law* (n 6); Albertyn, 'Contested Substantive Equality in the South African Constitution' (n 1); Ngcukaitobi, Currie and De Waal (n 13); Cameron and Boonzaier (n 93). Collins refers to OW Holmes *The Common Law* (1881) 1: 'like all univocal theories of legal doctrines or bodies of law, it must be wrong because the life of the law is not logic but experience, and experience is very messy'.
[227] Blum (n 166).
[228] Davis (n 153).
[229] Yacoob (n 20) 3.
[230] Catherine Albertyn, '(In)equality and the South African Constitution' (2019) 36 Development Southern Africa 751.
[231] Firoz Cachalia, 'Democratic Constitutionalism in the Time of the Postcolony: Beyond Triumph and Betrayal' (2018) 34 SAJHR 375.

CHAPTER 4

COMPARATIVE APPROACHES TO ANTI-DISCRIMINATION DUTIES BEYOND THE STATE

4.1 INTRODUCTION

In this chapter, I consider some central questions regarding the imposition of anti-discrimination duties on non-state actors from the perspective of comparative law. I look at five jurisdictions – the United States, Canada, the United Kingdom, India and Kenya – and how these jurisdictions have answered four key questions: Do anti-discrimination laws apply to all private relations (economic, social and even the intimately personal)? If there are limits on the scope of application of anti-discrimination laws, how are these to be determined? What role do autonomy and privacy play in drawing these boundaries? What are the consequences of these boundaries for our understanding of the public/private divide?

As discussed in chapter 1, for a sense of the stakes I consider whether the following intuition pumps constitute unjustified and unlawful discrimination in the surveyed jurisdictions. I return to these cases again in chapters 5 and 6, on South Africa's doctrinal and normative approach.

1. **Case 1: the B&B owner:** A Black couple attempts to book a bed and breakfast for a weekend away. They receive an email in response, refusing their booking. The email cites a verse from the Bible and notifies them that the guest house does not accept Black guests.
2. **Case 2: the cakeshop:** A cakeshop refuses to bake a wedding cake for a queer couple, citing the shop owner's rights to freedom of expression and freedom of religion.
3. **Case 3: the testator:** A private will provides that only biological grandchildren, and not adopted grandchildren, will inherit the testator's property.
4. **Case 4: the religious institution:** A woman who has trained as a religious leader is not recognised by and is denied access to a religious institution, on the grounds that the religion accepts only male religious leaders. The institution argues that this was warranted, as an exercise of the rights of freedom of association and freedom of religion.

5. **Case 5: the Tinder user:** An individual using Tinder, an online dating app, routinely swipes right to match only with opposite sex people of the same race and religion.

These intuition pumps all raise the question of whether the private person discriminates in a manner that is prohibited by law.[1] In this chapter, I explore how the five jurisdictions determine which of the scenarios constitute proscribed discrimination. Most of the scenarios are drawn from decided cases in South Africa and other jurisdictions. Beyond the tension between equality and anti-discrimination rights, on the one hand, and autonomy interests and the right to privacy, on the other, several of the scenarios deal with competing claims of equality and freedom of religion, and so require some sort of balancing analysis.[2]

I begin with a brief comparative analysis of the position in a number of surveyed jurisdictions, showing that in most of them the imposition of anti-discrimination duties on private persons is relatively circumscribed. Next, I discuss the dominant theoretical accounts in these jurisdictions, which turn on some conception of publicness. Given the central role which most of the surveyed jurisdictions accord to publicness when carving out anti-discrimination duties, I finally turn to a discussion of the public/private divide. I examine key criticisms of the divide and assess its prospects as a descriptive and analytical tool for the allocation of anti-discrimination duties. Ultimately, I argue that a sharp public/private divide is both unhelpful and unpersuasive, but that autonomy and privacy should continue to play a role in determining the scope and content of anti-discrimination duties.

4.2 COMPARATIVE JURISDICTIONAL APPROACHES

The drafting of South Africa's constitutional equality clause and legislation incorporated aspects of other jurisdictions' models. Empowered by section 39(1)(c) of the Constitution, South African courts have also shown a willingness to engage with foreign law approaches.[3] In this chapter, I will use this comparative background to sketch competing conceptions of the scope and justification for the extension of the anti-discrimination duty. This helps to situate South Africa's approach within a broader comparative context, and demonstrates that there

[1] I note that most jurisdictions do not use the terminology of 'unfair discrimination' (which is the term of art in South African law), and the terminology in this chapter will reflect that.
[2] The clash of LGBTQI+ rights and freedom of religion is where this is particularly acute, and warrants extended separate treatment. As Lippert-Rasmussen points out, '[f]ew people today would accept racial discrimination practiced on religious grounds. Yet, for apparently no good reason, many accept sex discrimination and discrimination on grounds of sexual orientation when religiously motivated.' K Lippert-Rasmussen, *Born Free and Equal? A Philosophical Inquiry into the Nature of Discrimination* (OUP 2013).
[3] *H v Fetal Assessment Centre* 2014 ZACC 34.

may be interesting converges in outcomes across contested cases even where jurisdictions adopt starkly different approaches to equality from a theoretical point of view. A comparative discussion thus sheds light on the ways in which South African anti-discrimination law coincides with and diverges from other jurisdictions, and the reasons for this. However, comparative learnings should be appropriately contextualised.[4] As the Constitutional Court has noted:

> the various conventions and national constitutions are differently worded and … the interpretation of national constitutions, in particular, reflects different approaches to the concepts of equality and non-discrimination. The different approaches adopted in the different national jurisdictions arise not only from different textual provisions and from different historical circumstances, but also from different jurisprudential and philosophical understandings of equality.[5]

As I argue in chapters 5 and 6, South Africa's anti-discrimination law has distinctive features which may warrant a different approach, compared to how other jurisdictions have treated private anti-discrimination duties. I consider five jurisdictions:

- United States (US): The US has been influential globally, given the Civil Rights Act 1964 (and subsequent legislation), which put in place anti-discrimination duties on non-state actors. US anti-discrimination law also articulates varying threshold levels of scrutiny.[6] This is pertinent to chapters 5 and 6, as a recent South African Constitutional Court judgment gestured towards using a variable intensity of review for private anti-discrimination duties.[7]

- Canada: Much of South Africa's constitutional architecture was influenced by the Canadian Charter of Rights and Freedoms 1982.[8] Canadian jurisprudence was also drawn on in the drafting of PEPUDA, not least because the judicial recognition of substantive equality has its roots in Canadian doctrine.[9] Canada is also a fruitful

[4] Sandra Fredman, 'Foreign Fads or Fashions? The Role of Comparativism in Human Rights Law' (2015) 64 International and Comparative Law Quarterly 631.
[5] *Brink v Kitshoff NO* 1996 ZACC 9 [39].
[6] The US puts these in place to subject certain grounds to a greater degree of scrutiny. In South African law, that mechanism has been recently drawn on not to differentiate between grounds, but instead to suggest that certain discriminatory acts in the private sphere are subject to attenuated scrutiny, as I discuss in chapter 5.
[7] *Wilkinson v Crawford NO* 2021 ZACC 8.
[8] Jeremy Sarkin, 'The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions' (1998) 1 Journal of Constitutional Law 176; Heinz Klug, 'The Canadian Charter, South Africa and the Paths of Constitutional Influence' in Richard Albert and David Cameron (eds), *Canada in the World: Comparative Perspectives on the Canadian Constitution* (CUP 2017).
[9] *Andrews v Law Society of British Columbia* [1989] 1 SCR 143.

comparator because although its approaches to anti-discrimination law are rooted in substantive equality, it has an entrenched commitment to the state action doctrine.

- United Kingdom (UK): English law has influenced much of the development of South African private law, and its Equality Act 2010 serves as an important comparator to PEPUDA (especially on positive measures for state and non-state actors). The UK also has relatively recent jurisprudence on double proportionality tests and balancing rights in the context of clashes between private persons.[10] This is relevant to my argument, which grapples with how the right to equality must be balanced against competing considerations such as autonomy and privacy.

- India: Like South Africa, India has a constitution that purports to be transformative but which operates in the context of pressing inequalities against a history of colonial and other oppressions. The Indian Constitution also expressly provides for the imposition of certain anti-discrimination duties on non-state actors in Article 15(2).[11]

- Kenya: Kenya serves as an important African and Global South comparator. Its 2010 Constitution, which was influenced by South Africa's Constitution, explicitly provides for private anti-discrimination duties. Courts have begun to determine the boundaries of these duties in burgeoning jurisprudence which has received academic attention.[12]

Although most of the surveyed jurisdictions initially had the state as the exclusive duty-bearer, with the advent of civil rights movements across various jurisdictions, this started to shift from the 1960s onwards.[13] This stemmed partially from a recognition that anti-discrimination laws that only regulate the state are ultimately ineffective at achieving their underlying purposes. Modern anti-discrimination law and indeed, more broadly, developments in private law in several jurisdictions thus make some incursions into social and economic relationships previously thought to be insulated from regulation,[14] but leave unchecked other conduct

[10] *Bull v Hall* 2013 UKSC 73; *Lee v Ashers Bakery Company Ltd* 2018 UKSC 49.
[11] Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (HarperCollins India 2019).
[12] *Rose Wangui Mambo v Limuru Country Club* 2014 EKLR; YK Sang, 'Horizontal Application of Constitutional Rights in Kenya: A Comparative Critique of the Emerging Jurisprudence' (2018) 26 African Journal of International and Comparative Law 1; Jill Cottrell Ghai and Yash Ghai, 'The Contribution of the South African Constitution to Kenya's Constitution' in Rosalind Dixon and Theunis Roux (eds), *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence* (CUP 2018); Victoria Miyandazi, *Equality in Kenya's 2010 Constitution* (Hart 2021).
[13] For example, the US Civil Rights Act 1964 extends anti-discrimination duties on the grounds of race and gender to certain non-state institutions and persons. See Title II, the constitutionality of which was first upheld by the US Supreme Court in *Heart of Atlanta Motel, Inc v United States* 379 US 241, and Title VII.
[14] Hugh Collins, 'The Decline of Privacy in Private Law' (1987) 14 Journal of Law and Society 91.

thought to be in the private sphere. The anti-discrimination duty is typically imposed on, in addition to the state, specific non-state actors: employers, landlords or housing agencies, service providers and retailers. By way of a brief overview, private anti-discrimination laws are typically restricted to offers of services or goods to the public, or public institutions or facilities, and often provided for in subsidiary legislation rather than in the Constitution itself.[15] Aside from Kenya, the duty-bearers in the surveyed jurisdictions are closer to the public end of the traditionally conceived public/private divide.[16]

Additionally, across many jurisdictions, anti-discrimination in the employment context is actively regulated through discrete labour legislation.[17] Given that the employer is in a particular relationship of power over employees, regulating this relationship through tailored legislation vindicates a host of rights, including the right to fair labour practices. While this is significant – not least because much of the discrimination by non-state entities occurs in the workplace – because it engages dynamics of labour law and is typically regulated through bespoke legislation, it falls outside of the scope of this thesis.

4.2.1 US law

The equal protection clause contained in the 14th Amendment to the US Constitution prohibits any state from denying 'any person within its jurisdiction the equal protection of the laws'. The Amendment targets state action only. In 1948, in *Shelley v Kramer*, the US Supreme Court considered the status of a covenant that prohibited certain property from being occupied by any person who was not white.[18] It found that while the 14th Amendment does not extend to merely private conduct, if that conduct is discriminatory, it would not be enforced by the court as an arm of the state. This judgment is a classic case of the state action doctrine:[19] what did the conceptual work was not finding that certain private persons bear horizontal duties, but instead that once the state is implicated (by, for example, enforcing a law), it is bound vertically by rights.[20] Later, in 1968, the US Supreme Court held that private home owners could be

[15] Hugh Collins, 'The Vanishing Freedom to Choose a Contractual Partner' (2013) 76 Law and Contemporary Problems 71.
[16] Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) 207.
[17] As discussed in Chapter 1, this is of course the case in South Africa, which puts in place a specific legislative regulatory framework for anti-discrimination in the workplace. Because this framework is so detailed and discrete, it is not analysed in this thesis.
[18] *Shelley v Kraemer* 334 US 1 1948.
[19] David Bilchitz, *Fundamental Rights and the Legal Obligations of Business* (CUP 2021) 135.
[20] Gautam Bhatia, 'Horizontal Rights: An Institutional Account' (PhD Thesis, University of Oxford 2021) 94.

prohibited from discriminating on the basis of race when selling their property, in *Jones v Alfred H Mayer*.[21]

The growing momentum of the civil rights movement in the US led to the passing of the Civil Rights Act 1964, which applies to discrimination on the grounds of race, colour, sex, religion and national origin (and was later interpreted to also include sexual orientation and gender),[22] with discrimination on the ground of disability regulated under the Americans with Disabilities Act 1990. The Civil Rights Act 1964 regulates certain non-state actors such as employers, schools and other public service providers, as well as public resorts (i.e. places of rest intended for public recreation). The Civil Rights Act 1968 (the Fair Housing Act) prohibits a landlord from refusing to house anyone on the grounds of race, colour, sex, religion, familial status or national origin. Many of the early landmark private discrimination cases involved white supremacy in aspects of social and economic life, in the form of restaurants that denied entry or service to African Americans, and discriminatory housing.[23] In addition, a suite of federal and state legislation governs discrimination in the employment sphere, including the Age Discrimination in Employment Act of 1967, which protects individuals above 40 years of age from employment discrimination.

The US does not regulate other forms of private discrimination. This gives rise to zones of protected discrimination within the private sphere, as traditionally understood. Some of the more prominent litigation on private discrimination occurs at the intersection of anti-discrimination and freedom of religion claims. Although this was not a discrimination case, in the 2014 *Hobby Lobby*[24] decision the Supreme Court ruled in favour of freedom of religion, exempting a corporation from complying with contraception regulations that required employers to provide coverage for contraceptive services in health insurance plans. Conversely, in the 2018 *Masterpiece Cakeshop* decision, the US Supreme Court overturned a state judgment that a bakery that refused to bake a cake for a gay wedding acted unlawfully.[25] The state judgment had affirmed the Colorado Civil Rights Commission's finding that the bakery had discriminated against the gay couple. The Supreme Court asserted that, in principle,

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[21] *Jones v Alfred H. Mayer Co* 392 U.S. 409 (1968).
[22] *Bostock v Clayton County* 590 US (2020); *Altitude Express, Inc v Zarda* 590 US (2020); *RG & GR Harris Funeral Homes Inc v Equal Employment Opportunity Commission* 590 US (2020).
[23] *Newman v Piggie Park Enterprises, Inc* 390 US 400 (1968); *Katzenbach v McClung* 379 US 294 (1964); *United States v Johnson* 390 US 563 (1968); *Bouie v City of Columbia* 378 US 347 (1964); see also discussion in Bhatia, 'Horizontal Rights: An Institutional Account' (n 20).
[24] *Burwell v Hobby Lobby Stores, Inc* 573 US 682 (2014).
[25] *Masterpiece Cakeshop v Colorado Civil Rights Commission* 128 Ct 1719.

business owners and those providing goods and services to the public are not exempt from anti-discrimination law, even when this conflicts with their religious beliefs, but that the Colorado Civil Rights Commission had not evaluated the bakery in a way that was religiously neutral. For this reason, the claimant's case failed. Arguably, the Supreme Court did not ultimately decide the intersection of the rights or the effect of the 1st Amendment's free exercise of religion clause. But based on *Hobby Lobby* and its current conservative composition, there is reason to be circumspect about the prospects of the Supreme Court robustly upholding the right not to be discriminated against on the grounds of sexual orientation, in the face of religious interests.

What would the US legal approach be to the five intuition pumps? Case 1 involving the B&B owner, who refuses accommodation to a Black couple, would be straightforwardly prohibited in terms of Title II of the Civil Rights Act 1964, which prohibits public service providers from discriminating on the grounds of race. Somewhat more ambiguous is case 2 i.e. whether a religious cakeshop owner can lawfully refuse to bake a wedding cake for a queer couple. As the discussion of *Masterpiece Cakeshop* demonstrates, the prospects of the anti-discrimination right triumphing should the Supreme Court conclusively determine the question are not strong. The final three cases, however, are relatively clearcut. Case 3, involving the genetics-favouring testator would almost certainly not be prohibited discrimination, as a private will would fall squarely within the jurisdiction's designation of a protected private sphere. Case 4, where a religious institution refuses admission to a female religious leader, would also be protected by freedom of religion and the jurisdiction's reluctance to intervene in religious domains. Finally, in case 5, the Tinder user's conduct would also escape legal sanction, for the decision about whom to date, no matter how inflected by racism or other forms of discrimination, is an intimately private one.

4.2.2 Canadian law

Canada serves as an important comparator for South Africa, given that the genealogy of South Africa's substantive equality jurisprudence is rooted in Canadian law[26] (which first judicially endorsed the concept of substantive equality in *Andrews*,[27] rejecting formal equality in favour

[26] S Gutto, *Equality and Non-Discrimination in South Africa: The Political Economy of Law and Law-Making* (New Africa Education 2001) 287.
[27] *Andrews v Law Society of British Columbia* (n 9).

of an 'effects-based conception of substantive equality').[28] Nevertheless, there are significant divergences between the two jurisdictions with respect to the classes of anti-discrimination duty-bearers. Principally, Canadian equality jurisprudence has developed along state-centric lines,[29] although certain non-state actors are now regulated through various pieces of legislation.

Prior to the passing of the 1982 Canadian Constitution (including the Charter of Rights and Freedoms), there were several significant judgments on anti-discrimination duties. In 1940, the Canadian Supreme Court held that Mr Christie, who had been refused a drink at a tavern on the express grounds of his race, had no claim against the tavern owner, given the owner's right to choose his customers.[30] The Court endorsed a sharp distinction between racist discrimination by the government (which was not lawful) and private discrimination (which was permissible even when services are offered to members of the public).[31] Moreover, administrative law principles operated to fill gaps in the absence of anti-discrimination jurisprudence or legislation.[32] In 1960, the Canadian Bill of Rights was passed as an ordinary statute, and included (a relatively narrow) articulation of equality rights.[33] The Canadian Human Rights Act, passed in 1977, put in place further legal reforms prohibiting discrimination as group-based disadvantage or exclusion.[34]

By the time that the 1982 Canadian Charter of Rights and Freedoms was passed, anti-discrimination law in the jurisdiction had shifted significantly. Discrimination was understood as systemic, moving away from the subjective intention of the wrongdoer to the complainant's experience or position of disadvantage and exclusion. The Canadian approach also emphasises indirect discrimination (or adverse effects discrimination), institutional transformation and the remedial purpose of the right to equality.[35] As in the other surveyed comparative jurisdictions, Canada also specifically regulates discrimination in an employment context.[36]

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[28] Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (McGill-Queen's University Press 2010) 6.
[29] ibid 16.
[30] *Christie v York* [1940] SCR 139.
[31] Claire L'Heureux-Dubé, 'Realizing Equality in the Twentieth Century: The Role of the Supreme Court of Canada in Comparative Perspective' (2003) 1 ICON 35, 40–41.
[32] *Roncarelli v Duplessis* [1959] SCR 121; discussed in L'Heureux-Dubé (n 30).
[33] L'Heureux-Dubé (n 30) 45.
[34] Sheppard (n 27) 16.
[35] ibid 17–18; L'Heureux-Dubé (n 30).
[36] Canadian Human Rights Act 1985 ss 7–11.

Despite progressive developments in the concept of discrimination, Canadian anti-discrimination law still tracks a clear separation between governmental and non-state spheres. Section 32(1) of the Canadian Charter limits its application to the legislature and executive, and private action is not expressly bound by the Charter.[37] This was confirmed by the Canadian Supreme Court in *Dolphin Delivery*, which took a firm line that the Charter is inapplicable to private persons.[38] However, section 15 of the Charter provides for equality before and under the law, and the equal protection of the law. This allows for the possibility of anti-discrimination laws (either federal or state) to regulate private discrimination, though this extension has largely been to encompass governmental-like private entities within the ambit of anti-discrimination law. This was the case in *Trinity Western University*, where the Canadian Supreme Court found that state law societies were empowered to refuse approval to a private religious law school on the basis that it discriminated on the grounds of sexual orientation.[39] It was the involvement of state agencies, through the state action doctrine, that enabled the Court to make a finding of discrimination.

Additionally, the Canadian Human Rights Act 1985 regulates both public and certain private persons, by prohibiting discrimination by entities and industries that 'provide goods, services, facilities or accommodation customarily available to the general public'. This links the constitutional and legislative prohibition of discrimination to the public or social nature of the good or service. Either state action or publicness is the fulcrum for the more limited application of anti-discrimination laws in the private sphere.[40] This is apparent in the *Gould v Yukon* judgment, where the Canadian Supreme Court held that a private fraternal order that collects and distributes historical material could deny membership to a woman without that constituting prohibited discrimination.[41] A majority of the Canadian Supreme Court reasoned that the Canadian Human Rights Act prohibits private discrimination in the provision of goods and services to the public. Had the order refused to provide a woman, but not a man, with historical material, that would be prohibited, but membership of the order itself was not a service provided to the public, and therefore was immune from anti-discrimination protections.

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[37] WS Tarnopolsky, 'The Equality Rights in the Canadian Charter of Rights and Freedoms' (1983) 61 Canadian Bar Review 242.
[38] *Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd* [1986] 2 SCR 573.
[39] *Trinity Western University v College of Teachers* [2001] 1 SCR 772.
[40] *Vriend v Alberta* 156 DLR (4th) 385; Timothy Macklem, 'Vriend v Alberta: Making the Private Public' (1999) 44 McGill Law Journal 197.
[41] *Gould v Yukon Order of Pioneers* 1996 CanLII 231 (SCC).

Nevertheless, there is some scope for discrimination to be controlled through the doctrine of public policy in private law (much like in the South African law of contract, as discussed in chapter 2).[42] Even so, there are some clear limits: for example, in *Spence v BMO Trust Co* the Ontario Court of Appeal held that discriminatory provisions in private wills are protected by freedom of testation (contrasting with recent South African case law, detailed in chapter 5).[43] Discrimination in employment contexts is regulated by legislation: the Employment Equity Act of 1995 applies to all employers that are federally regulated with over 100 employees, while the Pay Equity Act of 2018 covers federally regulated private sector employers with an average of 10 or more employees.

Canada's approach to private discrimination, then, proceeds from the basis that the state and those exercising public functions bear clear anti-discrimination duties. To the extent that private persons are held to such duties, it is likely to be through indirect channels, such as the state action doctrine,[44] or based on specific public characteristics. The Canadian Supreme Court has taken a relatively narrow view of what constitutes the provision of a good or service, as the *Gould v Yukon* judgment demonstrates.

Turning to our five intuition pumps, Canada's approach is similar to that of the US in several respects. Given that the two jurisdictions adopt quite different approaches to anti-discrimination law, at first blush this seems surprising, but it is partially explained by Canada's commitment to a state-action doctrine. Section 5 of the Canadian Human Rights Act 1985 proscribes the conduct of the racist B&B owner in case 1. Unlike in the US, the conduct of the cakeshop in case 2 might be prohibited in Canada, given the *Trinity Western University* judgment and the fact that the cakeshop sells to the general public, although, admittedly, an additional wrinkle in that judgment was that the lawfulness of the governmental regulatory body's conduct was being scrutinised, rather than the private person's conduct directly. This renders the ultimate position in Canadian law somewhat uncertain. The genetics-favouring testator's conduct in case 3 is legal, on the strength of *Spence v BMO Trust*, while the final two cases (the religious institution that refuses admission to a female religious leader, and the

[42] Jane Thomson, 'Discrimination and the Private Law in Canada: Reflections on Spence v. BMO Trust Co' (2019) 36 Windsor Yearbook of Access to Justice 138; *Re Drummond Wren* [1945] OR 778; *Canada Trust CO v Ontario Human Rights Commission* (1990) 74 OR (2d) 481.
[43] *Spence v BMO Trust Co* 2016 ONCA 196.
[44] *Vriend v Alberta* (n 39) holding the state liable for its failure to comprehensively legislate; *Trinity Western University v College of Teachers* (n 38).

Tinder user) would likely be permitted by the law based on Canadian law's strong endorsement of a state-action doctrine.

4.2.3 UK law

The position in UK law is somewhat anomalous, for the roots of anti-discrimination law begin with regulating certain kinds of private discrimination as opposed to discrimination by the state.[45] The centuries-old common-law 'common caller' duty entailed that any person trading for the public good (such as an innkeeper, blacksmith or common carrier) was constrained from certain forms of discrimination.[46] In addition, from the end of the 19th century, English administrative law recognised the principle that any measure that discriminates without justification between classes would be void.[47] This echoes a trend discussed earlier in Canadian law, as well as in South African law, where, prior to the enactment of a Bill of Rights, administrative law principles often filled an important gap and operated as a tool, albeit limited, for advancing justice and equity. In the UK, the common caller duty can arguably be understood as a precursor to modern anti-discrimination duties which was rooted in the public nature of the service being provided, notwithstanding that bodies providing that service were private. It was based on this duty that, in 1944, the West Indian cricketer, Mr Constantine, was successful in litigating against a hotel that refused him accommodation on the grounds of race,[48] contrasting with the Canadian judgment in *Christie* which, on very similar facts, had come to the opposite finding four years earlier.[49] These early safeguards against discrimination were anomalous rather than precedential, did not extend to state duties and belie the extensive structural racism and discrimination evident in UK society, in part wreaked by centuries of oppressive colonialism. Ultimately the common law was insufficient to protect against discrimination on various grounds, and legislation, buttressed by political developments and EU precedent, was required to put in place contemporary UK anti-discrimination law.[50]

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[45] Tarunabh Khaitan, 'Mansfield Public Talk: The History and Development of Race Equality Law in the UK' (2021) <https://www.youtube.com/watch?v=bI2TlSSZC24> accessed 4 November 2021. For a broad overview, see also B Hepple *Equality: The New Legal Framework* (Hart 2011); B Hepple, *Race, Law and Jobs in Britain* (Penguin 1968); A Lester and G Bindman *Race and Law in Great Britain* (Harvard 1972). For a discussion of the history of particular grounds, see S Fredman, *Discrimination Law* (3ed OUP 2023) 66-70 (gender) 97-99 (race), 151ff (disability) and chapter 3 (age, religion, gender identity and sexual orientation).

[46] For a discussion of the development of this duty, see Bogen DS, 'The Innkeeper's Tale: the Legal Development of a Public Calling' (1996) Faculty Scholarship 679; Khaitan, 'Mansfield Public Talk: The History and Development of Race Equality Law in the UK' (n 44); and further sources (n 45).

[47] *Kruse v Johnson* [1898] 2 QB 91.

[48] *Constantine v Imperial Hotels Ltd* [1944] KB 693.

[49] *Christie v York* (n 29).

[50] Hepple *Equality: The New Legal Framework* (n 45) 7-11.

In the wake of the global civil rights movements, the Race Relations Act 1965 was a first step to more extensive anti-discrimination duties on the grounds of race. Again, these duties were initially imposed on private entities providing public services (for example, in places of public resort) rather than on state or public entities more generally. This legislation was amended in 1968 to expand the reach of anti-discrimination law to employment, trade unions and housing, and again in 1976 to extend to certain trading relationships and partnerships.[51] The Equal Pay Act 1970, the Sex Discrimination Act 1975 and the Disability Discrimination Act 1995 expanded the grounds protected by anti-discrimination law, and similarly constrained employers and private entities that provide goods and services from discriminating.

EU law has been central to the development of contemporary anti-discrimination law in the UK.[52] Unfortunately, due to word constraints it is not possible to cover this jurisdiction as a further comparator, although I note that as early as 1976, aspects of EU discrimination law have applied horizontally,[53] and a significant body of law and jurisprudence has developed in this respect.[54]

The UK Equality Act 2010 is umbrella legislation that now consolidates these anti-discrimination statutes, and domesticates aspects of EU law. Section 29 of the UK Equality Act prohibits discrimination by a service provider 'concerned with the provision of a service to the public or a section of the public (for payment or not)'. The UK has also domesticated the European Convention on Human Rights through the Human Rights Act 1998, which has implications for anti-discrimination duties.[55] For example, in 2004 a majority of the European Court of Human Rights decided, in *Pla and Puncernau*, that Article 14 of the European Convention (which prohibits discrimination) required interpreting a private testator's will to extend benefits to adopted children, notwithstanding considerations of private family life.[56] The subsequent domestic case of *Erskin* followed this precedent, with the English court construing a settlement so as to eliminate discrimination against adopted children, in line with Article 14.[57] Having said that, the domestication of the European Convention and the status of

[51] Khaitan, 'Mansfield Public Talk: The History and Development of Race Equality Law in the UK' (n 44) and further sources (n 45).
[52] Somek A 'Introduction' *Engineering Equality: An Essay on European Anti-Discrimination Law* (Oxford, 2011).
[53] *Defrenne v Sabena* [1976] ECR 455 (ECJ).
[54] Fredman, *Discrimination Law* (3ed) (n 45) 243-244.
[55] See, for example, *Erskin (Gregg v Piggott)* [2012] EWHC 732 Ch which was impacted by the European Court of Human Rights' judgment in *Pla and Puncernau v Andorra* [2004] ECHR 334.
[56] *Pla and Puncernau v Andorra* (n 55); see also Collins, 'The Vanishing Freedom to Choose a Contractual Partner' (n 15), who considers the consequences of this judgment for UK equality law.
[57] *Erskin (Gregg v Piggott)* (n 55).

the Human Rights Act are now under threat post-Brexit, with the Bill of Rights Bill 2022 poised to significantly reduce the bite of human rights protections.

The UK Equality Act's application to the private sphere has been tested in two significant judgments: *Bull v Hall* and *Lee v Ashers.* In 2013, in *Bull v Hall*,[58] the UK Supreme Court found that religious bed and breakfast owners who refused to provide accommodation to a gay couple fell foul of the Equality Act's prohibition of direct discrimination. The owners raised their own right to religious belief but this did not carry the day, because, first, in the UK the anti-discrimination duty does apply to private persons in certain instances, while duties in respect of the right to religious freedom do not; second, an exemption from the application of anti-discrimination duties on the basis of religious freedom applies to religious organisations only and not to individuals; third, the Equality Act does not permit direct discrimination to be justified (and so is sharply distinguishable on this basis from PEPUDA);[59] and fourth, in any event the outcome of a balancing exercise between the implicated rights is in favour of the right not to be discriminated against on the grounds of sexual orientation.

Conversely, in 2018, the UK Supreme Court took a different view in *Lee v Ashers* where a gay man, Mr Lee, ordered a cake printed with 'support gay marriage'. The cakeshop owners were Catholic and considered that baking the cake with this message would undermine their values. The Court overturned the judgment *a quo* (which had found in Mr Lee's favour). The Court upheld the right of the shop owners, finding that there was no discrimination against Mr Lee because the shop owners' refusal was made not on the grounds of his sexual orientation, but because they disagreed with its message, and because the shop owners had a right not to manifest beliefs that they do not hold.[60] Unlike in *Bull v Hall*, the UK Supreme Court did not engage in any balancing or proportionality exercise as they concluded that there was no breach of the right not to be discriminated against in the first place.[61] Moreover, schedule 9 para 2 of the Equality Act specifically provides for an exception, stipulating that the legislation is not

[58] *Bull v Hall* (n 10).
[59] The Bulls' conduct constituted discrimination on the grounds of sexual orientation, and because it was found to be direct discrimination their religious interests played no role in justifying their action. Baroness Hale acknowledged *obiter* that religious rights may need to be balanced against the right not to be discriminated against in indirect discrimination cases (and that the general rule is that suppliers of goods and services are permitted to choose their contractual partners). However, the balance will be predetermined if conduct, even if motivated by religious belief, amounts to direct discrimination, as there is no justification available to the defendant under the Equality Act. Baroness Hale further noted that had the parties' positions been reversed and the Bulls turned away on the grounds of their religious beliefs they, too, would have had legal protection.
[60] *Lee v Ashers Bakery Company Ltd* (n 10).
[61] Hugh Collins, 'A Missing Layer of the Cake with the Controversial Icing' *UK Labour Law Blog* (4 March 2019) <https://wordpress.com/view/uklabourlawblog.com> accessed 10 November 2021.

contravened if discrimination occurs in employment for purposes of an organised religion. This effectively sanctions discrimination on the grounds of sexual orientation, for example, 'to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers or to comply with the doctrines of the religion',[62] and has been broadly construed by the UK Court of Appeal.[63]

As Collins argues, given the UK's Equality Act, 'a completely insulated private sphere cannot exist any longer', and the freedom to choose a contractual partner is now fettered by anti-discrimination duties.[64] However, how these duties are applied by UK courts has varied and again, as in most of the surveyed jurisdictions, the imposition of those duties is determined by the private person in question being of a certain character (such as an employer) or providing a certain public good or service.

The UK's approach to the five intuition pumps is consistent with the approaches of the US and Canada in some material respects. In these three jurisdictions, the cases of the female religious leader and the Tinder user would all fall within the ambit of permitted discrimination, while the B&B owner unambiguously contravenes anti-discrimination duties. However, in other respects, the UK's case law differs. As discussed above, the testator's conduct might be prohibited based on both domestic jurisprudence as well as jurisprudence of the European Court of Human Rights which, at least for the moment, inflects the UK's legal regime.[65] That case is not entirely straightforward, however, because the testamentary provision in the existing case law concerned a trust, rather than a private will, and so the position is uncertain. Finally, the *Lee v Ashers* judgment largely puts paid to any vindication for a claimant in the cakeshop case.

4.2.4 Indian law

India and South Africa are both marred by histories of colonialism and structural inequalities and injustice, and have put in place constitutions that, at least on paper, set out to forge more just societies and have been described as transformative.[66]

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[62] Fredman *Discrimination Law* (3ed) (n 45) 134.
[63] *Pemberton v Inwood* [2018[EWCA Civ 564 [18].
[64] Collins, 'The Vanishing Freedom to Choose a Contractual Partner' (n 15).
[65] See, for example, *Erskin (Gregg v Piggott)* (n 55), which was impacted by the European Court of Human Rights' judgment in *Pla and Puncernau v Andorra* (n 55).
[66] Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 SAJHR 146; Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (n 11).

Article 14 of the Indian Constitution provides for the right to equality and equal protection before the law. While Article 15(1) prohibits the state from discriminating on a number of protected grounds, Article 15(2) prohibits private discrimination:

> No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to:
>
> (a) access to shops, public restaurants, hotels and places of public entertainment;
>
> (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

The inclusion of Article 15(2) can be traced to India's history of horizontal discrimination and the transformative nature of the constitution that was put in place by the Constituent Assembly at least partially to address this.[67] Nevertheless, Article 15(2) is also noteworthy for what it does not proscribe. It ties the anti-discrimination duty in the private sphere to the provision of certain kinds of goods and services to the public generally, or to the presence of state funding.

There are, therefore, some noticeable gaps in its scope. Tellingly, Article 15(2) does not expressly prohibit discrimination in the context of housing, which cries out for regulation (though arguably, Article 15(2) could be read to extend to this).[68] Further, unlike most of the surveyed jurisdictions, Indian employment law is patchier in addressing workplace discrimination (outside of public employment) as there is no comprehensive legislative scheme in place. Instead, particular grounds and forms of discrimination are protected in a piecemeal fashion.

To date, Article 15(2) of the Indian Constitution has not been litigated on extensively. In the *locus classicus* on the provision, *Indian Medical Association*,[69] the Indian Supreme Court found that a private, unsubsidised educational institution could not refuse to admit certain students on discriminatory grounds. The Court found that such an institution falls within the ambit of a broad interpretation of the word 'shops' in Article 15(2)(a). As I discuss later in this chapter, this judgment has been the subject of academic debate – particularly on whether

[67] Upendra Baxi, 'Preliminary Notes on Transformative Constitutionalism' in Oscar Vilhena, Upendra Baxi and Frans Viljoen (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (PULP 2013); Gautam Bhatia, 'Horizontal Discrimination and Article 15(2) of the Indian Constitution: A Transformative Approach' (2016) 11 Asian Journal of Comparative Law 87, 109.
[68] Thulasi K Raj, 'Private Discrimination, Public Service and the Constitution' (2022) 6 Indian Law Review 17.
[69] *Indian Medical Association v Union of India* [2011] 7 SCC 179.

Article 15(2) should be understood as prohibiting private discrimination principally on economic or public service grounds.[70]

On India's approach to the five intuition pumps, the B&B owner case would fall within the ambit of Article 15(2)(a) of the Constitution, which prohibits hotels from discriminating. I note, however, that discrimination on the same grounds (or, as is also acutely commonplace, on the grounds of religion) but in the context of housing would not be proscribed. As for the rest of the cases, they would likely all constitute acts of legally permissible discrimination. While there have been recent noteworthy legal developments providing more recognition to LGBTQI+ rights in India,[71] sexual orientation is not an expressly protected ground, which would mean that the cakeshop case would not constitute prohibited discrimination.

4.2.5 Kenyan law

Kenya is another important comparator for South Africa: both countries on the continent have histories of British colonial rule, with the legal, political, economic and social legacies of colonialism continuing to exert force; both have adopted a conception of substantive equality for navigating deep and abiding inequalities; and both envisage the in-principle possibility of not only anti-discrimination duties applying to private persons but, more broadly, the horizontal application of constitutional rights.[72] Importantly, the drafting of Kenya's 2010 Constitution drew extensively on South Africa's Constitution; these genealogical roots are particularly strong with respect to Kenya's equality provisions.[73]

Articles 2 and 20 of the 2010 Kenyan Constitution impose horizontal obligations on all persons: 'the Bill of Rights applies to all law and binds all State organs and all persons'. It does so without the qualifications of South Africa's section 8, discussed earlier in chapter 2. Sang argues that the 2010 Constitution has thus expanded the scope for a broad application of rights, in part stemming from a recognition that private persons can wield power and influence that is comparable to that of the state.[74] This was a significant shift from the prior Constitution, which

[70] Bhatia, 'Horizontal Discrimination and Article 15(2) of the Indian Constitution' (n 67); Raj (n 68).
[71] *Navtej Singh Johar v Union of India thr Secretary Ministry of Law and Justice* AIR 2018 SC 4321 (decriminalising same-sex sexual activity); *S Sushma v Commissioner of Police* WP No 7284 of 2021 (prohibiting conversion therapy and ordering sensitisation training of governmental officials) and the Transgender Persons (Protection of Rights) Act 2019 are recent developments.
[72] See discussion in Victoria Miyandazi, Nomfundo Ramalekana and Larona Somolekae, 'An Equality-Sensitive Approach to Redressing the Disproportionate Socio-Economic Impact of COVID-19 on Vulnerable Groups in Botswana, Kenya, and South Africa' in Alfred Mavedzenge (ed), *COVID-19 Pandemic and Socio-Economic Rights in Selected East and Southern African Countries* (Juta 2020).
[73] Cottrell Ghai and Ghai (n 12); Miyandazi (n 12) 4.
[74] Sang (n 12) 3.

did not permit the enforcement of rights against private persons. To date, the Kenyan jurisprudence on horizontality has been variable, and heavily determined by the relevant context and the availability of legislative or private law remedies.[75]

Turning to the right to equality, like South Africa's Constitution, the Kenyan Constitution expressly prohibits private discrimination: Article 27(5) provides that '[a] person shall not discriminate directly or indirectly against another person' on any of the protected grounds (which are narrower than South Africa's protected grounds – sexual orientation and gender are omitted). Discrimination in employment is also specifically regulated, with the relevant legislation applying to all employers.[76] Other forms of discrimination are regulated through legislation passed prior to the enactment of the Kenyan Constitution.[77]

Article 27(5) of the Kenyan Constitution has been subject to litigation: the High Court, in *Rose Wangui Mambo*, found that a private club's rules, which excluded women from participating in certain meetings, were discriminatory and unlawful.[78] The club's rights to freedom of association must, the court found, yield to the complainants' rights to equality and freedom of expression, for otherwise the equality protections would be denuded of meaning. The High Court applied Article 27 to classically private domains, particularly given 'discriminatory practices … [which were] a manifestation of historically unequal power relations between men and women in Kenyan society'.[79]

Miyandazi praises this development, arguing that the horizontal application of anti-discrimination duties is 'important in eradicating patterns of systemic disadvantage as most of the discrimination in Kenya occurs in the private sphere'.[80] As more jurisprudence on the provision develops, Kenya will be an important comparator to track – not least because it is the only surveyed jurisdiction apart from South Africa that creates such a broad class of anti-discrimination duty-bearers. However, the jurisdictions are not totally analogous: Kenya's grounds of protection do not extend to sexual orientation, with the effect that some of the cases

[75] Sang (n 12).
[76] Kenyan Employment Act 2007 s 3.
[77] See, for example, the Kenyan Persons with Disabilities Act 2003 and the Kenyan National Cohesion and Integration Act 2008.
[78] *Rose Wangui Mambo v Limuru Country Club* (n 12); Eunice Song, 'No Women (and Dogs) Allowed: A Comparative Analysis of Discriminating Private Golf Clubs in the United States, Ireland, and England' (2007) 6 Washington University Global Studies Law Review 181.
[79] *Rose Wangui Mambo v Limuru Country Club* (n 12) para 113.
[80] Miyandazi (n 12) 34.

on the clash between the right not to the discriminated against on this ground and other rights, such as freedom of religion, would be pre-determined.

Although Kenya's distribution of the anti-discrimination duty is more extensive than in the other surveyed jurisdictions, the outcomes of the five intuition pumps may not differ all that much. The B&B owner case would squarely contravene Article 27(5) of the Kenyan Constitution. Arguably, on a textual reading of Article 27(5), the testator's conduct would also be proscribed (as birth is a protected ground), although Kenya's law of succession has sometimes struggled to adapt to anti-discrimination imperatives.[81] The cakeshop and religious institution would not be acting unlawfully although again, much of what is doing the work here is that sexual orientation is not a protected ground, rather than the class of duty-bearers: Kenya's Constitution imposes a broad anti-discrimination duty on all private persons, but nevertheless would not prohibit private discrimination on the grounds of sexual orientation as that ground is not protected.

4.2.6 Summary

Broadly speaking, across most of the jurisdictions surveyed, there is a clear division between the anti-discrimination duties imposed on (i) the state; (ii) certain non-state actors such as employers, shop owners and service providers; and (iii) private persons more generally.[82] With one notable exception,[83] comparatively the history of anti-discrimination duties begins with the state as the duty-bearer, and then expands to include certain non-state actors, leaving a zone of private actors relatively immunised from anti-discrimination duties. Kenya and South Africa are outliers in this, as both jurisdictions envisage the imposition of much more sweeping anti-discrimination duties.

The following table gives a broad summary of how the five intuition pumps, which this chapter began with, would likely be determined in the surveyed jurisdictions, as discussed in the narrative above. This table largely, but not exclusively, tracks differences in the jurisdictions' treatment of private discrimination. There are some interesting convergences in outcomes

[81] International Women's Human Rights Clinic Georgetown University Law Center and Federation of Women Lawyers: Kenya, 'Empowering Women with Rights to Inheritance—A Report on Amendments to the Law of Succession Act Necessary to Ensure Women's Human Rights: A Human Rights Report and Proposed Legislation' (Georgetown Journal of International Law 2009).

[82] Hugh Collins, 'Discrimination and the Private Sphere' in Kasper Lippert-Rasmussen (ed), *The Routledge Handbook of the Ethics of Discrimination* (Routledge 2018) 361.

[83] Until 2000, UK discrimination law was primarily about private (and public) employers, providers of goods, facilities and services and education. In 1998, the Human Rights Act introduced vertical obligations for state entities, and in 2000, public functions were included into anti-discrimination laws.

across the jurisdictions, even where the underlying theoretical approaches to equality and anti-discrimination law differ in substantive ways. I also indicate the current position in South African law, although I deal with this in detail in chapter 5.

Jurisdiction	Prohibited discrimination	Unclear	Not prohibited
USA	1: B&B owner		2: cakeshop 3: testator 4: religious institution 5: Tinder user
Canada	1: B&B owner	2: cakeshop	3: testator 4: religious institution 5: Tinder user
UK	1: B&B owner	3: testator	2: cakeshop 4: religious institution 5: Tinder user
India	1: B&B owner		2: cakeshop 3: testator 4: religious institution 5: Tinder user
Kenya	1: B&B owner	3: testator	2: cakeshop 4: religious institution 5: Tinder user
South Africa	1: B&B owner 2: cakeshop 3: testator	4: religious institution	5: Tinder user

4.3 PUBLICNESS

Save for Kenya, which has some obvious similarities with South Africa in terms of creating a universal class of anti-discrimination duty-bearers, the surveyed jurisdictions all circumscribe this class. In this section, I discuss the dominant justificatory accounts that have been advanced in these jurisdictions. The accounts need to address both why the anti-discrimination duties have been extended to apply beyond the state, on the one end, and why they are not extended further into more private spheres, on the other.

Before turning to discuss the role that publicness plays in delineating the duties in these jurisdictions, it is worth noting a significant feature of the character of anti-discrimination duties in (most of) the surveyed jurisdictions. The anti-discrimination duty is not imposed universally: '[i]t tends to govern *all* actions of the state, but for other duty-bearers the scope of

the duty is not similarly comprehensive'.[84] As a corollary to this, the expanded imposition of these duties is largely unidirectional – that is, while shop owners and employers are proscribed from discriminating against consumers and employees, the converse is not true.[85] So, the same individual who runs a shop and rents out accommodation may bear anti-discrimination duties in her capacity as an employer, a landlord and a provider of goods and services to the general public, but not bear such duties when she herself is choosing who to work for, where to live, or where to shop.

This presents a puzzle: regardless of whether discrimination occurs in classically public or private spheres, arguably in any sphere where a person is discriminated against, they are treated with less than equal respect, or the discrimination can entrench existing patterns and structures of disadvantage.[86] In chapter 3, I discussed the plural purposes of anti-discrimination law and substantive equality which seem to be defeated by discriminatory conduct or policies, irrespective of whether those occur in the public or private sphere. If this is so, why are some interactions or relationships insulated from the reach of anti-discrimination law?[87] These questions are, of course, pertinent when turning to South Africa's much broader class of anti-discrimination duty-bearers, which I do in the next two chapters. As I detail in the discussion below, as well as in the following two chapters, autonomy and the right to privacy play a critical role.

Returning to the surveyed jurisdictions, I explain that there are two dominant theoretical accounts that are offered as justificatory candidates. Methodologically, as set out earlier in 1.6, I attempt to strike a reflective equilibrium between abstract normative accounts and descriptively, what can be distilled from doctrine. First is an account that turns on the publicness of the *actor*. Second is an account that turns on the publicness of the *activity*, which in turn has two dominant strains: an economic version, which turns on the *transactional nature of the activity*; and a version that posits that the nature of the good or service in question, proffered to the public, allows individuals to pursue their own conception of the good and thus

[84] Khaitan, *A Theory of Discrimination Law* (n 16) 198 (emphasis added).
[85] Collins, 'The Vanishing Freedom to Choose a Contractual Partner' (n 15); Khaitan, *A Theory of Discrimination Law* (n 16); John Gardner, 'Private Activities and Personal Autonomy: At the Margins of Anti-Discrimination Law' in B Hepple and E Szyszczak (eds), *Discrimination: The Limits of Law* (Mansell Publishing Limited 1992).
[86] Tarunabh Khaitan, 'Osgoode Hall Law School: The Public-Private Divide in Discrimination Law' (2015) <https://www.youtube.com/watch?v=tv6sCVCA8SY> accessed 5 November 2021, discussing that in India one of the abiding sites of inequality is caste discrimination, much of which occurs in spheres typically thought to be deeply private (such as family enforcement of constraints on who can marry whom). Here, there may be no publicness, but nevertheless great power over individuals is wielded.
[87] Collins, 'The Vanishing Freedom to Choose a Contractual Partner' (n 15) 84.

must be regulated by anti-discrimination law. Although the accounts proposed in the literature for justifying the class of duty-bearers differ in some important respects, they are unified by some commitment to publicness (indeed, often the relevant legislative provision expressly ties the imposition of the duty to the provision of goods and services to the public). For this reason, these accounts, at least to a certain extent, maintain the public/private divide, which is in turn underpinned by a particular conception of autonomy. This is not to say that the accounts necessarily commit to an entirely rigid or impermeable divide; admitting of varying degrees of publicness in some ways resists a sharp divide, and instead sees publicness as falling along a spectrum as determined by the nature of the activity that is performed.[88] This is tied up with an entity being in a position of power, particularly with the capacity to exploit, abuse or dominate another. Even so, the divide is partially sustained through the differing treatment of actors based on whether they are state entities, private persons imbued with some sort of publicness, or other private persons. I turn to consider this in more detail in the final section of the chapter when I interrogate the place of autonomy and privacy.

4.3.1 Publicness of the actor

The first candidate account for justifying the imposition of anti-discrimination duties on certain entities turns on the nature of the actor in question. This account has something of a vertical flavour – either because the horizontal duty is imposed on the premise that the state owes duties to its subjects and, in fulfilling those, the state can legitimately impose downstream duties on non-state actors;[89] or because an actor is so public that it is sufficiently state-like in its character, and thus bears the same kinds of duties as the state. The account has two main permutations. We see the former play out in *Shelley v Kraemer*[90] in the US and in *Vriend v Alberta*[91] in Canada, where certain private entities were found to bear anti-discrimination duties indirectly by virtue of a primary obligation borne by the state to regulate discrimination. The second plays out in a modified form of the state action doctrine (discussed earlier in chapter 2): private entities that perform state-like functions, or step into the shoes of the state, are held to bear anti-discrimination duties.

The public actor argument essentially posits that certain putatively private actors have a sufficient degree of publicness to warrant the imposition of the anti-discrimination duty.

[88] Khaitan, *A Theory of Discrimination Law* (n 16) 203.
[89] ibid 195.
[90] *Shelley v Kraemer* (n 18).
[91] *Vriend v Alberta* (n 39).

Individuals or entities that take on public, institutional roles that render them state-like (such as employers and providers of goods and services to the public) fall within this ambit. This is partially justified by the position that such entities have potentially to exploit (or at least impact) others, including by virtue of an unbalanced power dynamic.[92]

Khaitan's account draws on these attributes: a notionally private entity will bear anti-discrimination duties based on its public character, which is determined by the extent of the entity's power and influence, and its control over basic goods. For this reason, Khaitan's account takes both the nature of the actor and the nature of the activity to be relevant. Extrapolating from the non-universal, unidirectional features of the anti-discrimination duty on private persons discussed earlier, Khaitan posits that the duty is justified because employers, as well as goods and services providers, are imbued with a modicum of publicness.[93] Their quasi-public nature justifies the imposition of duties not to discriminate, whereas employees and consumers are not public in the same way. Khaitan contends that this, too, feeds into a freedom-based enquiry, as the more public character an actor has, the less intense their negative freedom interest (in their activities not being interfered with by the state) would be.[94]

To be convincing, the account must justify why only anti-discrimination duties, but not other kinds of constitutional duties typically imposed on public entities, should apply if they are imposed because of their quasi-public nature. Additionally, while large corporate employers may be public in this respect, it is difficult to argue that individuals like small shop owners (on which all the surveyed jurisdictions do impose duties) are public in this respect. Raj, too, argues that the public actor account for why certain non-state entities bear anti-discrimination duties is flawed, because it focuses on the actor, rather than the act: 'the prohibition is actor neutral. It matters less who discriminates … [w]hat matters is what service is denied and what space is restricted.'[95] Put differently, the *publicness of the actor* argument ultimately collapses into having the *nature of the activity* determine whether the anti-discrimination duty is imposed, rather than the *nature of the actor*. These are thus compelling reasons for thinking that an account that seeks to justify the imposition of anti-discrimination duties on private persons solely by looking at the nature of the actor in question falls short, even in jurisdictions where the class of duty-bearers is more circumscribed than in South Africa.

[92] Khaitan, *A Theory of Discrimination Law* (n 16).
[93] ibid 206.
[94] ibid 200.
[95] Raj (n 68) 7–8.

4.3.2 Publicness of the activity

The second account takes the publicness of the *activity*, rather than that of the *actor*, to determine the distribution of the anti-discrimination duty. I consider two main versions of this account: first, an economic one; and, second, one that looks at the role that the activity plays in individuals' lives.

Transactional nature of the activity

The economic account argues that anti-discrimination duties adhere when two parties transact or contract with each other, at a degree of arm's length. Employers are bound not to discriminate against employees with whom they are in a contractual (albeit typically highly legislatively regulated) relationship. Providers of goods and services to the public cannot discriminate between who they will and will not transact with based on protected grounds, and so on.[96]

Although this account emerges in a number of jurisdictions (and can be endorsed for a range of reasons), certain strains of it are inflected by the law and economics school of thought, which analyses law through the lens of economic efficiency.[97] On this view, legal regulation of anti-discrimination serves to address failures in the market, with discrimination (including in the sphere of employment) viewed as a principally economic phenomenon that in turn must be addressed by the marketplace.[98] Such failures include failures of efficiency – that is, the idea that eliminating discrimination would reduce costs of business and boost economic output and so is valuable for that reason.[99] Conversely, at least on some versions of this account, if discrimination reflects a mere (that is, supposedly neutral) preference of an employer or service provider not to associate and does not undermine the market then it would not be subject to

[96] Khaitan, *A Theory of Discrimination Law* (n 16) (comparative overview, though not proposed as an exclusive or even dominant account); Matt Zwolinski, 'Why Not Regulate Private Discrimination?' (2006) 43 San Diego Law Review 1043 (US law); Michael Blake, 'The Discriminating Shopper' (2006) 43 San Diego Law Review 1017 (US account); Collins, 'The Vanishing Freedom to Choose a Contractual Partner' (n 15) (UK account, though only partially analysing from an economic perspective); Bhatia, 'Horizontal Discrimination and Article 15(2) of the Indian Constitution' (n 67) (Indian account, though author develops a more fulsome account in later work); Reagan Seidler, 'The Economics of Canadian Anti-Discrimination Laws' (2020) 57 Alberta Law Review 839 (Canadian account).

[97] See, for example, Richard Posner, 'Law and Economics: An Introduction' in Richard Posner, *Economic Analysis of Law* (9th edn, Aspen Publishers 2014).

[98] Gary Becker, 'The Forces Determining Discrimination in the Market Place' in Gary Becker, *The Economics of Discrimination* (2nd edn, University of Chicago Press 1957); Joni Hersh and Blair Bullock, 'The Law and Economics of Employment Discrimination Law', *Oxford Research Encyclopedia of Economics and Finance* (OUP 2019).

[99] Cass Sunstein, 'Why Markets Don't Stop Discrimination' (1991) 8 Social Philosophy and Policy 22, who rejects this view.

regulatory intervention.[100] This account – and indeed, law and economics more broadly as an enterprise – is premised on a jaundiced view of rights and a particular conception of the state that is rooted in neoliberal commitments.

A somewhat more compelling, though ultimately unpersuasive, version of the transactional account is to position it as a subset of the *publicness of the activity* argument. It posits that the anti-discrimination duty on non-state actors is justified on the basis that economic transactions must not be insulated from anti-discrimination law. Some argue that monetisation is a helpful demarcation here: the less monetised the relationship between the persons, the more private the relationship would tend to be (and thus less susceptible to the imposition of legal duties).[101] Put differently, anti-discrimination duties are justified by the transactional features of the interaction, which depersonalises the relationship between, for example, employer and employee, shop owner and consumer, and landlord and tenant. This places the interaction at arm's length and so requires an impersonal response to the particular features of an individual consumer or customer (thereby prohibiting discrimination on the protected grounds). In terms of legal regulation, it is often epistemically easier to track when this kind of discrimination has taken place as opposed to discrimination in the social sphere, given that commercial decisions are often articulated and give rise to a paper trail.[102] This is less true in the context of a refusal to initiate a contractual arrangement in the first place, which may not reflect in documentary evidence. The relationship is constituted as contractual rather than social in character.[103]

At least initially, Bhatia appeared to be one proponent of this view.[104] He advances a transactional argument in the context of Article 15(2) of the Indian Constitution (which proscribes discrimination with regard to access to shops, among other things, suggesting a transactional flavour to the prohibition), and takes all private economic transactions which involve the offering of goods and services to the public at large as the central case of private discrimination.[105] It is the marketplace of economic transactions that is regulated, he argues. Bhatia uses this to argue for an expansive understanding of what falls within the ambit of economic transactions. A shop, then, can be interpreted relatively broadly. This could include,

[100] See general discussion in John Donohue III, 'The Law and Economics of Antidiscrimination Law' National Bureau of Economic Research Working Paper 11631 (2005).
[101] Bhatia, 'Horizontal Rights: An Institutional Account' (n 20).
[102] Zwolinski (n 89).
[103] Collins, 'Discrimination and the Private Sphere' (n 82).
[104] Bhatia, 'Horizontal Rights: An Institutional Account' (n 20). In his more recent work on horizontality more broadly, as opposed to within anti-discrimination law, he departs from this analysis, arguing instead for an institutional account.
[105] Bhatia, 'Horizontal Discrimination and Article 15(2) of the Indian Constitution' (n 67).

for example, a private educational institution as in *Indian Medical Association*,[106] because a shop is 'the concrete expression of the idea of the impersonal, abstract market of the modern liberal capitalist economy'.[107]

Bhatia and Khaitan both posit at least a partially economic dimension to the imposition of the duty. Business entities whose relations are monetised will be more public than those that are not: 'the more intimate and less monetised the interaction between two persons, the more private is the relationship'.[108] Khaitan's account allows for a carve-out for charities and altruistic organisations, which are not monetised but nonetheless have a public character. An employer has a public character because of institutional power wielded within a capitalist, industrial context; providers of goods and services to the public generally, such as landlords, retailers and other associations, assume a degree of publicness by virtue of their transactional provision of these goods and services.[109]

The transactional account for the imposition of anti-discrimination duties on private persons implicitly includes the idea that the private sphere that is regulated operates at arm's length. On this account, case 1 (the B&B owner) and case 2 (the cakeshop) would constitute justifiably prohibited discrimination, though there may be other considerations at play that determine whether a duty is ultimately imposed in the second case. Conversely, case 3 (the testator), case 4 (the religious institution) and case 5 (the Tinder user) would likely constitute legally permissible discrimination.

But this argument falters because, as Raj points out, by focusing on the principally economic character of such transactions it fails to capture important social, political and relational dimensions of anti-discrimination law.[110] It is also does not closely fit the contours of the existing law in most jurisdictions, which extend to regulate non-commercial entities such as certain non-governmental organisations and charities, notwithstanding that those entities do not engage in transactional activities. For example, section 29 of the UK Equality Act expressly applies the duty to entities who provide a service to the public or a portion thereof, for payment or not, while Article 15(2) of the Indian Constitution extends to wells, tanks, bathing ghats and roads (also, not typically within a transactional domain).

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[106] *Indian Medical Association v Union of India* (n 69).
[107] Bhatia, 'Horizontal Discrimination and Article 15(2) of the Indian Constitution' (n 20) 100.
[108] Khaitan, *A Theory of Discrimination Law* (n 16) 203.
[109] ibid 203–204.
[110] Raj (n 68).

Gatekeepers of the good

Raj, analysing Indian anti-discrimination law, rejects the arguments that the anti-discrimination duty extends to the private sphere by virtue of the actor being public, or by virtue of the economic or transactional nature of the activity. Instead, she posits that what matters is not who discriminates, but the nature of the good, service or amenity that is denied.[111] This account continues to locate the prohibition of non-state discrimination in publicness rather than privateness.[112] She places some weight on the voluntariness of the entity's provision of a good or service, or (more broadly) its participation in a public space. She also places an additional qualifier on the public nature of the activity: not just any public service is governed by anti-discrimination law, but only those to which access 'must be necessary for full and equal participation in the society',[113] or where lack of access would otherwise 'seriously disadvantage a dignified life'.[114]

This argument predicates the extension of the anti-discrimination duty on the fact that the provider of goods or services acts as a gatekeeper of the good (here, meant more broadly as impeding or facilitating an individual's ability to pursue their own conception of the good). Khaitan (whose theory sometimes shifts across the candidate accounts) posits that whether a putative duty-bearer has the power to affect or control another's access to basic goods (construed broadly) will be a factor in determining whether the anti-discrimination duty is imposed, and so also endorses this approach.[115] Again, his theory is multi-pronged: both whether the actor is public in character, and the kinds of activities it does or the goods and services it provides, which can be either economic or else fundamentally determine another's access to basic goods. Voluntariness plays a role for him too: either the entity is an employer and so falls within industrial institutional structures, or the entity provides goods and services to the public voluntarily, and so has assumed this degree of publicness volitionally. By doing so, he posits, the entity has diluted its claims to negative liberty.[116] His account thus admits of degrees: a larger employer is more public than a smaller one; a landlord sharing a house with a tenant is interacting more privately, and so on.

[111] ibid.
[112] ibid 15.
[113] ibid 17.
[114] ibid 18.
[115] Khaitan, *A Theory of Discrimination Law* (n 16) 200.
[116] ibid 206.

Collins, too, suggests a mix of the transactional and gatekeepers-of-the-good versions of the *publicness of the activity* account. He contends that the boundaries of anti-discrimination law are demarcated by two overlapping considerations. The first is whether the relationship in question is transactional or contractual (as opposed to social – thereby permitting the Tinder swiper to exclude members of different races from their personal dating pool, but not the cake store owner from refusing to provide a wedding cake to a same-sex couple). The second are gatekeeping considerations, so that a more powerful person who is able to control another's access to a good (or, on an extended version of this, even a resource or an opportunity) is more likely to be a duty-bearer than the consumer of that good.[117]

In sum, on the gatekeepers-of-the-good account, employers and providers of goods and services can affect others' access to basic goods, which may be worthwhile to the pursuit of their autonomous choices. This need not entail that these entities themselves are necessarily public or quasi-public; it is enough that they exercise some control over opportunities, goods and services, and thus perform a public function or activity. If left free to choose with whom to engage or contract without any restriction, the autonomy of those who are discriminated against is imperiled.

In general, this account seems to be a better candidate than the two earlier accounts because it better captures (at least some of) the underlying purposes of anti-discrimination law. However, it still seems normatively underinclusive, in part because there are intangible goods, which do not usually fall within the purview of the account, that may still advance autonomy. This account also, at least as qualified by Raj, seems too narrow. As noted earlier, she argues that access to the good or service must be necessary to participate fully in society, or lack of access must seriously impair dignity. On this line, if an individual could access the same good or service elsewhere, then a discriminatory provider would be insulated from the reach of anti-discrimination law. This would, in turn, worryingly fail to account for the imposition of the duty on the B&B owner or cakeshop owner (because in most instances, a consumer would be able to access the goods and services elsewhere, unless of course the industry as a whole is discriminatory and exclusionary). Individual private conduct is one thing, but taken together, private acts 'form patterns that are no less consequential than, say, the passing of a piece of discriminatory legislation'.[118]

[117] Collins, 'Discrimination and the Private Sphere' (n 82).
[118] Lippert-Rasmussen (n 2).

One final point to make is this: proponents of the gatekeepers-of-the-good account usually seek to justify the extension of anti-discrimination duties beyond the realm of the state, while circumscribing their reach to limit incursions into more classically private spaces. Arguably, however, the gatekeepers-of-the-good account, if followed to its logical end, permits far more extensive regulation of the traditionally defined private sphere. For it is in the private sphere too – especially in relationships with others, as Nedelsky argues[119] – that an individual's ability to form and pursue her conception of the good is not only facilitated or impeded, but also often constituted, and there is no reason to think that the basic goods that we value are only tangible or material.

4.4 PUBLICNESS AND THE PUBLIC/PRIVATE DIVIDE

The theories sketched above, developed to account for the scope and distribution of private anti-discrimination duties in the surveyed jurisdictions, all turn on some form of publicness and thus are underpinned by an enduring commitment to the public/private divide.[120] This divide can mean multiple things: for example, the public/private divide may be used to designate the distinction between public and private law; between public spheres and private spheres; or between public actors and private actors. The divide is also recruited for both descriptive and normative purposes. Thus merely by designating something as within the private sphere, the inference is that it may be immune from legitimate legal regulation. As Collins puts it, 'the precise boundary of the unregulated private sphere seems likely to be set by a combination of views about the legitimate aim of the law, the proportionality of interference with the choices of individuals, and the need to balance the rights of all the parties concerned'.[121] Division of the spheres is partly predicated on the claim (traversed elsewhere in this thesis) that while there is significant power imbalance between the state and its subjects, private persons relate to each other on an equal footing.[122] Put differently, 'the conceptual divide between the public and private spheres exercises a restraining influence'[123] on the application of fundamental rights to private parties.

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[119] Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (OUP 2011).
[120] See Bruno de Witte, 'The Crumbling Public/Private Divide: Horizontality in European Anti-Discrimination Law' (2009) 13 Citizenship Studies 515 for a thoughtful discussion of developing European law on these questions, which falls outside the scope of this thesis.
[121] Collins, 'Discrimination and the Private Sphere' (n 82) 368.
[122] Alfred Cockrell, '"Can You Paradigm?" – Another Perspective on the Public Law/Private Law Divide' [1993] Acta Juridica 227, 228.
[123] Liebenberg S and Kolabhai RL, 'Private Power, Socio-Economic Transformation and the Bill of Rights' in Z Boggenpoel (ed), *Law, Justice and Transformation* (LexisNexis 2022) 251.

Underpinning the public/private divide is a conception of autonomy. On a classical liberal (and certainly, on a neoliberal) conception, autonomy is taken to require negative liberty, that is, to constrain intervention into certain spheres or activities designated as private. For this reason, the public/private divide 'has been central to the liberal project from the beginning',[124] with its establishment of a private sphere restricted from state interference and its Mills and Lockean influenced principle that state coercion that restricts a subject's conduct requires special justification.[125] The public/private divide is sustained in much of the influential Western political philosophy of the past century. Rawls, for example, works off a division between public reason and private interest,[126] while Rorty advances pragmatic arguments for the divide, separating public discourse from private self-expression.[127] Walzer characterises liberalism as involving 'the art of separation': 'liberalism is a world of walls, and each creates a new liberty'.[128] Not all liberal positions are committed to this thin understanding of autonomy – Razian accounts, for example, endorse a thicker conception of autonomy, as I discuss later in this chapter. Moreover, although the public/private divide plays out in liberal and libertarian philosophy, it is not confined to this. While this is contested, in certain strains of Marxist thought a private sphere (that particularly concerns the family) is delineated,[129] and some republican theory also endorses the divide.[130]

I consider the debates on the public/private divide in three brief parts: first, I examine shifting definitions of the public/private divide; second, I examine arguments advanced to defend the divide (including by recruiting the value of autonomy). I conclude by assessing the prospects of the divide, arguing that the strict divide is decaying, but that the right to privacy and other competing rights and interests, including in some instances autonomy, still have a valuable role to play.

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[124] Manuel Rodeiro, 'Rorty's Public-Private Distinction as a Pragmatic Tool' (2018) 15 Contemporary Pragmatism 476, 484, tracing the history of liberalism's view of the divide.
[125] John Stuart Mill, *Utilitarianism, On Liberty and Considerations on Representative Government* (Dent 1993).
[126] John Rawls, *Political Liberalism* (Columbia University Press 1993).
[127] Richard Rorty, 'Introduction', *Contingency, Irony and Solidarity* (CUP 1989).
[128] Michael Walzer, 'Liberalism and the Art of Separation' (1984) 12 Political Theory 315, 315.
[129] Nicola Lacey, 'Theory into Practice? Pornography and the Public/Private Dichotomy' (1993) 20 Journal of Law and Society 93, 94; though cf Danwood Chirwa, 'In Search of Philosophical Justifications and Suitable Models for the Horizontal Application of Human Rights' (2008) 8 AHRLJ 11.
[130] Berry Tholen, 'Drawing the Line: On the Public/Private Distinction in Debates on New Modes of Governance' (2016) 18 Public Integrity 237; Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 1990) 119, both discussing Arendt's approach to delineating the public and the private.

4.4.1 Defining and dismantling the public/private divide

The private and public spheres are typically divided on the basis of the activity, and the nature of the duty-bearer.[131] However, as Fraser points out, the terms 'private' and 'public' are not 'straightforward designations of social spheres' but instead are recruited to serve rhetorical and political ends.[132]

On this, as Lacey puts it, 'a strictly limited public sphere is appropriate for the enforcement of justice, whilst the state leaves relations and distributions in the private sphere untouched'.[133] Lacey, however, carefully delineates multiple possible meanings of the public/private divide. She traces two influential accounts: one which differentiates between the state and civil society, and another between the state and/or the market, versus the family. The family as a private sphere which escapes state or legal intervention has been the basis for far-reaching and compelling feminist critique.

Lacey notes that, on a straightforward descriptive view of the divide, dividing the social world into strict spheres is 'very crude',[134] for the state, the market, and families (as the central spheres that usually form part of the analysis) are made up of multiple, interactive or interdependent practices and institutions. The divide is also recruited to track spheres or institutions that are predominantly regulated or unregulated by state power. In this respect, regulation often differs by degree and manifests in both direct and indirect forms. Even the family, often placed at the heart of the private sphere, has always been subject to extensive regulation (think, for example, of marriage and associated proprietary regimes).[135] For this reason, 'the search for the public/private division in terms of the presence or absence of state-directed or state-sponsored regulation is as hopeless as the analysis of society merely in terms of state, market and family is inadequate'.[136] Because public and private power are frequently bound up, differentiating between power solely on the basis of who exercises it (as tracked by the divide) fails to account for the nuances of the social world. The analytical-descriptive

[131] Collins, 'Discrimination and the Private Sphere' (n 82).
[132] Nancy Fraser, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy' (1990) 25 Social Text 56, 73.
[133] Lacey (n 129) 94.
[134] ibid 95.
[135] ibid.
[136] ibid 95–96.

account of the public/private divide thus rests on shaky foundations, with the divide 'indeterminate and shifting'.[137]

What of the normative prospects of the divide? Again, Lacey's discussion is instructive. The normative argument is frequently that, because an issue falls within the private sphere, it ought not be subject to state or legal regulation.[138] She makes the first and clearly correct point that a decision not to regulate is as politically fraught as a decision to regulate, and equally calls for justification. Second, normatively, the public-private divide is typically sustained by a commitment to a certain conception of autonomy (principally, that it constitutes negative liberty, that is freedom from interference) which in turn requires a private sphere absent state regulation. I discuss this dimension in more detail below.

Both feminist political philosophy and critical legal theory have, in the past decades, assailed the public/private divide.[139] The dominant feminist critique is that women's[140] lives take place in the private sphere, rendering women's oppression and the patriarchal structures of power invisible and immune from legal scrutiny or regulation, while men monopolise public spheres of work and politics.[141] Historically, this oppression is also intersectional, and complicated by disadvantage on the grounds of race, class, disability, gender identity and sexual orientation, as well as assumptions about which women are confined to private spheres with relatively low degrees of state intervention, and which (often, working-class women of colour) are not.[142] That is acutely so in South Africa, with its history of migrant labour and forced removals displacing the family lives of so many, and with the role of domestic work predominantly undertaken by Black women. It is important, however, to note that feminist critiques are not monolithic; after all, individual autonomy and the right to privacy play an important role in

[137] Susan Boyd, 'An Overview' in Susan Boyd (ed), *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (University of Toronto Press 1997) 4.
[138] Alfred Cockrell, '"Can You Paradigm?" – Another Perspective on the Public Law/Private Law Divide' (n 122) 227, 234 makes this point: 'The label "private" is sometimes used to encapsulate an area of activity that should be located presumptively beyond the sphere of legitimate governmental power.'
[139] Carol Pateman, 'Feminist Critics of the Public/Private Dichotomy' in Carol Pateman (ed), *The Disorder of Women* (Stanford University Press 1989); Lacey (n 129); Boyd (n 137); Tracy Higgins, 'Reviving the Public/Private Distinction in Feminist Theorizing' (2000) 75 Chicago Kent Law Review 847 (for a critical discussion).
[140] Here, I track the terminology as it appears in the literature, which predominantly emerges in the late 1980s and early 2000s.
[141] Boyd (n 137) 8.
[142] ibid 4.

critical feminist struggles, such as the right to sexual agency,[143] and the right to access abortion services.[144]

Nevertheless, the force of the feminist critique is that the preservation of the divide (and the associated reach and limits of legal regulation) ossifies the status quo of existing (oppressive) power relations and distributions remain untouched.[145] In addition, this status quo is not neutral – instead, it is normatively laden.[146] Lacey points out that the feminist critique is typically supported by a more fulsome conception of freedom. Similarly, critical legal studies theorists have also challenged the divide, based on a realist assessment of the power that is wielded by both the state and private actors, and the argument that the division (which renders non-state exercise of power subject to lower degrees of regulation) is not politically neutral.[147]

4.4.2 Autonomy and the public/private divide

As touched on above, the public/private divide is partially sustained by the idea that 'the private sphere is one in which individuals may have a certain level of autonomy to determine the course of their own lives'.[148] Put differently, the public/private divide is underpinned by an idea of negative liberty, which sees state interference with individual action as requiring special justification.[149]

The values of equality and freedom are often pitted against each other.[150] Freedom to act without state interference is impaired by the demands of substantive equality, so the argument goes, because substantive equality requires active intervention and constrains individual agents' ability to freely make contracts, and more broadly to take and implement decisions across various spheres of their lives (including social, economic and associational spheres).

It is important, however, to clarify the underlying conceptions of both equality and freedom that are at stake.[151] I have explored the former at length in chapter 3. I now turn to some competing conceptualisations of freedom and autonomy. Berlin famously differentiates

[143] Amia Srinivasan, *The Right to Sex* (Bloomsbury 2021).
[144] Higgins (n 139).
[145] Lacey (n 129) 97.
[146] Sheppard (n 27) 16.
[147] See discussion in Frank Michelman, 'Constitutions and the Public/Private Divide' in Michael Rosenfeld and András Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (OUP 2012); and in Higgins (n 132).
[148] Bilchitz (n 19) 45.
[149] Lacey (n 129) 97.
[150] Elizabeth S Anderson, 'Freedom and Equality' in David Schmidtz and Carmel E Pavel (eds), *Oxford Handbook of Freedom* (OUP 2018).
[151] ibid.

between positive and negative liberty. Negative liberty entails the absence of obstacles and constraints – that is, freedom to act without interference.[152] At a state institutional level, it is exemplified by the state being constrained from intervening in subjects' lives through regulation, redistributive measures and so on.[153] Conversely, positive freedom entails not only freedom from constraints but freedom to determine one's own decisions, which may in turn require access to a particular set of goods which condition the ability to pursue one's own conception of the good.[154]

The objection to equality levelled by those endorsing negative liberty as a comprehensive freedom norm is that state power should be properly limited, and should not allow for subjects to be coerced for others' ends.[155] Commentators thus understand the right not to be discriminated against as in tension with various freedoms, such as freedom of association, and other rights.[156] This includes the exercise of rights in the domain of private law, such as contract law, which has typically protected an individual's right to choose – or reject – a contractual partner as 'emblematic of individual liberty and autonomy'.[157] One way of characterising the cakeshop owner's refusal to sell a wedding cake to a queer couple, for example, is as an exercise of unencumbered freedom to act in accordance with one's beliefs and freely to choose a contractual partner. Anti-discrimination laws, then, place constraints on this negative liberty interest. Unlike private persons, the state has no claim to negative liberty or autonomy interests more broadly (except insofar as it has duties to respect its subjects' negative liberty interests).[158] I should not overstate this, because of course the state bears some duties *vis-à-vis* protecting others' negative liberty interests. Private persons, conversely, are animated by their own personal interests as against others.[159]

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[152] Isaiah Berlin, 'Two Concepts of Liberty' in *Four Essays on Liberty* (OUP 1969); DM Davis and Stu Woolman, 'The Last Laugh: Du Plessis v De Klerk, Classic Liberalism, Creole Liberalism, and the Application of Fundamental Rights under the Interim and Final Constitutions' (1996) 12 SAJHR 361.
[153] Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 1974); Friederich Hayek, *The Constitution of Liberty* (Routledge 1960).
[154] Berlin (n 152) 22-23 on positive freedom as consisting in being one's own master, though he ultimate asserts the primacy of negative freedom for fear of authoritarianism; Sandra Liebenberg, 'The Value of Freedom in Interpreting Socio-Economic Rights' [2008] Acta Juridica 149 on access to basic goods. For a critique of Berlin on the basis that his favouring of negative freedom is premised on the erroneous assumption of the possibility of state neutrality, see Sandra Fredman, *Human Rights Transformed* (OUP 2008) 19-20.
[155] Elizabeth S Anderson, 'What Is the Point of Equality?' (1999) 109 Ethics 287, 287–288.
[156] Blake (n 96).
[157] Collins, 'The Vanishing Freedom to Choose a Contractual Partner' (n 15) 71.
[158] Khaitan, *A Theory of Discrimination Law* (n 16) 201; Bilchitz (n 19) 146.
[159] Michael Dafel, 'The Constitutional Rebuilding of South African Private Law' (DPhil Thesis, University of Cambridge 2018).

However, given that freedom, like equality, is conceptually contested, the argument that it is necessarily opposed to equality does not follow. Why should we care only about negative liberty? After all, 'hostility to coercion and manipulation is not all there is to personal autonomy'.[160] Anderson notes that a regime that gives priority to negative liberty is unstable, for it 'tends to shrink the domains in which individuals interact as free and independent persons',[161] and instead enlarges the scope for domination and subordination. Oppressive, structural injustice negates the ability for individuals to stand in equal relation to each other. A thicker, positive sense of freedom is more plausible and can accommodate some of the negative liberty concerns, for they may impede an individual's ability to pursue her conception of the good.

Positive freedom commitments are articulated by some of the leading perfectionist accounts of autonomy, principally influenced by Raz. This conception of autonomy emphasises that autonomy requires having access to a wide range of valuable options – echoing the gatekeepers-of-the-good argument explored above. On this conception, state intervention and regulation which enable the recognition of marginalised or vulnerable persons and the redistribution of goods can enhance, rather than impair, autonomy.[162] There is a link here to the purpose of substantive equality, which may demand that structural, social disadvantage must be overcome for the purposes of personal autonomy.[163] Other conceptions of autonomy (discussed earlier in chapters 2 and 3) emphasise that it need not entail an atomistic approach to the self – that our identities and conceptions of the good that are worth pursuing are shaped relationally, and not simply in an insulated private sphere.[164] The point remains that the dichotomy set up between freedom, on the one hand, and equality, on the other, is overstated, and its recruitment to sustain a strict public/private divide thus also founders.

4.4.3 Prospects of the divide, autonomy and the right to privacy

Where to, then, for the public/private divide? Lacey's 1993 article again is illuminating. She argues that 'a commitment to the idea that privacy can be of value and should sometimes be respected does not entail a commitment to a private *sphere*'.[165] Instead, privacy as a value and

[160] Gardner (n 85) 160.
[161] Anderson (n 155) 315.
[162] Paul Waybourne, 'Developing a Constitutional Law Paradigm for a National Health Insurance Scheme in South Africa' (PhD Thesis, University of the Witwatersrand 2014).
[163] Joseph Raz, *The Morality of Freedom* (OUP 1986) 400ff on the conditions necessary for the exercise of positive freedom; Khaitan, *A Theory of Discrimination Law* (n 16) chapter 3 on the adequate range of valuable options.
[164] Nedelsky (n 119) 4, 19; Rodeiro (n 124) 487.
[165] Lacey (n 129) 100.

a right is contextual and none of the accounts that assail the strict public/private divide need be committed to a wholesale rejection of privacy. The effect of this is that there is no dichotomous divide between public and private spheres, nor do notions of publicness or privateness alone track whether an action ought to be regulated or not.[166] This is inflected by Young's argument that, rather than the private being defined as what the public excludes, instead 'the private should be defined … as that aspect of his or her life and activity that any person has a right to exclude others from';[167] this centres the individual's right rather than strict social or institutional separation between public and private spheres.

What the right to privacy[168] – as separate from autonomy, which has been discussed more extensively across this thesis – comprises is contested. Thomson argues that the right to privacy is a cluster of rights that intersects with the right to property and the right over the person, and that possibly there is nothing especially distinctive about the right to privacy that is not covered by other rights,[169] or that 'every right in the right to privacy cluster is also in some other right cluster'.[170] Marmor agrees with Thomson that the right differs from what is commonly understood, but argues that it has specific content nonetheless. He argues that the right to privacy protects a person's interest 'in having a reasonable measure of control over the ways in which they can present themselves (and what is theirs) to others'.[171] Ultimately, a more fulsome account of the right to privacy (as a distinct inquiry from charting the public/private divide) falls to future research and outside the scope of this thesis.

What is clear, however, is that considerations of autonomy and privacy do not work to create a schism between public and private spheres or domains or a zone beyond which state intervention or legal regulation is precluded. Instead, privacy and autonomy interests form part of the principles that inform a balancing enquiry when adjudicating between competing rights (which in turn may lead to the crystallisation of a particular legal rule).[172] For the right to privacy remains important – clear (though of course not exhaustive) examples of its salience are in buttressing abortion rights, rights to same-sex sexual relationships, and rights not to be

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[166] ibid 103.
[167] Young (n 130) 119.
[168] For an overview of philosophical accounts of the right to privacy, see DeCew J, 'Privacy' *Stanford Encyclopedia of Philosophy* (2018), <https://plato.stanford.edu/archives/spr2018/entries/privacy/>.
[169] Thomson JJ, 'The Right to Privacy' (1975) 4 Philosophy and Public Affairs 295, 310.
[170] ibid 313.
[171] Marmor A, 'What Is the Right to Privacy?' (2015) 43 Philosophy and Public Affairs 3
[172] Liebenberg and Kolabhai (n 123) 263 put it eloquently: 'considerations of private autonomy would enter the picture, not in terms of the application analysis, but rather in terms of the substantive balancing between various rights in the Bill of Rights'.

subject to illegitimate state surveillance.[173] While these rights are also underpinned by other rights (for example, the rights to bodily integrity, to dignity and to equality), the right to privacy does play a normative role here. What the right does not do, however, is lead to sharp distinctions between different public and private spheres.

This account also does not mean that, outside anti-discrimination law, there is no usefulness in retaining some distinction between state and non-state power. This is the case in administrative law, given that judicial review is predicated on distinguishing between public and private forms of power. It is also the case when considering the wrongs of and remedies for state versus private wrongdoing: consider, for example, the distinction between acts of private violence, as opposed to acts of violence perpetrated by the police or state agents.[174] Of course, this does not mean that the concept of the state is now denuded of all meaning,[175] nor that it is not analytically useful to differentiate between the norms that typically apply in public versus private law.[176] Even within anti-discrimination law, this thesis as a whole is predicated on there being certain meaningful differences between private and state duty-bearers. These considerations, however, remain distinct in character from setting up a strict divide between private and public spheres, and shielding one of those spheres from regulation.

4.5 CONCLUSION

In this chapter, I charted the approaches taken in five comparative jurisdictions to private anti-discrimination duties. In almost all these jurisdictions, the anti-discrimination duty is not imposed universally. Instead, the state is the primary duty-bearer and private persons bear duties only under certain conditions – typically, when they provide a good or service to the public generally, or when they exercise extensive power relative to an individual. I examined the dominant normative accounts for why this is the case. Two accounts emerge: one turns on the publicness of the actor (although ultimately collapses into an enquiry into the nature of what the actor *does*, rather than who the actor *is*), while the second more straightforwardly turns on the publicness of the activity (in turn, characterised by whether the activity in question in transactional in some sense, or involves gatekeeping access to a set of goods needed to live an autonomous life). I briefly contended that, if one endorses a more fulsome notion of

[173] Liebenberg and Kolabhai (n 123).
[174] Higgins (n 139) 862, though she argues more generally for retaining the divide in feminist theorising.
[175] I previously considered this, arguing for the need for a more principled conception of the state, in Meghan Finn, 'Organs of State: An Anatomy' (2015) 31 SAJHR 631.
[176] Paul Craig, 'Public Law and Control over Public Power' in Michael Taggart (ed), *The Province of Administrative Law* (Hart 1997).

autonomy, the gatekeepers-of-the-good argument extends far beyond how it is typically applied in the surveyed jurisdictions. Finally, I considered how the publicness accounts are underpinned by an abiding conception of the public/private divide. I traced different understandings of the divide, and the role that autonomy plays in giving meaning to these understandings. Drawing on feminist and critical legal literature, I argued that there is no sharp divide between public and private spheres, not least because 'private and public power are intertwined and mutually constitutive'.[177] However, even if the public/private divide should be abandoned, attenuated, reconstituted or understood as permeable, the right to privacy and autonomy interests remain valuable. I pick up some of these threads, particularly on conceptions of the public/private divide and the role of autonomy and competing interests, in the following two chapters: in chapter 5, I examine South Africa's legislative and doctrinal regulation of private anti-discrimination duties, and in chapter 6 I work towards a normative account (underpinned by substantive equality) that explicates these duties.

[177] Liebenberg and Kolabhai (n 123) 7.

CHAPTER 5

PRIVATE ANTI-DISCRIMINATION DUTIES IN SOUTH AFRICAN LAW: THE DOCTRINE

5.1 INTRODUCTION

How does South African law's commitment to substantive equality translate to regulating private anti-discrimination duties in legislation and case law? Compared to the jurisdictions surveyed in chapter 4, South Africa has a much broader class of duty-bearers. This is borne out in the constitutional and legislative provisions, and in established and developing doctrine. In this chapter, I turn to a closer examination of horizontality in the specific context of South African anti-discrimination law. The chapter attempts to synthesise the arguments made in chapters 2 and 3 – which looked at horizontality broadly, and overarching conceptions of (in)equality – to examine the question of private anti-discrimination duties and how a commitment to substantive equality translates to the private sphere.

In this chapter, I map out South Africa's legislative and doctrinal approach to regulating private anti-discrimination duties. I begin by discussing the pre-constitutional position in two parts: first, by briefly setting out the many ways in which the law reached into and reinscribed discrimination and disadvantage in private lives; and second, by looking at the extent to which the common law regulated discrimination by private actors and the role that administrative law played in the absence of a fundamental rights regime.

Against this backdrop, I draw on historical records to set out the legislative drafting history of section 9 of the Constitution and PEPUDA. I argue that both section 9(4) of the Constitution and PEPUDA were very consciously drafted to recognise substantive equality and, more particularly, to reach into the private sphere as it has traditionally been conceived. I chart some of the major debates in the PEPUDA drafting process, including on whether private discrimination should be regulated universally or according to sectors, and how a defence to a discrimination claim should be structured.

Next, I discuss the broad jurisprudential approach that has emerged in South African doctrine on private anti-discrimination duties. I then discuss two specific doctrinal case studies that, I

contend, exemplify the key tensions in this area of law. First, I examine cases on the clash between LGBTQI+ rights not to be discriminated against, and the rights to freedom of religion and association. Second, I look at the regulation of private testamentary dispositions, where there has been recent jurisprudential development. I return to the five intuition pumps to illustrate South Africa's doctrinal position.

This situates where the legislation and courts have taken us so far. I argue that three divergent approaches to governing a private person's anti-discrimination duties can be distilled from recent jurisprudence: (1) an approach that favours insulating the private sphere; (2) an approach that appears, at first blush, to advocate for the duties of private persons to mirror those of the state; and (3) an approach that supports regulation of the private sphere, but subject to a lower level of judicial scrutiny.

I argue that none of these approaches gets things quite right. Instead I advocate for a fourth approach that does not limit the class of anti-discrimination duty-bearers as a threshold enquiry (i.e. unlike most surveyed jurisdictions discussed in chapter 4) and does not introduce varying levels of judicial scrutiny, but that does recognise that private interests may differ from state interests, with these interests factoring into a proportionality analysis at the fairness or justification leg of an anti-discrimination claim.[1] For this approach, section 14 of PEPUDA is key, and I contend that the approach is consistent with the purposes of PEPUDA and section 9 of the Constitution. I develop this argument in chapter 6.

5.2 THE PRE-CONSTITUTIONAL POSITION

Both the colonial and apartheid systems were characterised by inequality and discrimination that were systematic and pervaded almost all aspects of public and private life.[2] To illustrate this, I detail some ways in which the private sphere was controlled through racist laws which were essential mechanisms for establishing white supremacy.[3] Extensive social engineering legislation was put in place by the colonial and apartheid regimes to regulate the private

[1] A number of academics recognised this in early commentary on PEPUDA, but the point has not been foregrounded in subsequent case law or more recent commentary. See C Albertyn, B Goldblatt and C Roederer, *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (Wits University Press 2001); S Gutto, *Equality and Non-Discrimination in South Africa: The Political Economy of Law and Law-Making* (New Africa Education 2001); Judicial Services Commission, *Bench Book for Equality Courts in South Africa* (2002); Anton Kok, 'A Socio-Legal Analysis of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000' (LLD Thesis, University of Pretoria 2009).

[2] David Bilchitz, *Fundamental Rights and the Legal Obligations of Business* (CUP 2021) 197–198.

[3] Given word count constraints and because the overall point is elucidated by the extensive regulation on the basis of race, I do not cover other protected grounds such as gender, disability and sexual orientation here.

domain, governing not only enfranchisement, political and economic participation, the market economy, contractual and property relations and access to services and amenities, but also intimate relationships and other private interactions. Racial segregation was the official policy of the Union from 1910. The Natives Land Act 27 of 1913 and the Native Land and Trust Act 18 of 1936 allocated over 80% of land to white owners, who then made up under 20% of the population. The Native Administration Act 38 of 1927 established a separate legal and political regime for Black areas, while the Representation of Natives Act 12 of 1936 assailed the enfranchisement of Black people. The colonial Immorality Act 5 of 1927 and then the apartheid Prohibition of Mixed Marriages Act 55 of 1949 and Immorality Amendment Act 21 of 1950 reached into the most intimate spheres of life, prohibiting sexual relations across (rigidly determined) race lines. Spatial and residential segregation, including through forced removals and evictions, was inscribed through the Group Areas Act 41 of 1950 and the Bantu Authorities Act 68 of 1951. Personal movement was restricted and influx control was enforced by the Pass Laws Act 67 of 1952, requiring all Black South Africans over the age of 16 to carry a *dompas*. Access to public goods and services – whether provided by the state or private actors – was segregated through the Reservation of Separate Amenities Act 49 of 1953. In apartheid South Africa, then, 'the domain of the private … [was] effectively colonized by the state'.[4]

In the absence of meaningful constitutional safeguards for fundamental rights, pre-constitutional administrative law performed a significant function in guarding against egregious abuses of power.[5] However, administrative law's domain is the exercise of public power. Thus, even where its tenets were recruited to curb instances of discrimination and racial segregation, this was limited to regulating public rather than private power.[6]

The common law provided limited tools to counteract some of the pernicious effects of this legislation, although it often reinscribed or bolstered policies of segregation and discrimination. South Africa's common law is rooted in a mixed system of Roman-Dutch law and English law, as transmuted through colonial rule. Both Roman-Dutch and English law recognised a form of non-discrimination duties for the providers of certain public goods and services. In chapter 4, I explained that although English anti-discrimination law in its contemporary form is indebted to political developments that gave rise to legislation, the early origins of English anti-

[4] Simon Gikandi, 'Response: Rethinking the Public/Private' (2013) 27 Cultural Studies 487, 487.
[5] Karthy Govender, 'Administrative Law as a Surrogate for Human Rights Law' in Hugh Corder and Linda van der Vijver (eds), *Realising Administrative Justice* (Siber Ink 2002); Cora Hoexter and Glenn Penfold, *Administrative Law in South Africa* (3rd edn, Juta 2021) 221.
[6] *R v Carelse* 1943 CPD 242, drawing on the English law case of *Kruse v Johnson* [1898] 2 QB 91.

discrimination law – at least regarding notions of publicness – can arguably be traced to the common caller and common carrier duty, which constrained certain persons providing goods and services to the public (such as innkeepers) from discriminating by refusing to serve the public on certain grounds.[7] Roman-Dutch law was slightly less clear on this point, though Voet, for example, noted that once an innkeeper (or other purveyor of accommodation or transport services) had begun to run services at their free discretion, they could not turn travellers away in the absence of just reasons.[8]

Nevertheless, South Africa's common law did not expressly constrain providers' discretion to refuse guests on any grounds. The judiciary tended to be a bastion that upheld, rather than overturned, discrimination, as demonstrated in several judicial decisions which affirmed (governmental) power to discriminate.[9] Judicial review powers were also curtailed through parliamentary sovereignty.[10] In *Jockie*, the closest analogue to the English *Constantine* judgment discussed in chapter 4,[11] the Appellate Division suggested that a hotel could only deny accommodation to a traveller on good grounds, and that exclusion on the basis of race might not constitute a good ground.[12] Unlike in *Constantine*, however, the court declined to ultimately decide this question, thereby failing to recognise a common caller anti-discrimination duty (although I note that while *Constantine* is a rare example of an English common-law intervention that recognised the duty, neither race nor discrimination were mentioned in the judgment). However, in South African law although there was no common-law duty that precluded a common caller from refusing to accommodate in the first place, once a guest had been accommodated, a downstream common-law rule provided that the guest could not then be ejected without lawful cause.[13] In *Rex v Abdurahman*, for example, the Appellate Division found that discrimination on the grounds of race was not unlawful per se, though unequal treatment could be found to be unlawful, thereby endorsing a 'separate but equal'

[7] DS Bogen, 'The Innkeeper's Tale: the Legal Development of a Public Calling' (1996) Faculty Scholarship 679; Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) 205; Bob Hepple, *Equality: The New Legal Framework* (Hart 2011) 7-11.
[8] Voet 4.9.4. Gane's translation 769.
[9] Hugh Corder, *Judges at Work* (Juta 1984); C Forsyth, 'Judiciary Under Apartheid' in M Olivier and C Hoexter (eds), *The Judiciary in South Africa* (Juta 2014).
[10] See, for example, the effects of *Harris v Minister of the Interior (No2)* 1952 (4) SA 769 (AD); *Collins v Minister of the Interior* 1957 (1) SA 552 (AD).
[11] *Constantine v Imperial Hotels Ltd* [1944] KB 693. Hepple notes a cautious tone that '[t]he [English] judge-made common law has never offered meaningful protection against racial discrimination' – B Hepple, *Race, Law and Jobs in Britain* (Penguin 1968) 143-144..
[12] *Jockie v Meyer* 1945 AD 354.
[13] *Lomax v Killarney of Durban (Pty) Ltd* 1961 (2) SA 573 (D); TW Beckerling, 'Tourism' in WA Joubert (ed), *LAWSA*, vol 28 (2nd edn, LexisNexis 2012).

approach.[14] A final significant judgment to mention is *Mustapha*, where the Appellate Division upheld a government minister's decision to evict Indian residents from land on the basis of their race.[15] Schreiner JA wrote a dissenting judgment, on the basis that the minister was exercising a public power and so was constrained in a way that a private owner would not be. His famous dictum captures the pre-constitutional position:

> [f]or no reason or the worst of reasons the private owner can exclude whom he wills from his property and eject anyone to whom he has given merely precarious permission to be there.[16]

5.3 DRAFTING HISTORY AND CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

Section 9 of South Africa's Constitution and PEPUDA are responses to this history. They embody a reckoning with the fact that not only the public sphere, but also the private, entrenched systemic discrimination. As a starting point, South Africa's approach to anti-discrimination duties – and duty-bearers – is broad.[17] In a separate provision to that governing the state's duties, section 9(4) of the Constitution sets out that 'no person' may unfairly discriminate, directly or indirectly, against anyone on the protected grounds, and requires the creation of national legislation to prevent or prohibit unfair discrimination. Various provisions of PEPUDA impose obligations on private persons in further detail. In this section, I delve into aspects of the drafting history that informed section 8 of the Interim Constitution, section 9 of the Constitution, and PEPUDA.[18] This is by no means a comprehensive discussion of the drafting process – instead, I identify some key themes and debates that emerge on the question of private anti-discrimination duties.

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[14] *Rex v Abdurahman* 1950 (3) SA 136 (A).
[15] *Mustapha v Receiver of Revenue* 1958 (3) SA 343 (A).
[16] ibid 347F.
[17] As noted in chapter 4, the Kenyan Constitution also imposes a textually unqualified prohibition against discrimination on all persons: section 20 stipulates that 'the Bill of Rights applies to all law and binds all State organs and all persons', while section 27(5) provides that 'a person shall not discriminate directly or indirectly against another person' on any of the protected grounds.
[18] I am very grateful to my supervisor, Cathi Albertyn, who made her personal papers recording the PEPUDA drafting process available to me. I have provided more specific details of these papers at various points in this section of the chapter.

5.3.1 Section 8 of the Interim Constitution

While the negotiating parties agreed that the equality clause had to be a core provision of the Interim Constitution, there was contestation over how the clause should be characterised.[19] The list of protected grounds – and, particularly, whether sexual orientation should be listed – was especially controversial.[20] However, the discussions on this point gained sufficient momentum and once sexual orientation was tabled, it became politically impossible to remove it. Another hotly debated issue was the recognition of affirmative action – particularly whether the Interim Constitution should provide that such measures were only permitted, or also required.[21]

As discussed in chapter 2, horizontal application more broadly was a contested issue in the drafting process for the Interim Constitution. The outcome was that the Interim Constitution did not explicitly stipulate that rights can apply horizontally, leading to the *Du Plessis v De Klerk* judgment.[22] This contestation was true, too, of the specific horizontal application of the anti-discrimination duty. The final wording of section 8(2) does not expressly designate the state as the sole anti-discrimination duty-bearer, but it also does not expressly provide that non-state actors can bear anti-discrimination duties. Instead, the right is framed negatively and in the passive voice – 'no person shall be unfairly discriminated against' – in a way that could easily be interpreted to extend to private persons. Because it did not expressly regulate private persons, and because section 7 of the Interim Constitution made it clear that the Bill of Rights principally applies vertically, there was some debate among commentators about the extent to which private anti-discrimination was proscribed.[23]

The notion that only *unfair* discrimination is prohibited was recognised in the Interim Constitution and carried through to both the 1996 Constitution and PEPUDA. Other jurisdictions do not qualify the prohibition on discrimination in this way (with the term 'discrimination' itself taken to be pejorative). The qualifier mirrors South African employment law (which similarly prohibits *unfair* labour practices[24]) and is something of a historical quirk, influenced by various labour law experts who had a hand in the constitutional drafting process. Drawing on contemporaneous records of the negotiations, commentators note that the qualifier

[19] R Spitz and M Chaskalson, *The Politics of Transition: The Hidden History of South Africa's Negotiated Settlement* (Hart 2000) 301.
[20] ibid 306–307.
[21] ibid 308–310.
[22] *Du Plessis v De Klerk* 1996 ZACC 10.
[23] Lirieka Meintjies-Van der Walt, 'Gender Equality in the Interim Constitution' (1995) 11 Agenda 83; Firoz Cachalia, *Fundamental Rights in the New Constitution* (Juta 1994) 19.
[24] Judicial Services Commission (n 1) 71.

was included on the recommendation of the Ad Hoc Committee on Fundamental Rights to recognise that certain forms of differentiation – including those in the personal sphere – could be justified, and to allow for the possibility of affirmative action.[25] So, even though the Interim Constitution did not expressly regulate private discrimination, it was envisaged that section 8 would apply across both the public and the private spheres. The qualifier also has evidentiary consequences: the equality clause provided for a presumption that discrimination is unfair, once it is established that the discrimination has taken place on a protected ground.

Ultimately, the relevant sub-clause provided that:

> 8(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

5.3.2 Section 9 of the Constitution

All negotiating parties for the 1996 Constitution endorsed equality as a foundational constitutional value, and relevant theme committee discussions reflect that substantive equality was core to the conception of equality.[26] On private duties, while the Interim Constitution used the passive voice ('no person shall be unfairly discriminated against') and did not make it express that the anti-discrimination right applied to both the state and all persons, in negotiating documents for the 1996 Constitution the wording was expressly formulated in the active voice to eliminate any doubt that the duty applied to the state as well as all persons. As the documentation from the Panel of Constitutional Experts Technical Committee captures, a 'clear statement [that not only the state but also all persons are bound by the anti-discrimination duty] is not just legally important – it is important for all citizens to understand one of the Constitution's most fundamental messages'.[27]

Initially, this was uncontentious, as all political parties had determined that the right would apply horizontally.[28] Early working drafts of the constitutional equality clause thus provided

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[25] Spitz and Chaskalson (n 19) 310; Cachalia (n 23) 28–29; Catherine Albertyn and Janet Kentridge, 'Introducing the Right to Equality in the Interim Constitution' (1994) 10 SAJHR 149.
[26] 'Report from Theme Committee One Block 2: Equality and Single Sovereign State 20 April 1995'.
[27] 'Panel of Constitutional Experts Technical Committee: Draft Memorandum Equality Clause (Section 8(3)) 28 March 1996'.
[28] 'Constitutional Committee Sub-Committee (Theme Committee 4, Fundamental Rights), Draft Bill of Rights – Volume One, Explanatory Memoranda, 9 October 1995', discussed in Michael Dafel, 'The Constitutional Rebuilding of South African Private Law' (DPhil Thesis, University of Cambridge 2018) 56; 'Panel of Constitutional Experts Technical Committee: Draft Memorandum Equality Clause (Section 8(3)) 28 March 1996' (n 27).

that neither the state *nor any person* may unfairly discriminate.[29] The recorded justifications for this in the technical committee drafting processes reflect that the right to equality must be calibrated by historical context:

> Firstly … [o]ur history is not simply a history of discrimination by the state – it is a history of discrimination between citizens. Secondly there is the mischief that the subsection seeks to remedy. The object of the subsection is not just to root out discrimination by the state but to attack it in its most pervasive form – discrimination as between citizens.[30]

At some points in the negotiations, the National Party and the Democratic Party walked back on this position, and the horizontal application of non-discrimination became controversial again. Debates turned on whether the clause should expressly impose such obligations on private persons or instead simply state that the state has an obligation to regulate discrimination through legislation.[31] These parties contended that the words 'nor any person' should be omitted from the clause, and some submissions by the public and interest groups (such as Business South Africa) advanced similar arguments.[32] Key worries were that the horizontal application of the right to equality would infringe the rights to freedom of religion and culture, and could lead to unstructured and onerous results, including that the anti-discrimination duty would extend to intimate decisions. Examples of such concerns included that the duty would regulate who to marry, who to invite to a dinner party, or would require private homeowners to take positive steps to accommodate persons with disabilities.[33]

The African National Congress did not accede to the attempt to water down the wording of the equality clause, instead persevering with the view that both vertical and horizontal discrimination should be proscribed. History vindicates this position. Once the negotiating parties reached consensus on the general application clauses (in sections 8 and 39 of the Constitution), the equality clause was reformulated. While courts were empowered to develop the common law in the absence of legislation, the equality clause also expressly captured the legislature's mandatory duty to enact legislation.[34]

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[29] 'Constitutional Assembly, Consolidated Draft, 19 October 1995'; Dafel (n 28) 55.
[30] 'Panel of Constitutional Experts Technical Committee: Draft Memorandum Equality Clause (Section 8(3)) 28 March 1996' (n 27).
[31] Dafel (n 28) 56.
[32] 'Analysis of Submissions – BOR Technical Committee – T4014038.MEM [Undated]'.
[33] 'Panel of Constitutional Experts Technical Committee: Draft Memorandum Equality Clause (Section 8(3)) 28 March 1996' (n 27).
[34] Dafel (n 28) 57–58.

The discussions of the Panel of Constitutional Experts Technical Committee underscore the important function played by the qualifier of *unfair* discrimination. The Panel notes that the qualifier of 'unfair' was included 'in order to do in respect of the horizontal application of the subsection [binding natural and juristic persons to the anti-discrimination duty] what the limitations clause does in respect of vertical application'.[35] Put differently, the inclusion of the word 'unfair' allowed for the possibility of balancing and justification that could render certain discriminatory acts fair:

> The inclusion of 'unfair' specifically addresses the concern that the horizontal application of the clause may lead to 'unstructured' results. … [T]he concept of 'unfair' will allow the courts to hold that the choice of one's marriage partner, or the composition of a guest list to a private dinner, or the failure to build ramps for one's disabled visitor does not constitute unfair discrimination.[36]

However, this set up an uneasy relationship between section 9 and the general limitations clause in section 36. The Panel acknowledged this potential difficulty but suggested that the inclusion of the qualifier 'unfair' in section 9 did not render the limitations clause obsolete. Instead, it proposed that the unfairness test could turn on the interests of the specific parties, while the limitations test could factor in broader social policies.[37] Although section 36 can in theory operate as a final backstop, in practice it is unclear 'whether section 36 can have any meaningful application to section 9',[38] given the overlap between factors that are relevant to determining whether discrimination is unfair, whether unfair discrimination is justified, and the limitations analysis. Put crisply, it is difficult to imagine that an act could constitute unfair and unjustified discrimination, but nevertheless be reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality.[39] In any event, as Albertyn and Goldblatt point out, and in line with the Panel's draft memorandum, section 36 applies only to a law of general application and not to conduct, and so likely would not be apposite in the case of unfair discrimination committed by a private person.[40] To date, no majority

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[35] 'Panel of Constitutional Experts Technical Committee: Draft Memorandum Equality Clause (Section 8(3)) 28 March 1996' (n 27).
[36] ibid 3.6.
[37] 'Panel of Constitutional Experts Technical Committee: Draft Memorandum Equality Clause (Section 8(3)) 28 March 1996' (n 27).
[38] T Ngcukaitobi, I Currie and J de Waal, 'Equality' in I Currie and J de Waal, *Bill of Rights Handbook* (6th edn, Juta 2013) 218.
[39] See Sheilah Martin, 'Balancing Individual Rights to Equality and Social Goals' (2001) 80 La Revue de Barreau Canadien 229 for a discussion of the Canadian approach to this question. South Africa draws its section 36 from the equivalent limitations section in the Canadian Charter of Human Rights and Freedoms.
[40] Catherine Albertyn and Beth Goldblatt, 'Equality' in S Woolman (ed), *Constitutional Law of South Africa* (Juta 2013) 35-83; and see *Barkhuizen v Napier* 2007 ZACC 5 for a restrictive interpretation of what constitutes a law of general application, finding that common-law rules which may underpin private conduct do not constitute laws of general application for the purposes of section 36.

appellate court judgment has concluded that discrimination is unfair, but nevertheless justified under the limitations analysis.[41]

What of the relationship between sections 8 and 9? As we saw in chapter 2 of this thesis, section 8 of the Constitution is the general horizontality provision, while section 9(4) is the special provision that regulates the horizontal application of the anti-discrimination duty. Ackermann suggests that the purpose of singling out section 9(4) 'was to make clear that it was not, in its horizontal application, subject to the qualification "if, and to the extent that, it is applicable, taking into account"' which governs the broad horizontal application provision in section 8(2).[42] Bhana argues that even where section 9(4) is squarely at issue, sections 8(2) and 39 may still have a role to play in determining the scope of other fundamental rights which may apply.[43] She proposes this as a way of determining the impact that the right to equality has on contract law, an important project that targets the privatisation of apartheid.

Accordingly, the final wording of section 9 separately provides for the state's non-discrimination duties (in section 9(3)) and for all persons' duties in section 9(4) as follows:

> 9(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> 9(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of section (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

Not only the state but also 'no person' may unfairly discriminate against another. The inclusion of the word 'unfairness' does a lot of the normative heavy lifting, allowing for discrimination by private persons to be justified. The state is then additionally held to a duty to enact legislation to regulate the horizontal application of the non-discrimination duty.

5.3.3 PEPUDA

PEPUDA is an instance of 'social legislation' enacted with the clear purpose of redressing inequality as a result of colonialism and apartheid, in line with a national transformative

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[41] Chris McConnachie, 'Transformative Unfair Discrimination Jurisprudence: The Need for a Baseline Intensity of Review' (2015) 31 SAJHR 504, 509; but see *Lotus River, Ottery, Grassy Park Association v South Peninsula Municipality* 1999 (4) BCLR 440 (C).
[42] Laurie Ackermann, *Human Dignity: Lodestar for Equality in South Africa* (Juta 2012) 267.
[43] Deeksha Bhana, 'The Implications of the Right to Equality in Terms of the Constitution for the Common Law of Contract' (2017) 134 SALJ 141, 146.

agenda.[44] The Ministry, the Department of Justice and the South African Human Rights Commission initiated the drafting process. The Equality Legislation Drafting Unit (initially housed within the South African Human Rights Commission) was charged with drafting the legislation.[45] The unit was assisted by teams of focus groups and a reference group, as well as an international conference of experts.[46] Public participation occurred through mass meetings, written submissions and engagement with civil society.[47] Gutto, one of the members (along with Madonsela and Bassett) of the core drafting team appointed by the executive for the drafting process, notes the time constraints on drafting, given the constitutionally imposed deadline for enacting the legislation within three years of the Constitution's taking effect.[48] Discussions began in earnest only in mid-1998, and a draft Bill was tabled in Parliament only in late October 1999. As a result, the team was under significant pressure to complete the process.

As in the negotiations for the right to equality in the Constitution, the drafters were clear that formal equality was insufficient and that the legislation should reflect a commitment to substantive equality. Ultimately, however, neither the constitutional right nor PEPUDA make express mention of the term 'substantive equality'. This was due to heated debates in the drafting process, with the compromise struck that the term would not be explicitly included, but the legislation would make it clear that equality's demands extend beyond formal equality.[49] For this reason, the definition of equality in PEPUDA provides that equality:

> includes the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes de jure and de facto equality and also equality in terms of outcomes.

Linked to the commitment to substantive equality is a recognition that the purpose of PEPUDA is to eliminate 'unfair discrimination structurally entrenched through society'.[50] This is also made clear in the preamble.

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[44] Gutto (n 1) 7; Kok, 'A Socio-Legal Analysis of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000' (n 1).
[45] The unit was initially headed by Johann van der Westhuizen, but he left in 1999 as he was appointed to the Bench. Subsequently, the unit included Shadrack Gutto and Thuli Madonsela.
[46] Barney Pityana, 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000' (2003) 44 Codicillus 3.
[47] Gutto (n 1) 18.
[48] ibid; item 23(1) of Schedule 6 of the Constitution.
[49] ibid 126.
[50] 'Meeting Report: Joint Ad Hoc Committee on Promotion of Equality and Prevention of Unfair Discrimination Bill, 5 November 1999' (Madonsela's address).

As constitutionally required, a starting premise of the drafting process was that the legislation, to be effective, had to regulate private actors. More controversial was how this should be done. One key debate was whether the private sphere should be regulated by putting in place a universal duty on all private persons, along with a universal defence to a claim of unfair discrimination, or instead whether (in addition to this universal duty and defence) particular private sectors should be specifically regulated, along with the creation of sector-specific defences. Historical papers reveal a shifting approach. Initial drafts heavily favoured the latter approach, regulating discrimination across specific sectors.[51] The arguments in favour of sectoral regulation included that it would be useful for interpretive and educational purposes and for regulating how discrimination works in private spheres, thereby ensuring that private actors do not escape the net of anti-discrimination law. However, there were some clear challenges. The drafting process was rushed, and there was not enough time to consult sufficient stakeholders, especially in the sectors in question. Additionally, the proposed sectoral regulation was ad hoc, fragmented and often inconsistent, which would lead to the legislation as a whole being patchwork and vague. As a result, a number of key organisations made extensive submissions urging that the sectoral regulation approach be abandoned in favour of a universal duty and defence.[52] Once the Bill was tabled in Parliament, the Democratic Party also advanced submissions against sectoral regulation,[53] although this was likely animated by a desire to protect commercial interests rather than a concern about overall legislative coherence. Ultimately, an attenuated middle ground was struck.[54] PEPUDA does put in place a universal duty (in section 6) and defence (in section 14) that applies to all duty-bearers including private commercial actors, but allows for the possibility of sector-specific regulation through a positive duty imposed on the state as well as a schedule to the legislation which lists illustrative unfair practices in particular private sectors. Discrimination within employment was largely carved out of PEPUDA, given the existence of labour legislation and jurisprudence that protected against unfair labour practices, including discrimination.

[51] Equality Legislation Drafting Unit, 'Discussion Document 4 – First Outline of Draft Bill' (1998) 2; Equality Legislation Drafting Unit, 'Prevention and Prohibition of Unfair Discrimination Bill, 27 October 1998'; Equality Legislation Drafting Unit, 'Discussion Document 5 – Outline of Draft Bill 20 November 1998'; Promotion of Equality and Prevention of Unfair Discrimination Bill B57-99.
[52] Equality Alliance, 'Programme for Equality Legislation Workshop 28 April 1999'; Women's Legal Centre and Community Law Centre, 'Joint Submission 23 November 1999'.
[53] Pityana (n 46) 6.
[54] Equality Alliance, 'Workshop, 20 October 1999' contains a proposal to shift the sectors to chapter 5 on positive measures.

How a defence to unfair discrimination should work was another flashpoint in the drafting debates. As explained earlier, South Africa's prohibition of *unfair* discrimination is somewhat unusual: most other jurisdictions prohibit discrimination *simpliciter*. Once the Constitution's wording on section 9 regulated *unfair* discrimination, PEPUDA had to follow suit. Regarding a defence to unfair discrimination, there were three main debates within the Equality Legislation Drafting Unit process.

The first debate tracked the sectoral question: should there be specific defences that apply to sectors, rather than or in addition to a general defence? Early discussions within the unit and versions of the Bill provided for these defences:[55] for example, it would be a defence if discrimination in the provision of insurance were based on actuarial data on which it is reasonable to rely.[56] However, sector-specific defences were criticised on the basis that they would too easily allow private actors to escape accountability for discrimination.[57] These points won out: as enacted, PEPUDA does not provide for sector-specific defences.

The second debate was about whether there should be a defence available only for indirect, and not also direct, discrimination. Initial outlines of the proposed Bill provided for a defence only to indirect discrimination[58] (which is the case in other jurisdictions such as the UK, with some caveats).[59] Submissions from civil society organisations and academics opposed this because it conveyed the impression that direct discrimination is worse than indirect discrimination.[60] This is at odds with substantive equality, which requires addressing systemic discrimination and focusing on the impact of discrimination, rather than the conduct of the discriminator.

The third debate involved the relationship between the enquiry into unfairness and the defence. One model proposed that the test should involve three stages, on the basis that this best reflects the constitutional scheme of section 9 read with section 36:[61]

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[55] Equality Legislation Drafting Unit, 'Discussion Document 4 – First Outline of Draft Bill' (n 51).
[56] Equality Legislation Drafting Unit, 'Discussion Document 5 – Outline of Draft Bill 20 November 1998' (n 51).
[57] Equality Alliance, 'Proposals on the Prevention and Prohibition of Unfair Discrimination Draft Bill, 2 June 1999'.
[58] Equality Legislation Drafting Unit, 'Discussion Document 4 – First Outline of Draft Bill' (n 51); Equality Legislation Drafting Unit, 'Prevention and Prohibition of Unfair Discrimination Bill, 27 October 1998' (n 51).
[59] UK Equality Act 2010 section 19. This is true generally and for core cases of discrimination, though I note that the UK Equality Act does provide justification defences for specific instances of discrimination such as equal pay, direct age discrimination and certain forms of direct disability discrimination. Further, the Act provides a genuine occupational qualification defence for all direct discrimination claims.
[60] Equality Alliance, 'Programme for Equality Legislation Workshop 28 April 1999' (n 52). The Equality Alliance was a network of community-based, labour, religious and non-governmental organisations formed specifically to have input on the PEPUDA drafting process.
[61] Gender Research Project at CALS, 'Submission on B57-99'.

(i) whether discrimination has occurred
(ii) whether the discrimination is unfair, looking here only at the impact on the complainant and not at any possible defences
(iii) whether the discrimination could be justified, looking at defences and incorporating factors that parallel the limitations enquiry in section 36 of the Constitution.

Another model instead worked with a two-stage test:[62]

(i) whether discrimination has occurred
(ii) whether the discrimination is unfair, using both the impact on the complainant, on the one hand, and the potential defences to unfairness, on the other, to make this determination.

The latter model is what PEPUDA reflects – the defence is folded into an unfairness enquiry that must account for both impact and justification (which can include the purpose of the discrimination and the respondent's reasons).

Once the draft Bill was tabled in Parliament, further stakeholders, including political parties, made submissions. The Democratic Party suggested that the application provision of PEPUDA should track the wording of section 8(2) of the 1996 Constitution, specifying that PEPUDA binds all persons 'if and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'.[63] This proposal would have narrowed the duty and was rejected. Further, a number of political parties, interest groups and industry representatives advanced arguments in the public participation process that PEPUDA's horizontal application would have negative effects on business. Representatives from political parties across the spectrum especially relied on insurance industry practices to argue that the private sector should not be extensively regulated, and that the legislation impermissibly constrained legitimate discrimination or should provide for exemptions to commercial entities and religious associations. The response by the drafting committee was that section 14 of PEPUDA allows for differentiation to be justified, and that the presumption of unfairness if discrimination occurs on a listed ground is warranted – not least because business entities have

[62] Women's Legal Centre and Community Law Centre (n 52).
[63] 'Joint Ad Hoc Committee on Promotion of Equality and Prevention of Unfair Discrimination Bill 14 January 2000'.

deep pockets.[64] As Kok notes, 'the economic elite did what it could to soften the Act's blows by vigorously lobbying Parliament during the drafting process'.[65]

Deliberations reflect that private persons would be specifically regulated in two main ways. First, the horizontal application of the unfair discrimination clause 'would be squarely incorporated' in the legislation.[66] Second, a chapter on promoting equality through positive measures would place some duties on not only the state but also private persons, but would do so on the basis of a three-tiered approach, differentiating between the state, entities exercising public power or performing public functions, and private persons. The imposition of positive duties on private persons would be further qualified by (i) requiring relevant ministers to pass regulations; and (ii) making the positive duty contingent on the size, resources and influence of the private actor in question.

5.3.4 Relevant provisions

I now turn to discuss relevant provisions of PEPUDA in more detail. Its preamble notes the importance of eradicating social and economic inequalities that are systemic, and rooted in colonialism, apartheid and patriarchy. As the preamble puts it, these inequalities 'remain deeply embedded in social structures, practices and attitudes' and thus the legislation 'endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate'. Although a statutory preamble does not necessarily have direct justiciable force, it is helpful in providing interpretive context to the legislation, especially in ascertaining the legislation's purpose.[67] In this respect, it is apparent from PEPUDA's preamble that the legislation envisages anti-discrimination law dislodging abiding, structural inequality and disadvantage that is not confined to public spheres only, but extends to social and economic structures, practices and attitudes. The objects provision, in section 2, does not contain any wording that limits the ambit or reach of the Act, reflecting the drafting choices discussed above.

Importantly, PEPUDA makes it clear, in section 5(1), that it applies to the state and 'all persons', save for those who are already regulated by the Employment Equity Act 55 of 1998.

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[64] Gutto (n 1) part 1 partem.
[65] Kok, 'A Socio-Legal Analysis of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000' (n 1) 47 fn 92.
[66] 'Joint Ad Hoc Committee on Promotion of Equality and Prevention of Unfair Discrimination Bill [B57-99] 9 December 1999 Deliberations'.
[67] *Bertie van Zyl (Pty) Ltd v Minister for Safety and Security* 2009 ZACC 11.

Section 6 of PEPUDA provides that '[n]either the state nor any person' may unfairly discriminate against another, and the operative provisions prohibiting specific forms of discrimination on the grounds of gender, race and disability, and prohibiting harassment and hate speech, also extend to an unqualified class of duty-bearers (by using the term 'no person').

Consistent with section 9(4), then, the prohibition of unfair discrimination in section 6 of PEPUDA is expressly horizontal in nature: '[n]either the State *nor any person* may unfairly discriminate against any person.'. Sections 7 to 9 put in place more particular prohibitions against unfair discrimination on the grounds of race, gender and disability that are applicable to all persons.

The burden of proof for discrimination, in terms of section 13 of PEPUDA, is that a complainant must make out a *prima facie* case of discrimination and that, if that has been made out, the respondent then bears the burden to show either that the discrimination did not occur or that the conduct is not based on one of the prohibited grounds. If, however, the discrimination occurred on a prohibited ground, then it is presumed to be unfair and the respondent bears the onus of persuading the court that it is fair.[68] Importantly, this eases the burden on complainants and is an attempt to make enforcement of the anti-discrimination right easier and more accessible.

In determining whether discrimination is fair or unfair, section 14 of PEPUDA sets out a number of factors to be taken into account.[69] *Harksen v Lane*, the *locus classicus* on unfair discrimination, was decided in 1997 prior to the passage of PEPUDA.[70] The court set out a three-stage test:

(1) whether a provision differentiates between persons on the basis of a rational connection;
(2) whether the differentiation amounts to unfair discrimination (which in turn requires examining—
    (i) whether the differentiation amounts to discrimination; and

[68] PEPUDA defines prohibited grounds more expansively than does section 9 of the Constitution.
[69] Anton Kok, 'Is Law Able to Transform Society?' (2010) 127 SALJ 59 notes that these factors also appear in s 11(2) of the Queensland Anti-Discrimination Act, s 9(2) of the Victoria Equal Opportunity Act, s 8(3) of the Australian Capital Territories Discrimination Act, s 49C of the New South Wales Anti-Discrimination Act, and s 58(2) of the Northern Territory Anti-Discrimination Act.
[70] *Harksen v Lane NO* 1997 ZACC 12.

(ii) whether if yes, it amounts to *unfair* discrimination, with the unfairness test focusing primarily on the impact of the discrimination on the complainant and others in their situation; and

(3) if the discrimination is unfair, whether it can nevertheless be justified under the limitations analysis.

The three-part test has been criticised by numerous commentators,[71] partially for rendering the limitations analysis obsolete as it is difficult to imagine discrimination that is unfair but nevertheless saved by section 36.[72] The remaining heart of the test turns on the fairness or unfairness of discrimination.

PEPUDA's section 14[73] was partially based on the judicial factors proposed in that judgment,[74] as well as components of the limitations analysis.[75] Although this has not been sufficiently tested, the enquiry under section 14 of PEPUDA is wide enough to 'accommodate a consideration of other rights'.[76] Arguably, section 14 of PEPUDA imposes a wider test than the test provided for in section 9 of the Constitution.[77] It builds a proportionality assessment into the determination of unfair discrimination, for it includes factors such as whether the discrimination has a legitimate purpose, whether and to what extent it achieves its purpose, and whether there are less restrictive *and less disadvantageous* means to achieve the purpose. Section 14(1) provides that discrimination is not unfair if it involves taking measures to protect or advance disadvantaged persons. Section 14(2) and (3) provides the test for determining whether discrimination is fair, including context in section 14(2)(a) and the section 14(3) factors.

The section 14(3) factors can be broadly divided into two categories.[78] The factors in section 14(3)(a) to (e) are focused on *impact*, looking at the discrimination's effect on the complainant or protected group. The factors in section 14(3)(f) to (i) are concerned with

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[71] Rósaan Krüger, 'Equality and Unfair Discrimination: Refining the Harksen Test' (2011) 3 SALJ 479; Chris McConnachie, 'What Is Unfair Discrimination? A Study of the South African Constitutional Court's Unfair Discrimination Jurisprudence' (DPhil Thesis, University of Oxford 2014).

[72] Titia Loenen, 'The Equality Clause in the South African Constitution: Some Remarks from a Comparative Perspective' (1997) 13 SAJHR 401 for an alternative argument that the second leg of *Harksen* should not include any justification factors, which should be solely considered under the third leg.

[73] The full text of section 14 is provided in an annexure.

[74] Krüger (n 71).

[75] *MEC for Education: KwaZulu-Natal v Pillay* 2007 ZACC 21.

[76] Catherine Albertyn, 'Getting It Right in Equality Cases: The Evaluation of Positive Measures, Groups and Subsidiarity in Solidariteit v Minister of Basic Education' (2018) 135 SALJ 403, 419.

[77] The Constitutional Court noted this in *MEC for Education: KwaZulu-Natal v Pillay* (n 75) para 70.

[78] Judicial Services Commission (n 1) 125; Albertyn, Goldblatt and Roederer (n 1) 43.

justification, considering the reasons, purpose and behaviour of the respondent, and incorporate some of the wording from section 36 of the Constitution.

In substance, section 14(2)(c) also forms part of the justification enquiry. It provides that discrimination can be proven to be fair if it 'reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned'. This is another basis on which discrimination could be justified,[79] although it overlaps with some of the factors in section 14(3). Section 14(2)(c) is something of an uncomfortable fit within the rest of section 14. It is arguably redundant (given the factors included in section 14(3)) and is 'an attempt to placate the vociferous commercial sector';[80] it came about as a result of extensive lobbying from the economic industries[81] to give specific legislative heft to commercial considerations in an unfair discrimination enquiry.[82] Essentially, section 14 thus sets up a balancing or proportionality exercise. I examine section 14 in more detail in chapter 6, where I make some concrete proposals for how the courts should give meaning to this provision.

Chapter 5, which has yet to be brought into force, envisages positive measures to be taken not only by the state but also by all persons.[83] It was enacted with the purpose of bringing about social change and tackling systemic inequality, as envisaged by section 9(2) of the Constitution. Positive measures are 'proactive, requiring institutional and policy-oriented steps, as opposed to being reactive (i.e. concerned with litigation arising from particular complaints in respect of discrete discriminatory acts)'.[84] Chapter 5's wording does, however, differentiate between the state and private persons in some important ways, and further differentiates among private persons based on (i) their role in public activities; and (ii) their size, resources and influence.[85]

Earlier, we saw that there was an express decision in the drafting process not to vary the private anti-discrimination duty according to sectors. However, sector-specific considerations are

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[79] Anton Kok, 'The Promotion of Equality and Prevention of Unfair Discrimination Act: Why the Controversy?' [2001] TSAR 294, 307.
[80] Pityana (n 46) 6.
[81] Kok, 'A Socio-Legal Analysis of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000' (n 1) 94.
[82] Albertyn, Goldblatt and Roederer (n 1) 47.
[83] At the time of writing, chapter 5 is subject to envisaged legislative amendment. Please see broader commentary in 'Submission to the Department of Justice and Constitutional Development on Amendments to The Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000' (The South African Research Chair in Equality, Law and Social Justice School of Law, University of the Witwatersrand, Johannesburg, 2021) <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/law/documents/sarchi-equality-chair/SARChISubmission.pdf> accessed 17 February 2023.
[84] ibid 23; see also Sandra Fredman, 'Breaking the Mold: Equality as a Proactive Duty' (2012) 60 American Journal of Comparative Law 257.
[85] Sections 26 and 27.

reflected in section 29 of PEPUDA, which envisages an illustrative list of unfair practices in certain private sectors to emphasise unfair practices that are widespread, and empowers the minister to set out these illustrative practices in a schedule. That schedule lists unfair practices in ten sectors: labour and employment; education; health care services and benefits; housing, accommodation, land and property; insurance services; pensions; partnerships; professions and bodies; provision of goods, services and facilities; and clubs, sports and associations. While some of these sectors fall within core sites of anti-discrimination regulation in other jurisdictions (such as housing, and the provision of goods, services and facilities), others, such as clubs, do not. It is telling, however, which sectors are not specifically regulated (such as religious institutions). The illustrative list is also hedged: section 29(1) provides that the practices are or may be unfair, and the provision also includes qualifications (on the basis of unfairness, reasonableness and practicability). The intention (in section 29(5)) is that the schedule would be considered and revised on a continuous basis. In practice, that has not been the case: in over twenty years, the schedule has not been changed once and current amendment processes similarly would preserve its current form. Nor has it been litigated on. As a mechanism for regulating private discrimination, the sectoral schedule has been something of a dead letter.

5.3.5 Principles established by the drafting history and legislative provisions

In sum, then, the history of the negotiations and drafting process shows that South Africa's constitutional and legislative regime was put in place as a deliberate effort to work towards substantive equality. This necessarily requires subjecting the private sphere to regulation, at the risk of otherwise privatising inequality. As Kok puts it, PEPUDA is an attempt to 'reach into the hearts, minds and homes of its subjects, and affect fundamental changes in basic social relationships'.[86] The legislative drafting history was inflected by substantive equality as requiring material change. This in turn involved breaking through a rigid public/private divide, or at the very least consciously exposing the traditionally private sphere to interrogation. Accordingly, regulation of certain areas – such as the intersection of the right to equality with religion and culture – was left relatively open, with the legislative regime providing the overarching framework but effectively tasking the courts with striking the appropriate balance between competing rights.[87] This was a conscious drafting choice: as discussed earlier, the

[86] Kok, 'The Promotion of Equality and Prevention of Unfair Discrimination Act?' (n 70) 308.
[87] ibid 138.

drafting team moved away from an approach that operationalised regulation of the private sphere by sector-specific duties and defences in favour of a universal duty with a universal defence. That in turn tasks the courts with giving meaning to this duty, and with determining hard cases, including those involving competing rights.

At the time of its enactment, it was envisaged that PEPUDA would be used widely – with Equality Court procedures set up to be accessible and inexpensive, at least in theory. In reality, 'the uptake of the Act has been disappointingly uneven',[88] and many of its provisions remain untested or unenforced. As a result, the transformative tools provided by PEPUDA to contest inequality have been underused.[89] Furthermore, litigants and courts have sometimes subverted the doctrine of subsidiarity by relying on section 9 directly.[90] In the section that follows, I discuss selective case law that illustrates how the horizontal application of PEPUDA has been doctrinally interpreted.

5.4 GENERAL DOCTRINAL APPROACH

In chapter 3, I mapped South African law's jurisprudential approach to the right to equality across a number of key conceptual fault lines. Drawing on both significant cases and academic commentary, I argued that South African law has endorsed substantive equality, which in turn demands a contextually rooted and multidimensional approach. While substantive equality has predominantly been theorised by analysing the state's obligations, the call for the dismantling of systemic inequalities and disadvantage by necessity also includes private discrimination. We see this clearly in the drafting processes for both section 9 of the Constitution and PEPUDA, discussed above. I now visit the case law again, as well as the five intuition pumps, tracing how South African courts have treated private anti-discrimination duties. I begin with a general discussion of a number of key cases, and then shift focus to two case studies which, I argue, demonstrate an emerging approach to the scope of and justification for regulating discrimination by private actors. The first engages the clash between the right not to be discriminated against on the ground of sexual orientation and the right to freedom of religion. The considers considers discrimination in private testamentary bequests.

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[88] Mateenah Hunter-Parsonage and Catherine Albertyn, 'Emerging from the Shadows? The Equality Courts in South Africa' (NRF SARChI Chair in Equality, Law and Social Justice Research Report 1/2021, School of Law, University of the Witwatersrand, 2021).
[89] See also ibid; Kok, 'The Promotion of Equality and Prevention of Unfair Discrimination Act' (n 79).
[90] Catherine Albertyn, 'Getting It Right in Equality Cases' (n 76).

Given how broad the private anti-discrimination duty is in the Constitution and PEPUDA, there have been surprisingly few cases in the past 25 years that have tested the duty. Similarly, notwithstanding how central section 14 of PEPUDA is to adjudicating the fairness of discrimination, there is a dearth of doctrine on the justification leg of an unfair discrimination claim. Impact and justification are separate enquiries, with the impact assessment (which in turn informs whether discrimination has occurred) preceding whether that discrimination can be justified and is thus fair.[91] McConnachie proposes that only 'sufficiently weighty reasons' should be accepted in justification, which must also appropriately weigh the imperatives of preventing and tackling patterns of group disadvantage.[92] This applies to both the state and private persons. While the fairness test captured in section 14 of PEPUDA provides scope for justification, including on the basis of private persons' rights, a sufficient basis needs to be laid, and it is not enough simply to assert that there is a competing right, or that the state ought not interfere in the private sphere.

Sadly, section 14 has received very little attention in judgments to date. Litigants have tended not to rely on the section to justify discrimination even where there are apparently competing rights at stake. Where courts have referred to it, it is often in passing, or in state-centric contexts. In *Pillay*, the Constitutional Court did engage with a section 14 analysis, finding that reasonable accommodation must factor into (but does not exhaust) the fairness enquiry.[93] In *September*, the Equality Court (Western Cape Division) found that the refusal to allow an incarcerated transwoman to express her gender in prison constituted unfair discrimination.[94] The court applied the principles established in *Pillay* to find that the failure to reasonably accommodate Ms September was unfair and contrary to section 14. In *Cape Bar*, the Western Cape High Court considered section 14(2) as justifying affirmative action measures, but did not engage with a broader fairness analysis.[95] However, beyond reasonable accommodation and remedial measures, section 14 has not been substantively developed into a broader jurisprudence. This is compounded by a confusion about whether litigants who allege discrimination on the grounds of race, gender or disability should proceed under the general prohibition against discrimination in section 6 of PEPUDA, or the more specific provisions in

[91] McConnachie, 'Transformative Unfair Discrimination Jurisprudence' (n 41) 513.
[92] ibid.
[93] *MEC for Education: KwaZulu-Natal v Pillay* (n 75) [77]–[78].
[94] *September v Subramoney NO* 2019 ZAEQC 4; Rachel Sloth-Nielsen, 'September v Subramoney and Its Implications for Transgender Persons in South Africa' (2021) 29 African Journal of International and Comparative Law 325.
[95] *Cape Bar v Minister of Justice and Correctional Services* 2020 (3) SA 413 (WCC).

sections 7, 8 and 9, which include some specific considerations that may factor into a fairness analysis. As a result, a number of cases – including ones which squarely implicate the clash between private persons' rights – have avoided an in-depth section 14 analysis, as I argue in more detail below. This failure can be partially attributed to the courts, who have not deployed the tools that PEPUDA provides, but is also a failure of litigation strategy and framing.

One recent judgment handed down by a High Court does merit brief comment in part because of its approach to the fairness analysis. In *Palestinian Solidarity Campaign v Labia Theatre*, the Western Cape High Court found that a small, privately funded independent cinema was required to screen a documentary, 'Roadmap to Apartheid' (which makes the case that Palestinians are oppressed by Israel's apartheid regime) on the basis that its refusal to do so constituted unfair discrimination on the grounds of conscience and belief.[96] The cinema had argued that the discrimination was fair in terms of section 14(3) of PEPUDA, on the basis that in choosing not to screen the documentary, it was exercising its rights to freedom of thought, conscience and religion, and freedom of expression. This argument receives almost no treatment by Le Grange J, who does not enumerate the basis for the defence, beyond noting that 'I remain unconvinced that the sum total of factors raised by the Labia supports a conclusion that its discrimination towards the [Palestinian Solidarity Campaign] was fair.'[97] Instead, Le Grange J notes that 'private persons can attract a duty to make contractual offers where a refusal to do so would be unfairly discriminatory'. The worry is that this line of reasoning risks begging the question, as the countervailing considerations at play should factor into a determination of whether the discrimination is unfair or not.[98]

There have been a number of further private anti-discrimination cases, even if these cases have not engaged in a detailed section 14 analysis. In *iSimangaliso Wetland Park*,[99] the KwaZulu-Natal High Court decided that a guest lodge owner's refusal to accommodate Black people (on the stated basis of religious beliefs that segregation is biblically ordained and that Black people are animals) constituted unfair discrimination and hate speech. The Court noted that while religious freedom is protected, the right to discriminate against another in the name of a belief system is not.[100] Restricting accommodation on the grounds of race is clearly prohibited. In

[96] *Labia Theatre CC v South African Human Rights Commission, Palestinian Solidarity Campaign v Labia Theatre CC* 2021 ZAWCHC 63.
[97] ibid 60.
[98] This is the case even if one believes that Israel clearly has in place an apartheid regime and has flouted international law for decades, largely with impunity.
[99] *iSimangaliso Wetland Park v Sodwana Bay Guest Lodge* 2018 ZAKZDHC 62.
[100] ibid [22].

Bronwyn Eller Geber v Dunmark Investments, the Equality Court also declared a lease agreement that restricted the letting of premises to white applicants unlawful, but did not provide reasons.[101]

A counterpoint to the *isiMangaliso* judgment is *Forum for Black Journalists v Katopodis*,[102] which was not decided by a court, but was an internal appeal of findings and recommendations made by the South African Human Rights Commission (SAHRC). The case concerned a complaint that the exclusion of white journalists from the launch of a forum constituted discrimination on the grounds of race. In response, the forum argued that it lawfully exercised its right to freedom of association. The SAHRC disagreed, finding that the blanket exclusion of white journalists was not justified. It charted a spectrum of voluntary associations, with intimate relationships at one extreme and overtly public entities on the other, ultimately positing that the regulation of private discrimination should similarly differentiate between these associations. The forum unsuccessfully appealed the finding. The decision is an interesting but somewhat troubling one: South Africa does recognise a degree of asymmetry in its discrimination protections, and arguably an exclusive forum for Black journalists is a corrective to decades of exclusivity that systematically favoured white journalists. After all, this is the premise on which affirmative action measures are not only permitted, but actively required. Notably, however, the forum did not argue in their representations that the racially exclusive membership policy constituted a legitimate remedial measure, but instead relied on the right to freedom of association to justify the blanket exclusion, and so did not meet the requisite test.[103]

I now turn to consider two case studies which demonstrate how the courts have treated competing rights in the context of an unfair discrimination claim.

5.5 PRIVATE ANTI-DISCRIMINATION DUTIES IN TWO CASE STUDIES

5.5.1 Clash between LGBTQI+ rights and freedom of religion and association

One pressure point in South African private anti-discrimination doctrine is the clash between the right to equality (in particular, the right not to be discriminated against on the grounds of

[101] *Bronwyn Eller Gerber v Dunmarsh Investments (Pty) Ltd and S T Evenwel* 2007 ZAEQC Case No 692007 Unreport DBN.
[102] *Forum for Black Journalists v Katopodis* 2009 (2) SA 499 (SAHRC).
[103] See also *Maharaj v Gold Circle (Pty) Ltd* 2018 (1) SA 760 (KZP), which considered but did not decide on the application of private anti-discrimination duties to another voluntary association, albeit in an administrative law context.

sexual orientation[104]) and the right to freedom of religion (and related associative rights). Sometimes the tension can arise on the grounds of two competing anti-discrimination claims, for in addition to the constitutional right to freedom of religion, the Constitution also prohibits unfair discrimination on the grounds of religion.[105] How to resolve the tension is still somewhat open in our law – and in the context of religious associations, it is further complicated by the doctrine of entanglement, that is 'a reluctance of the court to become involved in doctrinal disputes of a religious character'.[106] In *Christian Education*,[107] the Constitutional Court noted the difficulties inherent in balancing in the context of freedom of religion claims, in part because of the difficulty of determining which components of an activity are religious and which are secular.[108]

In *Minister of Home Affairs v Fourie*, the Constitutional Court rejected the argument that same-sex marriage ought not to be legally recognised, for doing so would impair the right to freedom of religion in section 15(3) of the Constitution. The Court recognised that religion plays an important role in public life and individuals' lives. Nevertheless, the Court found that religious doctrine cannot be used to interpret the Constitution, and that '[i]t would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others'.[109] This echoed the earlier line established in *National Coalition I* that religious views, even if sincerely held, cannot determine constitutional demands proscribing discrimination on the basis of sexual orientation.[110] The *Fourie* judgment also noted, however, that 'it would be wrong and unhelpful to dismiss opposition to homosexuality on religious grounds simply as an expression of bigotry to be equated to racism'.[111]

In *Fourie*, the balance was easily struck, for whether a religious entity should itself recognise same-sex marriages was not at issue. Instead, all that was at issue was whether particular religious doctrine can dictate the content and scope of a constitutional right as enshrined in law. More difficult is where the rights to freedom of religion and to associate operate in tension with

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[104] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 ZACC 15 [25].
[105] Some jurisdictions draw this distinction sharply: in the US, freedom of religion cases are litigated under the 1st Amendment rather than the 14th Amendment. Other jurisdictions – such as our own (see *Woodways CC v Vallie* [2009] ZAWCHC 155, 2010 (6) SA 136 (WCC)), the UK and the European Court of Human Rights – recognise that the enquiries can overlap.
[106] *Gaum v Van Rensburg NO* 2019 ZAGPPHC 52 [27]; *Taylor v Kurtstag* 2005 (1) SA 362 (W).
[107] *Christian Education South Africa v Minister of Education* 2000 ZACC 11.
[108] ibid [34].
[109] *Minister of Home Affairs v Fourie* 2005 ZACC 19 [92].
[110] *National Coalition for Gay and Lesbian Equality v Minister of Justice* (n 104) [38].
[111] *Minister of Home Affairs v Fourie* (n 109) [91].

the right to equality in circumstances which require a religious institution as a private entity to actively afford recognition to same-sex persons.

In *Strydom*,[112] a gay music teacher working as an independent contractor in a church's cultural academy successfully sued the church for having terminated his contract on the ground of his sexual orientation. Unlike many other cases surveyed, the Equality Court did engage in a balancing exercise within the confines of section 14 of PEPUDA, noting that the right to equality is particularly fundamental and so, as a starting principle, 'the Constitution will counteract rather than reinforce unfair discrimination on the ground of sexual orientation'.[113] The Court considered the argument advanced by the church that the discrimination was for a legitimate purpose in terms of section 14(3)(f) of the Constitution, to ensure that persons in leadership positions did not conduct themselves contrary to religious doctrine. The Equality Court decided in favour of the dismissed teacher, on the basis that he did not occupy a position of spiritual leadership and was not required to teach Christian doctrine and so the dismissal could not be justified on the basis of this purpose. Given this, the impact on freedom of religion was minimal and was outweighed by the enormous impact that the discrimination had on the dismissed teacher's rights to equality and dignity.

What is the position where a spiritual leader is dismissed on the grounds of sexual orientation? In *De Lange*, a church dismissed a lesbian minister following the announcement of her engagement to a woman.[114] Unlike *Strydom*, this case reached the Constitutional Court, but that judgment sidestepped deciding whether this was unconstitutional, because of procedural challenges facing the case – including that Ms De Lange should have brought proceedings under PEPUDA and to an Equality Court, as required by the doctrine of subsidiarity.[115] Moseneke J's unanimous judgment therefore did not consider the clash within the paradigm of PEPUDA and section 14's fairness determination. Van der Westhuizen J's separate concurring judgment suggested that clash cases should be conceived of not as involving zones beyond the law's reach, but rather as requiring the careful balancing of rights.[116]

In the subsequent *Gaum*,[117] the High Court declared unlawful and set aside a decision taken by the General Synod of the Dutch Reformed Church. The Church had reversed its prior decision

[112] *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* 2008 ZAGPHC 269.
[113] ibid [14].
[114] *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being* 2015 ZACC 35.
[115] ibid [53]–[59].
[116] On the point that a completely insulated private sphere can no longer exist, see Hugh Collins, 'The Vanishing Freedom to Choose a Contractual Partner' (2013) 76 Law and Contemporary Problems 71.
[117] *Gaum v Van Rensburg NO* (n 106).

with the effect that the church no longer recognised same-sex civil unions, prohibited ministers from solemnising same-sex civil unions, and stipulated that LGBTQI+ persons could only be ordained if they are celibate. The litigation, brought by a number of individuals who sought to have the more progressive earlier decision reinstated, was not brought under PEPUDA. Nevertheless, the Court found that it had jurisdiction to determine the issue, but relied on section 9 of the Constitution directly, rather than on PEPUDA's provisions. Strikingly, in defending its later decision the Church did not mount any substantive defence whatsoever in attempting to argue that the discriminatory decision was fair. As a result, the Court declined to find that the question required the balancing of rights.[118] Instead, the Court held that the impact of the discrimination (in light of the long history of marginalisation and persecution of LGBTQ+ persons) on dignity rendered the decision unfair. Although the Court was constrained by the case pleaded by the Church, and its outcome is compelling, the Court's denial that there are competing rights to be balanced is surely misguided. The denial is also belied by the substantive reasoning in the judgment itself that upholds the right not to be discriminated against while considering the countervailing religious considerations. Again, much of the judgment dealt with jurisdictional and procedural questions, although unlike in *De Lange*, the Court did reach the substance, declaring the later decision unlawful and invalid, and setting it aside. Neither the doctrine of entanglement nor voluntary association render religious interests immune from scrutiny or interference. Instead, the Court held that 'communities should exercise their religious freedom with due regard to their legal, ethical and community responsibilities'.[119] *Gaum* is thus another judgment that effectively resolves the clash between the right to equality and the right to freedom of religion in favour of equality, even though it does not do so within the framework of section 14 of PEPUDA.

Recently, Beloftebos, a Cape Town wedding venue that is open to the public, cancelled a booking made by a same-sex couple on the grounds of the venue owners' religious beliefs. After receiving numerous complaints, including from the engaged couple, the SAHRC launched an Equality Court case against the owners.[120] At the time of writing, settlement discussions were taking place and the venue owners had opted to shut down their venue entirely, rather than make it available to same-sex couples. Legally, the matter is clearcut in South African law – the owners have unfairly discriminated and their religious beliefs would

[118] ibid [82].
[119] ibid [25].
[120] Papers on file from SAHRC.

not constitute a sufficient justification, not least because they themselves are not necessarily involved in the ceremonies that are conducted on their venue. Even jurisdictions that are more restrictive regarding anti-discrimination duty-bearers would likely proscribe the venue owners' conduct: the venue is a provider of goods and services to the public and cannot discriminate against persons on the grounds of their sexual orientation. If the case is ultimately settled, this would be a real missed opportunity for generating clear legal precedent on the issue.[121]

These cases demonstrate that some key questions on the clash between the right to freedom of religion and the right not to be discriminated against on the basis of sexual orientation remain open. The less central a decision is to spiritual leadership and belief, the less likely it is that freedom of religion would trump the right to equality. But how this all factors into a section 14 analysis remains murky.

Commentators (particularly on *Strydom*) are sharply divided on how the balance should be struck. A notable debate within the South African academy played out principally[122] among Bilchitz, Lenta and Woolman in a series of articles on whether religious associations are entitled to discriminate. Tellingly, the pieces do not devote much attention to PEPUDA's unfairness test but instead traverse broader jurisprudential arguments.

Lenta notes that it is uncontroversial that religious associations should be permitted to use religious criteria for their choice of religious leaders, even where that constitutes discrimination.[123] Lenta contends that equality – which he understands to require equal treatment – is not more fundamental than freedom of religion and so should not be treated exceptionally or accorded more weight in a balancing exercise. This conception of equality is out of step with substantive equality, which emphasises context and systemic disadvantage. He argues that liberalism 'does not insist that illiberal associations … must always ensure that the conduct of their internal affairs conforms to liberal principles, including the principle of non-discrimination'.[124] Instead, religious associations have the right to discriminate and should be

[121] At the time of writing, the couple expressed disappointment with the SAHRC's approach and its openness to settlement, and indicated that they are considering their legal options – see <https://www.mambaonline.com/2022/02/11/same-sex-couple-react-as-beloftebos-stops-hosting-all-weddings/> accessed 17 February 2023.
[122] Shaun de Freitas, 'Freedom of Association as a Foundational Right: Religious Associations and Strydom v Nederduitse Gereformeerde Gemeente, Moreleta Park' (2012) 28 SAJHR 258 also weighs in, arguing that Lenta does not go far enough in asserting the rights of religious associations to discriminate. For the purposes of this chapter, I focus on the main commentators in the debate.
[123] Patrick Lenta, 'Taking Diversity Seriously: Religious Associations and Work-Related Discrimination' (2009) 126 SALJ 827.
[124] ibid 831.

exempted from PEPUDA's reach where there is a connection between the discrimination and their beliefs,[125] on the basis that diversity requires protection and that voluntary associations must be treated as distinct from public, political and ordinary commercial spheres.[126] But diversity as a value cuts in multiple directions – protecting disadvantaged groups such as LGBTQI+ people from unfair discrimination clearly vindicates diversity.

Woolman, too, falls on the side of religious institutions, arguing for the maintenance of 'meaningful settings for social action and, more importantly, leverag[ing] the social capital to be found in various associations and religious communities'.[127] He endorses constitutive liberalism – that the social and associations are integral to the self and to social capital that is required for both social cohesion and individual identity. Freedom of association justifies many instances of discrimination (such as religious independent schools, stokvels that are limited to members of a community, and churches that discriminate on the basis of sexual orientation). On his account, 'a panoply of rights in the Constitution vouchsafes objectives that cannot be reduced to equality without doing substantial violence'.[128] Woolman is thus critical of the 'over-valorisation of equality' and the scheme of PEPUDA which makes equality a trump. His account differs from Lenta's: he argues that what justifies liberalism (including the conclusion that the state should be hesitant to interfere in religious associations' conduct) is not diversity *per se*, but instead a commitment to associational life, and that religious associations should have more extensive scope to discriminate. However, even if the law's principal aim is ensuring that individuals can leverage social capital, anti-discrimination protections are an attempt to address vast inequalities in social capital. In response to points raised by Bilchitz, Woolman subsequently qualifies his position.[129] Although he persists with his rejection of what he terms Bilchitz's 'scorched earth egalitarianism', he notes that South African law does not endorse a

[125] P Lenta, 'In Defence of the Right of Religious Associations to Discriminate' (2013) 29 SAJHR 429; Patrick Lenta, 'The Right of Religious Associations to Discriminate' (2012) 28 SAJHR 231.
[126] Associational rights have been significant in the balancing enquiry in other jurisdictions: see, for example, *Rose Wangui Mambo and Limuru Country Club and 17 Others* [2014] eKLR (where the High Court of Kenya held that the rules of a private club which excluded women golfers were discriminatory) and *Equality Authority v Portmarnock Golf Club* [2009] IESC 73 (where the Irish Supreme Court found that private clubs that excluded women patrons were nevertheless entitled to licences and tax exemptions), discussed in B Sang YK 'Horizontal Application of Constitutional Rights in Kenya: A Comparative Critique of the Emerging Jurisprudence' (2018) 16 African Journal of International and Comparative Law 20. See also E Song 'No Women (and Dogs) Allowed: A Comparative Analysis of Discriminating Private Golf Clubs in the United States, Ireland, and England' (2007) 6 Washington University Global Studies Law Review 181, 184.
[127] Stu Woolman, 'On the Fragility of Associational Life: A Constitutive Liberal's Response to Patrick Lenta' (2009) 25 SAJHR 280, 305.
[128] Stu Woolman, 'Defending Discrimination: On the Constitutionality of Independent Schools That Promote a Particular, If Not Comprehensive, Vision of the Good Life' (2007) 18 Stell LR 31, 51.
[129] Stu Woolman, 'Seek Justice Elsewhere: An Egalitarian Pluralist's Reply to David Bilchitz on the Distinction between Differentiation and Domination' (2012) 28 SAJHR 273.

sharp public/private divide. This does not mean, however, that there are no associations or relationships beyond the reach of the state.[130] Woolman draws on Walzer's work[131] to ground an argument that there are meaningful differences between differentiation and domination, which means that some distributions of social goods are legitimate, whereas other abuses of power should be condemned.

Bilchitz defends the *Strydom* judgment and contends that the South African context – marred by its history of systemic discrimination and exclusion – requires a strong (though not absolute) presumption in favour of equality and non-discrimination, with the effect of imposing limits on the freedom of religious associations.[132] This is buttressed by the history of religious associations in South Africa which often acted to legitimate apartheid, and by the fact that 'the private sphere has been suffused with discriminatory practices'.[133] Bilchitz argues that both diversity and social capital (which Lenta and Woolman respectively recruit to argue for an attenuated anti-discrimination duty on religious associations) actually cut the other way, requiring that private discrimination be prohibited. Bilchitz argues that blatant discrimination cannot be justified by courts merely on the basis that it is grounded in religious doctrine, because this 'would render the institutions of the state complicit in the very acts of discrimination taking place in the private sphere'.[134]

Woolman and Bilchitz's positions converge on the importance of remedies in resolving hard cases.[135] They both argue that remedial equilibration has much to offer when resolving the clash between associational rights and protection against discrimination. Remedial equilibration understands rights and remedies to be inextricably linked: '[t]he rights a constitution recognizes obviously affect the remedies that are available; but remedies also affect the value and the content of right'.[136] Both reject the idea that a finding of unfair discrimination should require coercive measures that demand that religious associations choose between the law and religious doctrine. Creative and flexible remedies, then, can help mediate

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[130] ibid 281.
[131] Michael Walzer, *Spheres of Justice* (Basic Books 1983).
[132] David Bilchitz, 'Should Religious Associations Be Entitled to Discriminate?' (2011) 27 SAJHR 219; David Bilchitz, 'Why Courts Should Not Sanction Unfair Discrimination in the Private Sphere: A Reply' (2012) 28 SAJHR 296.
[133] Bilchitz, 'Should Religious Associations Be Entitled to Discriminate?' (n 132) 222.
[134] Bilchitz, 'Why Courts Should Not Sanction Unfair Discrimination in the Private Sphere' (n 132) 298.
[135] Woolman, 'Seek Justice Elsewhere' (n 129) 291–294; Bilchitz, 'Why Courts Should Not Sanction Unfair Discrimination in the Private Sphere' (n 132) 313–315.
[136] Michael Bishop and Stu Woolman et al, 'Chapter 9: Remedies' in S Woolman (ed), *Constitutional Law of South Africa* (Juta 2013) 9-19.

between collective and associational rights and the rights of queer persons not to be discriminated against.

5.5.2 Private testamentary bequests

I now turn to discuss two significant recent Constitutional Court judgments on the scope of anti-discrimination duties in the private sphere. Both judgments concerned the law of succession: in both, the applicants relied on their rights not to be discriminated against unfairly (on the grounds of gender and birth respectively) to vindicate inheritance claims.

As brief background, although there is no express constitutional provision concerning freedom of testation, it is generally accepted that the principle forms part of the right to property, dignity and privacy protected in sections 25, 10 and 14 of the Constitution.[137] This does not mean, however, that it is an unfettered principle (both now, in a constitutional era, but also historically). As Du Toit notes, public policy (in the form of the *boni mores* test) has long played the role of circumscribing the bounds of societally acceptable bequests in the law of succession.[138] Any bequest that was contrary to public policy (as informed by the legal convictions of the community) would not be enforced by the courts. However, pre-constitutional case law demonstrates that courts were reluctant to apply that test to limit freedom of testation where charitable testamentary bequests were based on protected grounds such as race, gender, nationality and religion.[139]

Prior to the Constitutional Court's judgments in *King* and *Wilkinson*, several testamentary provisions were tested in lower courts against the Constitution's demands.[140] The four judgments all concerned discriminatory testamentary provisions in public trusts or bequests that provided scholarship funding but restricted that funding on the grounds of race (and, in two instances, also gender and religion) by making the funding available only to white students.

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[137] Francois du Toit, 'The Constitutionally Bound Dead Hand? The Impact of Constitutional Rights and Principles on Freedom of Testation in South African Law' (2001) 12 Stell LR 222.
[138] ibid. See, most famously, *Aronson v Estate Hart* 1950 (1) SA 539 (A) – there, a will included a term providing that a beneficiary would forfeit benefits should they marry a non-Jew. The Appellate Division held that it was not contrary to public policy to exclude a beneficiary on the basis of choice of religion.
[139] ibid 253.
[140] *Minister of Education v Syfrets Trust Ltd NO* 2006 ZAWCHC 65; *Board of Executors v Benjamin Godlieb Heydendrych Testamentary Trust, George King Testamentary Trust, Cyril Houghton Bursary Trust, Women's Legal Centre (Amicus Curiae)* 2012 (4) SA 103 (WCC); *Curators Ad Litem to Certain Potential Beneficiaries of Emma Smith Educational Fund v The University of KwaZulu-Natal* 2010 ZASCA 136; *BoE Trust Ltd NO and Another (in their capacities as co-trustees of the Jean Pierre de Villiers Trust* 2012 ZASCA 147.

In three of the judgments,[141] the courts declared the provisions invalid and contrary to public policy on the basis that the provisions violated the right to equality. In one judgment, the Supreme Court of Appeal sidestepped the question on the basis that the provision was impossible to fulfil.[142]

All those judgments evidence that courts were reluctant to enforce discriminatory provisions in certain testamentary contexts. The courts employed the public policy test to integrate constitutional equality imperatives.[143] Significantly, however, the judgments all involved a public dimension, in the form of public trusts for the award of bursaries. This tracked a commitment to the public/private divide. However, the prohibition of unfair discrimination by private persons shifts the needle – the anti-discrimination duty is not only imposed on the state. It was an open question, then, whether the Constitutional Court (which had not yet pronounced on discrimination in testamentary bequests) would extend the reasoning in these earlier cases to the private sphere.

This came to a head in two recent Constitutional Court judgments, *King*[144] and *Wilkinson.*[145] Both judgments concerned discriminatory provisions in private testamentary instruments, and so pitted freedom of testation (and implicated rights to privacy, dignity and property) against the right to equality. In both judgments, a majority of the Court held that freedom of testation is circumscribed by the demands of equality; however, the judgments differed on the relevant test, the extent to which duties borne by private persons mirror those of the state, and the balance to be struck when private persons' rights and interests compete. Both judgments also raise important questions about the doctrine of subsidiarity and the appropriate role and meaning of section 14 of PEPUDA.

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[141] *Minister of Education v Syfrets Trust Ltd NO* (n 140); *Curators Ad Litem to Certain Potential Beneficiaries of Emma Smith Educational Fund v The University of KwaZulu-Natal* (n 140); *Board of Executors v Benjamin Godlieb Heydendrych Testamentary Trust, George King Testamentary Trust, Cyril Houghton Bursary Trust, Women's Legal Centre (Amicus Curiae)* (n 140).

[142] *BoE Trust Ltd NO and Another (in their capacities as co-trustees of the Jean Pierre de Villiers Trust* (n 140); Modiri castigates the judgment as racially conservative and states that it 'tolerates and protects whites' perceived right to be racist': Joel M Modiri, 'Race As/And the Trace of the Ghost: Jurisprudential Escapism, Horizontal Anxiety and the Right to Be Racist in BOE Trust Limited' (2013) 70 PELJ 582.

[143] Francois du Toit, 'Constitutionalism, Public Policy and Discriminatory Bequests – A Good Fit between Common Law and Civil Law in South Africa's Mixed Jurisdiction?' (2012) 27 Tulane European and Civil Law Forum 97, who points out that this marks a shift towards an objective enquiry away from subjective considerations such as testamentary intent; however, he proposes that these subjective factors may still have a role to play.

[144] *King NO v De Jager* 2021 ZACC 4.

[145] *Wilkinson v Crawford NO* 2021 ZACC 8.

King v De Jager

In *King*, the Constitutional Court found that a private testator cannot discriminate unfairly on the grounds of sex and gender in a (private) will. The will that was made in 1902 passed farms to male descendants only. The granddaughters of the testators challenged this, relying on section 9 of the Constitution and the relevant provisions of PEPUDA, including section 8's prohibition of unfair discrimination on the ground of gender, 'the system of preventing women from inheriting family property' (section 8(c)), and the prohibition of 'any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men' (section 8(d)). At issue was whether an out-and-out disinheritance clause in a private will that excluded female descendants from inheriting property is legally valid and enforceable.

Both the High Court[146] and the Supreme Court of Appeal heard and dismissed the granddaughters' application, on the basis that the clause was in a private will that did not have a public character or an indefinite life (High Court) and, astonishingly, without providing any reasons whatsoever (Supreme Court of Appeal). These judgments were appealed to the Constitutional Court. While the respondents (the grandsons and great-grandsons) initially pressed their claim, in oral argument in the Constitutional Court hearing, they conceded that the provision was unfairly discriminatory on the ground of gender.

This concession enabled the court to bypass the section 14 analysis. Instead, the Court declared clause 7 of the will inconsistent with the Constitution and PEPUDA, and therefore unenforceable. As is now becoming an unfortunately regular refrain,[147] the Court's outcome is laudable, but its reasoning underdeveloped. While all Justices agreed on the outcome, the three judgments differed on the mechanism for testing the constitutionality of the provision.

First, Jafta J (the majority judgment) held that section 8 of PEPUDA applies, with the effect that the discrimination is unfair. As a result, the provision was invalid and unenforceable. Importantly, held Jafta J, the respondents' concession that the clause was unfairly discriminatory was determinative of the case, and so his judgment does not engage with a fairness analysis at all. Second, Mhlantla J would have found that the provision was unenforceable based on public policy – so, she advocated for the indirect application of the right to equality via the development of the common law. Third, Victor AJ wrote separately to

[146] *King NO v De Jager* 2017 ZAWCHC 79.
[147] S Woolman, 'The Amazing, Vanishing Bill of Rights' (2007) 124 SALJ 762; Meghan Finn, 'Befriending the Bogeyman: Direct Horizontal Application in AB v Pridwin' (2020) 137 SALJ 591.

find that the common law need not be developed, and that instead PEPUDA's provisions should be applied. In contradiction to this (given that PEPUDA is subsidiary legislation to section 9), Victor AJ held that direct application is the proper approach.

As in its recent *Pridwin* judgment,[148] much of the Court's attention was taken up by debates about the *form* of application of rights to private persons, discussed earlier in chapter 2. The Court was divided on whether the duties on the testator are imposed indirectly, through developing the common-law test of public policy (Mhlantla J), indirectly through the subsidiary provisions of PEPUDA (Jafta J), or directly by relying on sections 8(2) and 9(4) of the Constitution (Victor AJ).

The Court also differed on the relevant test for determining how (or indeed, whether) to balance the competing interests of private parties. Jafta J's majority judgment found that the testamentary provision was unfairly discriminatory, though his reasoning is slim on the basis of the concession. This is unfortunate – the judgment has potentially massive precedential effects, and the Court ought to have indicated the basis and scope for regulating private discrimination. Because the majority takes the concession to be determinative, it also fails to engage with the very real conflict between freedom and autonomy interests, on the one hand, and the right to equality, on the other. Jafta J's majority, however, does suggest that differentiating between public and private testamentary instruments constitutes a distinction without difference, on the basis that both have the same impact on a complainant, and both are inconsistent with the Constitution and thus invalid.[149]

Mhlantla J's judgment confronts the conflict between the rights (to autonomy, dignity and privacy, on the one hand, and to equality, on the other) and explains why equality should trump in this case. She also delves into the disjuncture between facially neutral rules that manifest in discriminatory (here patriarchal) ways.[150] Her judgment takes a structural approach to addressing discrimination. Notably, Mhlantla J finds that the provision is subject to constitutional scrutiny and is unfairly discriminatory, but also suggests that when courts intervene in private decisions (such as those that manifest in testamentary bequests), 'there

[148] *AB v Pridwin Preparatory School* 2018 ZASCA 150; Finn (n 147); N Ally and D Linde, 'AB v Pridwin Preparatory School: Private School Contracts, the Bill of Rights and a Missed Opportunity' (2021) 11 CCR 275.
[149] *King NO v De Jager* (n 144) [150].
[150] ibid [53].

ought to be a lower level of judicial scrutiny'.[151] She takes up this line again in *Wilkinson*, as I discuss below.

Victor AJ takes a similar systemic approach to substantive equality, noting that law has distributive consequences – and in this case, the discriminatory testamentary provision had direct economic effects.[152] The consequence is not simply that women are not treated with equal concern and respect (the dignitarian or expressive or recognition claim), but that 'iniquitous gender-based hierarchies' are maintained.[153] She also emphasises collective dimensions of equality and ubuntu in 'establishing a compassionate society which does not discard the humanity of any of its members'.[154] However, Victor AJ rejects the varying levels of scrutiny for the private sphere that Mhlantla J employs, which she contends is 'concerning', advocating instead for a relatively uniform approach to discrimination claims, whether in the public or the private sphere.[155] She does allow, however, for the fact that there may be a range of differing considerations relevant to public charitable trusts that are not apposite in the private sphere. Her judgment does not comprehensively enumerate what these considerations may be.

Osman and Effendi note that the effect of the *King* judgment is to restrict freedom of testation, but that the judgment must be understood as consistent with, rather than a departure from, existing jurisprudence.[156] This is because freedom of testation has always been subject to limitations and, in any event, the adjudication of a dispute will often turn on specific facts. They argue for the testator's intent and religious beliefs to play a role in this adjudication, as the common law of succession often factored in these subjective considerations in a public policy analysis.[157] These considerations could form part of a section 14 analysis, which allows for discrimination to be justified by a legitimate purpose (even if, strictly speaking, the subjective intention of a discriminator is not determinative of the fairness enquiry).

[151] ibid [82].
[152] ibid [198], [222].
[153] ibid [216].
[154] ibid [243].
[155] ibid [220]–[222].
[156] Fatima Osman and Gökşen Effendi, 'King v De Jager: Implications for Religion-Based Discrimination in Wills' (2022) 25 PELJ 1.
[157] ibid 20.

Wilkinson v Crawford

Two months after its decision in *King*, the Constitutional Court handed down another judgment on the limits of freedom of testation in light of the right to equality in *Wilkinson.*[158] While *King* involved the provisions of a will, *Wilkinson* involved the provisions of a private trust deed.

In *Wilkinson*, at issue was whether a private trust deed should be interpreted so as to avoid discriminating against adopted children. When the trust deed was executed, there was a legislative presumption that adopted children were excluded from inheriting unless a testator indicated a clear intention to the contrary. Unlike in *King v De Jager*, the trust deed was capable of being interpreted and enforced consistently with the Constitution (and the subsidiary demands of public policy).

A majority of the Supreme Court of Appeal had declined to interpret a private trust deed to benefit both biological and adopted children in *Harvey NO v Crawford NO*.[159] Instead, the Court distinguished between a private family trust deed and a charitable one, and accorded the former more weight to freedom of testation (undergirded by the right to property in section 25 of the Constitution) than to the right to equality. This was seemingly on the basis that, first, there remains a sufficiently private sphere that is immune from the prohibition against discrimination; second, no person has any entitlement to benefit from a will; third, public policy should not depend on idiosyncratic value judgments; and finally, applying the right to equality could 'lead to a range of insurmountable practical difficulties'.[160]

The Constitutional Court overturned this, handing down three judgments. A majority of the Court (per Mhlantla J) interpreted the deed that identified children and descendants as beneficiaries to include adopted children. Excluding adopted children would constitute unfair discrimination (on the ground of birth) and render the term unenforceable. Mhlantla J considers how freedom of testation (and associated constitutional rights) should be balanced against the right to equality. She notes that freedom of testation implicates the rights to property, dignity and privacy. While public policy is readily applicable in the case of public charitable trusts, here the bequest formed part of a private trust without public characteristics; as a result, she found 'the freedom of testation of the donor ought to be interfered with minimally'.[161] Again, and echoing her judgment in *King v De Jager*, this does not mean that the provisions of private

[158] *Wilkinson v Crawford NO* (n 145).
[159] *Harvey NO v Crawford NO* 2018 ZASCA 147.
[160] ibid [69].
[161] *Wilkinson v Crawford NO* (n 145) [73].

trusts cannot be tested against public policy and constitutional demands; while they are subject to lower scrutiny,[162] they must not be contrary to public policy, in part because no matter how private the trust is, a court (as a public body) will be required to enforce its terms. That the trust is private in nature, however, 'must be given due consideration'.[163]

Majiedt J wrote a dissent, disagreeing that the protected ground of birth extends to adoption and emphasising the importance of freedom of testation in the private sphere. His judgment would have found that the constitutionally and legislatively protected ground of birth does not extend to include adoption. As Bishop and Brickhill compellingly argue, this elision of the context of adopted children is 'clearly unsupportable' and at odds with substantive equality.[164] Flowing from this, his judgment finds that the exclusion of adopted children from benefiting from the estate constitutes mere differentiation, rather than discrimination. The judgment also draws a sharp distinction between the public and private spheres, and concludes that judicial interference in the former is justified but in the latter is not. Testamentary decisions, contends Majiedt J, 'are taken in a most intimate, personal sphere – they occur within what this Court has called the person's "inner sanctum", and within "the core most protected realms of privacy"'.[165] If the Court intervenes, it criticises deeply personal choices. And the distinction between public and private trusts is justified, on Majiedt J's argument, because unlike private trusts, public ones are meant to benefit the general public, and usually endure over longer periods of time (thereby also prolonging any potential dignity infringement of an excluded group of persons).[166] Conversely, he contends, in the context of private trusts there is no prima facie right to inherit, and the countervailing rights of the testator to privacy, dignity and property operate to insulate the testamentary instrument from excessive court intrusion. This, he finds, is consistent with the approach taken in other jurisdictions, where courts opt not to intrude. Majiedt J's reasoning echoes the High Court and majority Supreme Court of Appeal judgments, which were premised in part on the contention that constitutional rights principally protect individuals from undue state influence and coercion, and that it is arbitrary to impose different conditions on distributing property in a deceased's estate versus a living person's gift.

[162] ibid.
[163] ibid.
[164] Michael Bishop and Jason Brickhill, 'Constitutional Law' (2020) 1 Juta's Yearbook of South African Law 153, 167.
[165] *Wilkinson v Crawford NO* (n 145) [118].
[166] ibid [129].

Jafta J also wrote separately in favour of the adopted grandchildren, on the basis of the language in the deed itself. His judgment delves into the 1937 legislative provision that put in place the presumption that adopted children are excluded unless there is a clear intention to the contrary. He would have found that the conditions for that provision to apply had not been met in this deed, so the term 'legal descendants' includes adopted children.

Bishop and Brickhill argue that Mhlantla J's majority judgment is to be preferred. It sounds a clear call of protecting the rights of adopted children, and weaves together principles of unfair discrimination, freedom of testation and public policy.[167] Although I generally agree, there are two troubling aspects. First, her judgment houses the unfairness enquiry within public policy, rather than through analysing section 14 of PEPUDA (even if that analysis is then ultimately folded into the public-policy test, which is what subsidiarity and indirect application would require). What role does the doctrine of subsidiarity play, and how can we avoid the creation of parallel tracks with the common law insulated from equality's reach? I considered this in chapter 2, arguing that the preferred approach is indirect horizontal application, because this best complies with the imperative to constitutionally transform the private law. Similarly, in the contest of private testamentary bequests, PEPUDA and the right to equality are crucial for determining the dispute but can be accommodated within the existing common-law causes of action.[168]

King and *Wilkinson* thus represent a significant – and welcome – development of South African law on the imposition of anti-discrimination duties on private persons. Nevertheless, the judgments leave important questions unanswered. If we read the two together, the Court seems to have endorsed both that the private sphere cannot be insulated from the right to equality, and also that it is nevertheless subject to a lower scrutiny of review, in part on account of countervailing interests and rights which require balancing. What exactly this level of scrutiny demands, however, remains under-determined, and must be developed in subsequent jurisprudence. The judgment's failure to give more considered treatment to section 14 is also a missed opportunity. I pick up these points at the end of this chapter.

[167] Bishop and Brickhill (n 164) 177.
[168] Bhana (n 43) argues along similar lines for an integrated approach in the context of the constitutionalisation of the law of contract, and suggests that PEPUDA's provisions should be folded into the substantive *Barkhuizen* analysis.

5.5.3 Returning to the intuition pumps

In chapter 1, I introduced five cases which work as intuition pumps for how the anti-discrimination duty should apply to private persons. In chapter 4, I revisited these cases to illustrate how they have been decided in other jurisdictions. By way of a brief overview and having explored South African doctrine on private anti-discrimination duties both generally and through the two case studies discussed above, here is how I contend these five cases would be plotted out in South African law, as compared to other jurisdictions:

Uncontentious: prohibited across surveyed jurisdictions including South Africa	**Contentious: (likely) prohibited in South Africa but not in some other surveyed jurisdictions**	**Contentious: most likely not legally prohibited in South Africa, with some uncertainty**	**Uncontentious: not legally prohibited across jurisdictions, including South Africa**
Case 1: the B&B owner	Case 2: the cakeshop Case 3: the testator	Case 4: the religious institution	Case 5: the Tinder user

The first case of the B&B owner who refuses accommodation to a Black couple is clearcut: as discussed earlier, the *iSimangaliso* judgment settles this question.[169] Such discrimination is blatantly unfair and cannot be countenanced in South Africa's legal framework. The next two cases are a little more controversial in other jurisdictions, as we saw in chapter 4, although I argue that they are not controversial in South Africa. A religious cakeshop would likely not be permitted to refuse to bake a cake for a queer wedding – although this has not yet been directly tested in a South African court. On the strength of the *Strydom* judgment,[170] the exercise of the religious belief is likely too far remote and not intrinsically linked with spiritual activities. The Beloftebos dispute, if it does proceed to court, will provide more clarity on this point. The third case – whether a private testator can restrict a bequest to biological descendants only – is

[169] *iSimangaliso Wetland Park v Sodwana Bay Guest Lodge* (n 99).
[170] *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* (n 112).

answered in the negative by the *Wilkinson* judgment.[171] What of the fourth case, where a religious association declines to recognise a female religious leader? The answer to this is not cut and dried, although South African law would likely not proscribe this as unfair discrimination. Whether a church could permissibly fire a lesbian minister on the grounds of her sexual orientation was left open by the Constitutional Court in *De Lange*,[172] and South Africa's position on the question remains uncertain, in part because the litigation did not involve a section 14 fairness analysis because of defects in the parties' pleadings. On the other hand, there may be some instances where this conduct does constitute unfair discrimination – for example, if female religious leaders have previously been accepted. Much would depend on the role of context. The fifth case of the Tinder user is clearcut: this would not be prohibited, for regulating such intimate romantic and sexual choices is too great an intrusion into an individual's right to privacy.

5.6 MAPPING THE DIVERGENT APPROACHES

In this next section, I distill three divergent approaches regarding private person's anti-discrimination duties that emerge from the doctrine. I focus particularly on the *King* and *Wilkinson* judgments, as the two most recent and extended judgments of South Africa's highest court on the topic. I argue that three approaches emerge: (1) an approach that favours insulating the private sphere; (2) a uniform approach that advocates for the duties of private persons to largely mirror those of the state; and (3) an approach that advocates for the private sphere to be regulated, but subject to a lower level of judicial scrutiny.

5.6.1 Insulating the private sphere

The first approach favours insulating the private sphere, and so also private persons, from legal intrusion. That approach is rooted in a stricter understanding of the public/private divide. It seems to be animated at least in part by some of the considerations discussed in chapters 2 and 4 of this thesis – including that the imposition of duties on certain private persons risks being ad hoc or arbitrary; that it unduly curtails individuals' autonomy; that it distorts the character of private relations; and that the imposition of duties should flow from features of publicness. There is, too, a concern that regulating the private sphere by imposing anti-discrimination duties constitutes impermissible use of the state's coercive power to control individuals.

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[171] *Wilkinson v Crawford NO* (n 145), also discussed in the following section.
[172] *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being* (n 114).

The *King* and *Wilkinson* High Court judgments turned on these concerns. Bozalek J in *King* rejected the argument that the discrimination in question was systemic and emphasised that imposing an anti-discrimination duty in this case to override freedom of testation would be arbitrary.[173] In *Wilkinson*, Dlodlo J found that, principally, the Constitution guarantees individual freedom from undue state interference.[174] The judgment also asserted that it would be arbitrary for a court to intervene in the distribution of the property of a deceased person when it would not do so for distribution by a living person (for example, if a person decides to gift property to some but not all of their descendants on discriminatory grounds). The Supreme Court of Appeal's majority judgment in *Wilkinson* similarly found that public policy does not warrant interference into private testamentary instruments, and that judicial restraint must be exercised.[175]

At the Constitutional Court level, Majiedt J's dissent in *Wilkinson* traverses similar concerns. He emphasises that testamentary decisions 'are manifestations of personal love and affection, loyalties and kinship' and that, accordingly, courts should be loath to interfere with these decisions.[176] This objection captures a concern that affective relationships (characterised by emotion and intimacy) should not be subject to external directives or interference.[177] By intervening, Majiedt argues, a court 'may dictate to the testatrix whom she may and may not love',[178] which undermines the substratum of interpersonal relationships. Majiedt J's judgment falls on the negative autonomy side of the liberty versus equality debate, as he cautions against limiting individual freedom of choice. The judgment also draws a sharp distinction between the public and private spheres, arguing for regulation of the former but not the latter.

It is clear, however, that this line of reasoning has not found favour with the majority of Constitutional Court judges. It is also not supported by a range of normative considerations that I track in the next chapter 6, although the point about affective relationships is an important one to which I will return.

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[173] *King NO v De Jager* (n 146).
[174] *Harper v Crawford NO* 2017 ZAWCHC 78 [32].
[175] *Harvey NO v Crawford NO* (n 159).
[176] *Wilkinson v Crawford NO* (n 145) [118]–[119].
[177] John Gardner, 'Private Activities and Personal Autonomy: At the Margins of Anti-Discrimination Law' in B Hepple and E Szyszczak (eds), *Discrimination: The Limits of Law* (Mansell Publishing Limited 1992) notes that these relationships are direction-sensitive. I return to this in the following chapter.
[178] *Wilkinson v Crawford NO* (n 145) [119].

5.6.2 Mirroring the state

Indeed, at least some of the Constitutional Court judges take the opposite view, emphasising the permeability of the public/private divide. At first blush, this view could be understood to suggest that the duties to be borne by private persons mirror those borne by the state and that a uniform test applies in both the public and private spheres.

This line of reasoning emerges from both Jafta J's majority and Victor AJ's separate judgments in *King*. Jafta J stresses that whether a testamentary instrument is public or private has the same *impact* on the complainant. Because the discriminatory impact is the same, both would be equally constitutionally invalid.[179] Anything to the contrary, Jafta J suggests, implies that the Constitution does not reach the private sphere. This line of reasoning by Jafta J sits at odds with his position on horizontal application more generally – as discussed in chapter 2, he resists the imposition of positive duties on private persons, but treats section 9 of the Constitution as distinct because the text explicitly provides for private persons to be bound.

Victor AJ's judgment does not render the public/private divide completely irrelevant, but she rejects the suggestion that differing levels of scrutiny ought to apply regarding discriminatory conduct in these spheres.[180] Instead, highlighting the question of power, she also notes that discrimination has the same consequence for a complainant whether it originates in the public or the private sphere. Given that systems of oppression manifest in the private sphere, it is also important, argues Victor AJ, to ensure that this sphere is open to constitutional scrutiny.[181] This is underscored by the importance of substantive equality.

However, perhaps it is too hasty to characterise either of these judgments as endorsing a crude view that private duties should wholly mirror state duties. Both Jafta J and Victor AJ focus on the *impact* of the discrimination, but we know that *impact* is distinct from *justification*, and that both play a role in determining the ultimate fairness or unfairness of the discrimination in question. Indeed, at another point in her judgment, Victor AJ acknowledges the clash of principles in this case. She suggests that this should be accommodated within PEPUDA's section 14 and engages with that enquiry, although not at length. She notes that section 14 is 'a hybrid test which incorporates elements of the fairness enquiry from *Harksen* whilst also incorporating elements of proportionality that resemble a limitation analysis'.[182] Hers is the

[179] *King NO v De Jager* (n 144) [150].
[180] ibid [220]–[222].
[181] ibid [226].
[182] ibid [233].

only judgment of the six cumulative Constitutional Court judgments in *King* and *Wilkinson* to engage with section 14. In this case, however, she concludes the brief section 14 analysis by finding that in any event the outcome is clear: 'there can simply be no contest between the *raison d'etre* (reason for being) of the Constitution, namely the abolition of patriarchy and sexism, and the "right" to freedom of testation'.[183]

It would be a mistake to think that because the class of anti-discrimination duty-bearers in South African law is so extensive, the duties borne by private people are totally unqualified and straightforwardly mirror the duties borne by the state. Instead, certain cases of discrimination that would straightforwardly be prohibited if the state were the respondent may be legally permitted when a private person is the discriminator, as the basis for justifying discrimination is larger for private persons than the state.

As we saw earlier in the section on drafting history, one of the central arguments in favour of qualifying the prohibition against discrimination with the word 'unfair', and of including section 14 of PEPUDA, was to provide courts with adjudicative tools for determining *private* anti-discrimination claims. Private persons differ from the state here – which is not to say that justifications, even those that draw on competing rights, are not available to the state too. Even so, a private person may not be required to act rationally, proportionally or reasonably in the same way as the state would.[184] We also see in PEPUDA – particularly in chapter 5 on positive duties – that there are some differences in the treatment of state versus private duty-bearers, with further scope for differentiation among private actors based on their size, resources and influences. A variegated approach has started to emerge to the imposition of duties on private persons – both in the context of anti-discrimination duties, but also with respect to horizontality more broadly (as I discussed in chapter 2). Section 14 of PEPUDA's fairness analysis can accommodate these considerations but has yet to be substantively developed in doctrine.

5.6.3 Varying the intensity of review

Mhlantla J takes a mediating view between these two positions in her separate judgment in *King* and her majority judgment in *Wilkinson.* In both judgments, she ultimately falls on the side of equality, finding that private testamentary provisions are subject to anti-discrimination controls. In *King*, where she did not attract a majority, she recognised that private testamentary bequests fall within the sphere of intimate personal relationships, and proposes that this

[183] ibid [236].
[184] Khaitan (n 7) 208.

warrants a 'lower level of judicial scrutiny', given the impact on the right to privacy.[185] This does not mean, however, that the private sphere is entirely immune from scrutiny – instead, in this case, given the clear discrimination on the ground of gender, she finds that the bequest was plainly contrary to public policy.

In *Wilkinson*, her majority judgment asserts that because the trust is private in nature, courts should interfere with freedom of testation only 'minimally'. This does not entirely insulate testamentary instruments from review, but the determination must take into account 'balancing factors', and a standard of 'stricter scrutiny' must be applied to public charitable trusts.[186] Her judgment leaves open how these standards differ.

However, as her judgment in *Wilkinson* was the majority judgment (and Jafta J's majority judgment in *King* principally turned on the respondents' concession, and so its *ratio decidendi* is not ultimately inconsistent with her finding), it establishes a differing legal standard for public versus private discriminatory acts and suggests that the scope for justification by private persons would be larger than for public ones.

This is a novel development; unlike in US anti-discrimination law, South Africa's equality jurisprudence has not yet seriously engaged with varying the intensity of review.[187] Indeed, in an early equality court case, *Prinsloo v Van der Linde*, the Court cautioned that 'a simplistic translation from other countries into our equality jurisprudence of formulae, modes of classification of degrees of scrutiny might create more problems than it solved'.[188] Having said this, in South Africa intensity of review does form part of both administrative law as well as socioeconomic rights jurisprudence. In these contexts, the intensity-of-review question is fundamentally about the degree of deference that the court should afford to the decisions of another branch of government, often factoring in questions of institutional competence, expertise, polycentricity and the division of democratic labour.

McConnachie argues that a baseline intensity of review for assessing the state's justifications for discrimination should be applied in all cases.[189] However, his analysis is framed around the state as duty-bearer, and places emphasis on a culture of justification for which the state, rather than private persons, bears obvious obligations.

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[185] *King NO v De Jager* (n 144) [82].
[186] *Wilkinson v Crawford NO* (n 145) [73].
[187] Chris McConnachie, 'Affirmative Action and Intensity of Review: South African Police Service v Solidarity Obo Barnard' (2018) 8 CCR 163.
[188] *Prinsloo v Van der Linde* 1997 ZACC 5 [19].
[189] McConnachie, 'Transformative Unfair Discrimination Jurisprudence' (n 41).

On the one hand, employing a lower intensity of review to private duty-bearers is quite attractive. There is something intuitively appealing about subjecting private conduct, especially the personal decisions taken by natural persons, to attenuated scrutiny as compared to discriminatory conduct by the state. Varying the intensity of review depending on context is also not an alien concept in South African law. There is a well-established seam of doctrine in South African administrative law that varies the intensity of judicial review applied to exercises of public power, dependent on contextual considerations and the appropriate level of deference to be accorded to the decision.[190] This, in turn, depends on a determination of whether the power in question is public or private. While a varying standard of review has not been endorsed in anti-discrimination law in the way that it has, say, in the US, that alone is not a complete objection. In the US jurisdiction, the varying intensity of scrutiny applies to differentiate between the protected grounds. Here, Mhlantla J's suggestion is that the intensity of review is dependent on the duty-bearer (rather than on the nature of the power that is exercised, as in administrative law). Further, varying intensity of review can capture the differences between variegated kinds of private actors – so, discriminatory conduct by a corporate entity pursuing profit can be subject to more searching scrutiny than the personal decisions taken by a natural person in a more intimate sphere. Having said all this, varying the intensity of review does not solve the difficult questions that face a court when considering private anti-discrimination duties. All it does is set back the resolution of these questions a step: a court will still need to scrutinise the justification raised to defend discriminatory conduct and varying the intensity of this scrutiny does not entail that private actors escape regulation. Ultimately, a balancing or proportionality exercise will still need to be undertaken, which takes us back to section 14's fairness enquiry. Given this, it is not entirely clear what extra work the lower intensity of review standard does – aside from perhaps being a different way of framing the additional weight a court may accord to a private person's competing interests in the justification balancing process.

[190] Cora Hoexter and Glenn Penfold, *Administrative Law in South Africa* (3rd edn, Juta 2021) 192–196; Jonathan Klaaren, 'Five Models of Intensity of Review' in Jonathan Klaaren (ed), *A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy* (Siber Ink 2006); Cora Hoexter, 'The Future of Judicial Review in South African Administrative Law' (2000) 117 SALJ 484; Paul Craig, 'Public Law and Control over Public Power' in Michael Taggart (ed), *The Province of Administrative Law* (Hart 1997), discussing varying intensity of review in administrative law in other Commonwealth jurisdictions.

5.6.4 Another way: Section 14 of PEPUDA

Is there another, more obvious, way? South African law puts in place a more extensive regime for private people's anti-discrimination duties than other jurisdictions. Most surveyed jurisdictions use a form of a test of publicness as a threshold determination of whether an entity is an anti-discrimination duty-bearer (and so control the possible class of duty-bearers in this way, with the scope of the duty being informed by whether an entity is the state, or whether the nature of the conduct has a public dimension even when the entity in question is private). This is so even in the absence of a straightforward test for publicness, and the presence of some nuances – in terms of how publicness in conceived, and in instances where, for example, a relationship of employment conditions the imposition of the duty. Conversely, in South Africa our possible class of duty-bearers is much wider – in principle, all persons as well as the state are duty-bearers. Private persons and the private sphere more broadly are not immune from obligations in respect of the right to equality. The nature and extent of such obligations should be determined not by a threshold enquiry of publicness, but instead by a contextually sensitive balancing enquiry at the section 14 justification leg of an anti-discrimination claim.[191]

The clash between rights need not collapse into a balancing enquiry that straightforwardly sets unencumbered freedom (that is, negative liberty interests as understood, shorn of any institutional or structural context) in opposition to equality.[192] As I discussed in chapters 1, 2 and 4, and will return to in chapter 6, one can endorse a more comprehensive understanding of the personal autonomy interests that may be captured in other rights without rejecting the argument that, in the context of specific adjudication, a balancing or proportionality process ought to be undertaken. That balancing can accommodate the structural and institutional concerns that are apt for understanding both the relational context of the parties and the underlying demands of substantive equality, without presuming parity of power among individuals.

Section 14 of PEPUDA articulates a number of factors to inform a determination of whether discrimination is fair or unfair, including contextual factors, factors that examine the impact of the discrimination on the complainant, and extant patterns of disadvantage. Section 14(3)(f) of

[191] Note that the availability of a justification in the context of anti-discrimination law varies from jurisdiction to jurisdiction (for example, see discussion of UK Equality Act at 154 n 59).

[192] See criticism in Gautam Bhatia, 'Horizontal Rights: An Institutional Account' (PhD Thesis, University of Oxford 2021); A Barak, 'Constitutional Human Rights and Private Law' in D Friedmann and A Barak (eds), *Human Rights in Private Law* (Hart 2001).

PEPUDA includes in the determination of whether discrimination is fair whether the discrimination had a legitimate purpose. As we saw above, to date not much meaning has been given to this factor in existing jurisprudence. This is consistent with a trend, discussed in chapter 2, of flouting the doctrine of subsidiarity. Victor AJ's judgment in *King* engages with it briefly to suggest that freedom of testation would constitute a legitimate purpose (but that, given the constitutional commitment to substantive equality, is definitively outweighed).[193] The Labia Theatre's defence turned on section 14(3) of PEPUDA but was dealt with only glancingly by Le Grange J.[194] Ultimately, South African courts have yet to develop a clear test to govern the balancing exercise between competing rights. Instead, balancing enquiries have been casuistic and fact-dependent. While context sensitivity is critical, some more principled guidance is needed. I will sketch the factors that should inform the section 14 analysis in my next chapter.

5.7 CONCLUSION

In this chapter, I have tracked South Africa's approach to private anti-discrimination duties in legislation and doctrine. I began the chapter by surveying the pre-constitutional position, arguing that colonialism and apartheid entrenched discrimination across the public and private spheres through extensive legislative machinery, and that the common law did not provide any safeguards to ameliorate this. Section 9 of the Constitution and PEPUDA are attempts to dislodge the continuing legacies of white supremacy, patriarchy, ableism and heterosexism, as well as other deep-set systems of disadvantage as manifested in both the public and private spheres. For this reason, they impose an express anti-discrimination duty on private persons, and factor a justification into the fairness analysis, which envisages balancing competing private interests. I then surveyed the doctrinal interpretation of these provisions, arguing that surprisingly few cases have dealt squarely with private discrimination, and that section 14 of PEPUDA remains under-developed in our law. This is notwithstanding two doctrinal case studies: the clash between LGBTQI+ rights and the right to freedom of religion, and private testamentary bequests. I attempted to distil the divergent approaches that emerge from the doctrine, arguing that ultimately the correct framework for adjudicating private anti-discrimination in South African law is section 14 of PEPUDA itself.

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[193] *King NO v De Jager* (n 144) [235].
[194] *Labia Theatre CC v South African Human Rights Commission, Palestinian Solidarity Campaign v Labia Theatre CC* (n 96) [58]–[60].

In the next chapter, I delve into several normative considerations that underpin the doctrinal approach I have discussed in this chapter, and that can help map the way for future jurisprudential development. I then make some proposals for how the section 14 analysis should work and the expanded role that remedies should play in the adjudication of anti-discrimination duties.

CHAPTER 6

TOWARDS A NORMATIVE AND ADJUDICATIVE ACCOUNT

6.1 INTRODUCTION

What is the way forward for the justification and adjudication of private anti-discrimination duties in South Africa? In this chapter, I pull out the doctrinal threads developed in the preceding chapters and attempt to weave a normative account for how private anti-discrimination cases should be decided in the courts.

I begin the chapter by returning to substantive equality, focusing on its relational dimensions and its sensitivity to power and how such power – whether exercised by public or private actors – creates and drives systemic disadvantage, thus giving rise to duties.

I then shift to examine the kinds of countervailing considerations that can act as conceptual or normative brakes to the ultimate imposition of the duty. I consider three main pressure points: first, the limits of the law's coercive and regulatory claims; second, the need for the law to recognise plural rights and values and the (often over-stated, but still apparent) tension between freedom or autonomy and equality; and third, the direction-sensitivity and affective nature of certain relationships.

Following this, I turn to section 14 of PEPUDA's fairness enquiry, which constitutes a legislative balancing test. As I argued in chapter 5, this provision has been seriously underused by South African courts and litigants. I make some proposals for how a court should structure an analysis under section 14, and then return to the five intuition pumps to illustrate the application of this analysis. Finally, I discuss the important role that remedies play in concert with the fairness analysis when adjudicating private discrimination claims.

6.2 SUBSTANTIVE EQUALITY AND PRIVATE ANTI-DISCRIMINATION DUTIES

In chapter 3, I discussed South African law's endorsement of substantive equality. Using a broad theoretical framework of substantive equality, I mapped several fault lines in anti-discrimination law, including the jurisprudential adoption of a contextual approach which

moves away from an overly abstracted account of equality. I concluded that there is no single conception of equality or of the purpose of anti-discrimination law in South Africa, and advocated for a multidimensional approach. Although the conceptions of (in)equality that have developed are primarily centred on the state and its duties, many of the insights of substantive equality are equally applicable to the private sphere.

Substantive equality requires a historically rooted analysis. The first important (and perhaps most obvious) point to make is that the broad class of anti-discrimination duty-bearers in South African law stems from our history, which involved the oppressive, dominating and discriminatory regulation of all spheres, including not only the public but also the private (and sometimes, as in the regulation of sex and marriage, the deeply personal). This created and perpetuated structural inequality that cut across all sectors of society, creating systems of inequality that could not be dislodged by the regulation of public spheres alone. Given how pervasive these systems are, there is an evident need for a different response to that taken by most surveyed jurisdictions.

Relatedly, a consequence of South African law's commitment to substantive, rather than formal, equality as a comprehensive norm is a rejection of formal equality's implicit presumptions that individuals have parity of power, and that the status quo is neutral with respect to the allocation of advantages, rights and basic goods. This rejection, and the reality of extensive historic and extant inequality in South Africa, is one strut underpinning its different and more expansive approach to the anti-discrimination duty of private persons.

As we saw in an extended discussion in previous chapters, South African law does not hew to a strict public/private divide. This is for good reason. Descriptively, there has never truly been a clear divide – instead, the divide is recruited for political purposes. And normatively, the preservation of a rigid divide risks calcifying an unjust status quo and eliding abuses of power by non-state actors. It is also undergirded by a restrictive conception of autonomy as negative liberty. For these reasons, I argued against a sharp schism between the public and private spheres and the related implication that only the former should be legally regulated. This, however, does not mean that there is no conceptually useful role played by concepts of autonomy and privacy. As I will contend later in this chapter, courts must assess the competing rights and interests rather than designating a particular sphere as being private (and thus inapt for the application of anti-discrimination duties). Liebenberg and Kolabhai put it aptly:

'considerations of private autonomy would enter the picture, not in terms of the application analysis, but rather in terms of the substantive balancing between various rights'.[1]

Another important feature of South African discrimination law is that it is impact-oriented.[2] The impact of discriminatory conduct or rules that is experienced by the complainant is typically not dependent on the identity of the discriminator. As we saw in chapter 5, a concern with equivalent impacts (regardless of the identity of the discriminator) underpinned at least some of the Constitutional Court judgments in *King*[3] and *Wilkinson*.[4] Jafta J's majority in *King* notes, for example, that:

> [a] public trust deed or will that violates the values of the Constitution or one of its provisions *has the same impact* as a private trust deed or will in breach of the same provisions. Both of them are inconsistent with the Constitution and the supremacy of the Constitution renders them both equally invalid.[5]

In South Africa's anti-discrimination scheme, impact alone is not determinative of the fairness of discrimination, because the second part of the fairness enquiry looks at justification. Nevertheless, given that our jurisdiction places a lot of weight on impact in determining unfair discrimination, there is some reason to think that we should not draw a sharp distinction between public and private actors, for not only the state but also private persons are able to infringe rights and affect the interests that anti-discrimination law protects.

An emphasis on impact is consistent with substantive equality's concern with systemic discrimination. Substantive equality also requires a sensitivity to the institutions that construct and calibrate power in society.[6] This is because substantive equality drives at dismantling existing structures of inequality and injustice without necessarily apportioning blame to specific individuals,[7] but instead by tracking systems of disadvantage. The focus is thus shifted away from moral blameworthiness to an enquiry as to who is in the best position to remedy the

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[1] Liebenberg S and Kolabhai RL, 'Private Power, Socio-Economic Transformation and the Bill of Rights' in Z Boggenpoel (ed), *Law, Justice and Transformation* (LexisNexis 2022) 263.
[2] *City Council of Pretoria v Walker* 1998 ZACC 1; T Ngcukaitobi, I Currie and J de Waal, 'Equality' in I Currie and J de Waal, *Bill of Rights Handbook* (6th edn, Juta 2013).
[3] *King NO v De Jager* 2021 ZACC 4.
[4] *Wilkinson v Crawford NO* 2021 ZACC 8.
[5] *King NO v De Jager* (n 3) [150] (emphasis added).
[6] Bhatia advances an institutional account of horizontal rights in his doctoral thesis. Unfortunately, a considered engagement with his account falls outside the scope of this thesis. Gautam Bhatia, 'Horizontal Rights: An Institutional Account' (PhD Thesis, University of Oxford 2021).
[7] Iris Marion Young, *Responsibility for Justice* (OUP 2011) advances an argument that individuals bear responsibilities to address structural injustices based on a social connection model of responsibility. Where societies are deeply unequal, individuals who are advantaged are implicated even if they do not bear any individual blame.

violation, and how the relationship between the parties can best be equalised.[8] This in turn requires sensitivity to forms of power.

6.2.1 Relational egalitarianism

The imposition of anti-discrimination duties on private persons in South Africa is buttressed by relational egalitarianism. The ideal of relational egalitarianism as a component of substantive equality reaches into relationships in private capacities (including social norms, personal interactions and informal associative practices) beyond simply just economic or political ones. Relational egalitarianism takes equality to entail a commitment to living in a society of equals and so is concerned 'with the quality of social relations'.[9] Relational egalitarianism is not always explicitly foregrounded in current theorising on substantive equality or anti-discrimination law, in part because that literature has developed principally with the state as duty-bearer. Nevertheless, substantive equality clearly can and does accommodate relational considerations; ideas of relational egalitarianism are implicit and embedded within accounts of multidimensional substantive equality. After all, substantive equality is concerned with structural disadvantage as it affects both groups and individuals, and at dismantling systems of inequality, oppression and domination. This in turn requires confronting both public and private forms of power. For these reasons, social relations are taken to be a site of justice, where individuals can make legitimate claims on one another.[10] Put differently, relational egalitarianism posits that claims of equality exert force not only in respect of the basic structure of the state, as classic liberal egalitarian accounts would have it,[11] but also govern laws that regulate actions in society and daily lives.

Relational egalitarianism developed as a theory that is not concerned per se with the distribution of a tangible good, but instead about how individuals – and, importantly, groups, especially in light of historic disadvantage – relate to one another. In addition, relational egalitarianism has its origins in a non-idealised theory, in opposition to oppression and domination as barriers to egalitarianism.[12] It thus has more of an ameliorative aim than an idealised abstract one. It has sometimes been framed negatively (that is, as being against domination, exploitation, hierarchy and oppression). As such, relational egalitarianism is in

[8] ibid; Bhatia (n 6) 204.
[9] Dan Threet, 'Relational Egalitarianism and Emergent Social Inequalities' [2021] Res Publica 1.
[10] ibid.
[11] John Rawls, *Political Liberalism* (Columbia University Press 1993) 268–269; Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 296, 299.
[12] Kristin Voigt, 'Relational Egalitarianism', *Oxford Research Encyclopedia of Politics* (OUP 2020).

part about identifying what is inegalitarian rather than constructing a transcendental-ideal account of justice. For this reason, relational egalitarian concerns clearly map onto a substantive equality framework, as discussed in chapter 3.

Anderson provides a leading philosophical account of relational egalitarianism. I discussed her work in chapter 3 and return to it again here. Writing in response to proponents of luck egalitarianism (who contend that equality's purpose is to eliminate undeserved bad luck), she argues that egalitarian justice has two aims. First, it aims at eliminating oppression (again, the parallels with substantive equality's concerns are apparent). Second, its positive aim is concerned with creating or sustaining a community of people who stand in relations of equality. This positive aim can require duties in both public and private spheres.

This may suggest, at first blush, that relational equality principally asserts recognition rather than redistribution claims – to return to one of the fault lines along which conceptions of equality fall from chapter 3, as famously characterised by Fraser.[13] However, the relational egalitarian is not necessarily committed to this, as systemic and distributive inequalities, too, can impair individuals' ability to relate to one another as equals. Similarly, in the context of anti-discrimination law, which is structured by a claim brought by one (or multiple) parties against another, the relational context that governs the parties is critical.

Fraser's notion of participatory parity captures some similar concerns. Although she develops this notion within an account of justice (rather than equality), she argues that full participatory parity requires persons being able to deliberate as peers and equals.[14] Two conditions must be met, on her account, for participatory parity to be possible. First, a redistributive condition is required: the distribution of resources must enable individuals' voice and independence. Second, an intersubjective condition which has recognition elements must be met: 'institutionalized patterns of cultural value [must] express equal respect for all participants and ensure equal opportunity for achieving social esteem'.[15] This in turn entails a form of relational egalitarianism, albeit by a different name.

None of this, however, entails that relational egalitarianism collapses back into an individualist assessment of discrimination. This is in part because of the role played by patterns of *group* disadvantage (as discussed in chapter 3) which conditions participatory parity and how society

[13] Nancy Fraser, 'Redistribution or Recognition?' in Nancy Fraser and Axel Honneth, *Redistribution or Recognition? Political-Philosophical Exchange* (Verso 2003).
[14] Nancy Fraser, *Justice Interruptus* (Routledge 1997) 79–82.
[15] Fraser (n 13) 36.

is structured. It also allows for some measure of context-sensitivity: 'what it means to relate as equals will vary across different kinds of social relations'.[16] As relational egalitarianism entails a commitment to a society of equals, it seems to accommodate the regulation of relationships among individuals and groups acting in private capacities beyond their interaction in social, economic or political life.[17] In this respect, a relational egalitarian account also allows an assessment that is sensitive to power and vulnerability between parties (as the institutional accounts discussed above also do).

Relational egalitarianism has salience for the imposition of duties on private persons in several ways. It legitimises the claims that individuals make on one another by virtue of their status as equals in a shared society.[18] This is a normative or moral claim of what individuals owe each other; also pertinent is the jurisprudential approach one adopts to law's normativity – that is, to the question of how legal institutions and rules alter our rights, duties and powers. I work on a Razian account of law's normativity, which is that law gives us reasons for action such that it guides what we ought to do. Law speaks in the same language of morality – it draws on a vocabulary of rights, obligations and powers.[19] Most centrally, both law and morality seek to guide our actions by setting out how we should behave (though morality also more obviously has a role of guiding our beliefs, as well as our actions). Law's normative authority is thus grounded or legitimised by helping legal subjects conform to the reasons that apply to them. Gardner argues that the main purpose of law 'is to help people to do what they ought to be doing anyway, quite apart from the law'.[20] Relational egalitarianism, then, provides content to determining what people have reason to do regarding treatment of others, especially against the backdrop of extreme inequality. As Dagan and Dorfman put it (writing in the context of private law), the 'morality of laws adhering to the ideal of just relationships turns not on the actual motivations of duty holders but on their having reason to act in a way that is respectful of others'.[21]

As traversed in chapters 3 and 5, South Africa's historical context is one of enormous inequality and group disadvantage. The disruption to relations in the polity and among both groups and

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[16] Kasper Lippert-Rasmussen, *Relational Egalitarianism: Living as Equals* (CUP 2018) 122.
[17] Carina Fourie, 'Wrongful Private Discrimination and the Egalitarian Ethos' in Kasper Lippert-Rasmussen (ed), *The Routledge Handbook of the Ethics of Discrimination* (Routledge 2018) 421.
[18] S Gosepath, 'Equality' (2021) Stanford Encyclopedia of Philosophy <https://plato.stanford.edu/entries/equality/> accessed 18 February 2023; Samuel Scheffler, 'What Is Egalitarianism?' (2003) 31 Philosophy and Public Affairs 5.
[19] John Gardner, *Law as a Leap of Faith* (OUP 2012) 144.
[20] John Gardner, 'Dagan and Dorfman on the Value of Private Law' (2016) 117 Columbia Law Review 179.
[21] Hanoch Dagan and Avihay Dorfman, 'Just Relationships' (2016) 116 Columbia Law Review 1395.

individuals was profound, and discrimination cut across public and private lives, in political, social, economic and deeply personal spheres. Meyersfeld makes this point, arguing that South Africa's horizontal application regime requires individuals and juristic persons to 'participate in the restorative project of healing fractured interpersonal relationships'.[22] Although she writes more generally on section 8(2) duties, she argues that the horizontal application has both a 'love quotient' – that is, 'the potential to promote interpersonal equality between natural persons' – and a 'power quotient' – that is, 'the potential to ameliorate the power imbalance between rich and poor'.[23] This, expressed as a relational egalitarian imperative, goes a long way in justifying a near-universal imposition of the anti-discrimination duty.[24]

6.2.2 Ubuntu as a relational ideal

I do not, in this chapter, exhaustively consider the extent to which ubuntu tracks some of the concerns of relational egalitarianism. That is an extended theme that warrants separate, considered treatment. I begin by noting three points: first, that ubuntu as a concept is somewhat contested;[25] second, that ubuntu has typically been understood in South African theory and doctrine as related to the right to dignity rather than to equality; and third, that ubuntu has been understood to be non-regulative,[26] that is as not corresponding directly to legal rules that allocate or articulate rights and duties.[27]

Having said that, insofar as ubuntu is conceived as entailing that 'our ethical relationship to others is inseparable from how we are both embedded and supported by a community that is not outside each one of us, but is inscribed in us',[28] it has potential for infusing a theory of private discrimination. Although ubuntu is not easily defined,[29] it is 'intimately bound up with fundamentally social values'[30] and is often expressed through the isiZulu phrase 'umuntu

[22] Bonita Meyersfeld, 'The South African Constitution and the Human-Rights Obligations of Juristic Persons' (2020) 137 SALJ 439, 458.
[23] ibid 459.
[24] Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) 201.
[25] See, for example, the discussion in Drucilla Cornell and Karin van Marle, 'Exploring UBuntu: Tentative Reflections' in Drucilla Cornell and Nyoko Muvangua (eds), *Ubuntu and the Law – African Ideals and Postapartheid Jurisprudence*, vol 72 (Fordham University Press 2012); Irma Kroeze, 'Doing Things with Values: The Case of UBuntu' in Drucilla Cornell and Nyoko Muvangua (eds), *Ubuntu and the Law – African Ideals and Postapartheid Jurisprudence*, vol 72 (Fordham University Press 2012); T Maluleke, 'The Misuse of Ubuntu' (1999) 53 Challenge 12.
[26] Drucilla Cornell and Nyoko Muvangua, *Ubuntu and the Law – African Ideals and Postapartheid Jurisprudence*, vol 72 (Fordham University Press 2012) 5.
[27] JY Mokgoro, 'Ubuntu and the Law in South Africa' (1998) 1 PELJ 15.
[28] Cornell and Muvangua (n 26) 5.
[29] Mokgoro (n 27); Maluleke (n 25); Cornell and Van Marle (n 25); C Himonga, M Taylor and A Pope, 'Reflections on Judicial Views of Ubuntu' (2013) 67 PELJ 370.
[30] Himonga, Taylor and Pope (n 29).

ngumuntu ngabantu', usually translated as 'a person is a person through other people'. This gives expression to the communitarian dimensions of ubuntu, which focuses on the social, communal and collective ways in which these dimensions are constitutive of the individual. Such a conception also links rights and duties, emphasising 'the reciprocal relationship between the individual and the community'.[31]

Himonga, Taylor and Pope critically engage with judicial interpretations of ubuntu, drawing connections between ubuntu and the rights and values in the Constitution.[32] They consider the tension that can arise between individual and collective interests, which is sometimes raised as a reason to be sceptical of the use of ubuntu in adjudication.[33] They argue that ubuntu emphasises the importance of restorative justice, not only in the criminal law context but more broadly.

The use of ubuntu can be traced in doctrine. *S v Makwanyane*, the groundbreaking case that ruled that the death penalty is unconstitutional, featured ubuntu in a number of the judgments penned by members of the bench. Langa J (as he then was) noted that ubuntu captures the idea that 'the life of another person is at least as valuable as one's own' and involves fundamental '[r]espect for the dignity of every person'.[34] Mohamed J (as he then was) similarly noted that ubuntu involves the recognition of others' innate humanity and 'the reciprocity this generates in interaction within the collective community'.[35] The next significant Constitutional Court case to draw on ubuntu is *PE Municipality*, which established the importance of meaningful engagement in eviction disputes.[36] Sachs J noted that ubuntu 'combines individual rights with a communitarian philosophy'[37] and drew on this to argue that the resolution of disputes should shift away from adversarial combat to respectful mediation.

Ubuntu has also been employed in traditionally private law areas, notably in *Everfresh*[38] and *Beadica.*[39] Both cases involved contractual disputes, and in both ubuntu was raised as a possible source of development for the common law, in part to ameliorate an inequality of

[31] Danwood Chirwa, 'In Search of Philosophical Justifications and Suitable Models for the Horizontal Application of Human Rights' (2008) 8 AHRLJ 294, 304.
[32] Himonga, Taylor and Pope (n 29).
[33] Kroeze (n 25); R English, 'Ubuntu: The Quest for an Indigenous Jurisprudence' (1996) 12 SAJHR 641.
[34] *S v Makwanyane* 1995 ZACC 3 [225].
[35] ibid [263].
[36] *Port Elizabeth Municipality v Various Occupiers* 2004 ZACC 7.
[37] ibid [37].
[38] *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2011 ZACC 38.
[39] *Beadica 231 CC v Trustees for the time being of the Oregon Trust* 2020 ZACC 13.

bargaining power. In neither case was ubuntu decisive for the majority of the court, and its role in infusing substantive fairness into the law of contract remains open.[40]

Ubuntu has also played a role in equality and anti-discrimination jurisprudence. In *Pillay* (addressing discrimination on the grounds of religion and culture and reasonable accommodation), Langa CJ expressly connected ubuntu with relational imperatives: 'an individual human person cannot develop and achieve the fullness of his/her potential without the concrete act of relating to other individual persons'.[41] In a more recent judgment on reasonable accommodation, Pillay AJ's minority judgment would have drawn on ubuntu to determine the bounds of the duty to reasonably accommodate persons with disabilities.[42] In *Afriforum v Malema*, the Equality Court controversially found that singing the struggle song *Dubula ibhunu (Kill the Boer)* constitutes hate speech.[43] The judgment drew on ubuntu as:

> an important source of law within the context of strained or broken relationships amongst individuals or communities and as an aid for providing remedies which contribute towards more mutually acceptable remedies for the parties in such cases.[44]

Finally, Victor AJ's judgment in *King*, discussed at length in chapter 5, connects ubuntu with substantive equality in outweighing considerations of freedom of testation. She notes that ubuntu 'places a high premium on establishing a compassionate society'[45] and impels a shift away from a dematerialised conception of freedom – 'none of us are free until all of us are free'.[46]

The broader restorative justice aspects of ubuntu require the repairing of fractured relationships including through non-adversarial means. Given the extensive rips in South Africa's social and relational fabric as a result of colonialism, apartheid, patriarchy and multifarious forms of oppression, domination and inequality, this reading of ubuntu may be helpful to courts going forward in adjudicating private anti-discrimination claims.

In sum, then, relational equality takes the goal of equality as a partially deontic requirement, which articulates the ideal that members of society should stand in equal relation to each other

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[40] Dale Hutchison, 'From Bona Fides to Ubuntu: The Quest for Fairness in the South African Law of Contract' [2019] Acta Juridica 99.
[41] *MEC for Education: KwaZulu-Natal v Pillay* 2007 ZACC 21 [53], quoting from Kwame Gyekye, 'Person and Community in African Thought' in P Coetzee and A Roux (eds), *Philosophy from Africa: A Text with Readings* (OUP 1998) para 321.
[42] *Damons v City of Cape Town* 2022 ZACC 13.
[43] *Afri-Forum v Malema* 2011 ZAEQC 2.
[44] ibid [18].
[45] *King NO v De Jager* (n 3) [243].
[46] ibid [245].

(and so tackles social hierarchy).[47] Put differently, for the relational egalitarian a society is just if individuals within that society relate to one another as equals.[48] This in turn has some parallels with Fraser's participatory parity ideal and with the value of ubuntu. Relational egalitarian accounts typically (but not always) go beyond institutions to the associative, social, interpersonal and individual spheres.[49] This has clear salience for the extension of the anti-discrimination duty to private persons.

But there remain potential limits to the scope of this duty. Some relational egalitarians, such as Lippert-Rasmussen, advocate for a pluralist relational egalitarianism, which admits of other important non-egalitarian principles.[50] To determine the ultimate bounds of the anti-discrimination duty as weighed against other rights and imperatives, one may need to have recourse to other values and principles. In the next section, I turn to some of these countervailing considerations.

6.3 COUNTERVAILING CONSIDERATIONS: SOME CONCEPTUAL AND NORMATIVE BRAKES

Some things are legally permissible, even if morally questionable.[51] In this regard, it is helpful to differentiate between unfairness in a moral sense, and unfairness in the sense that satisfies the doctrinal test and is prohibited by law. Even so, there are two ways of characterising the constraints on the scope of South African anti-discrimination law. The first is that the law permits 'Constitution-free zones',[52] where the private sphere is not legally regulated. As Collins points out, designating a sphere as private 'is often no more than an assertion that it should be unregulated'.[53] The second is that, in principle, all zones are subject to the Constitution, but that the Constitution protects plural values and rights, which means that the right not to be discriminated against must yield to the exercise of other rights in certain instances. The second characterisation is what has been adopted by our Constitutional Court:

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[47] Elizabeth S Anderson, 'What Is the Point of Equality?' (1999) 109 Ethics 287.
[48] Gosepath (n 18).
[49] See discussion in Kristin Voigt, 'Relational Equality and the Expressive Dimension of State Action' (2018) 44 Social Theory and Practice 437 where she delineates these accounts (for example, Anderson, Fourie, Miller and Scheffler look at individual and social relations, while Pogge and Schemmel are more institutional-focused).
[50] Lippert-Rasmussen (n 16).
[51] Hugh Collins, 'Discrimination and the Private Sphere' in Kasper Lippert-Rasmussen (ed), *The Routledge Handbook of the Ethics of Discrimination* (Routledge 2018) 360; Jeremy Waldron, 'A Right to Do Wrong' (1981) 92 Ethics 21.
[52] *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being* 2015 ZACC 35 [70], where Van der Westhuizen J considers but does not decide whether such zones exist in South African law.
[53] Collins (n 51) 361.

> Not to do so says that there are areas of life and law where the values of the Constitution may be ignored. That is not the kind of choice that our Constitution allows judges to make. They must ensure that the values of the Constitution underlie all law, not that some part of the law can exist beyond the reach of constitutional values.[54]

In the previous section, I argued that substantive equality, including a concern with relational egalitarianism, provides the justification for the creation of universal anti-discrimination duties in South African law. However, there is reason to think that the anti-discrimination duty is not always imposed in each case (that is, a private person is not always ultimately held to have violated that duty). Unlike in other jurisdictions, however, that determination takes place not as a threshold enquiry as to whether the private person is a duty-bearer in the first place, but instead as a downstream enquiry as to whether the discrimination is nevertheless justified and therefore fair. In South African law, only unfair discrimination is prohibited. This enquiry thus operates as a normative and conceptual brake to the anti-discrimination duty.

In this section, I explore the factors that operate as conceptual brakes in South African law. I do so in three parts. I begin by discussing the harm principle and the extent to which the state, through law, can coerce subjects to behave in certain ways. Next, I examine the role of autonomy in constraining the reach of anti-discrimination law. I argue that autonomy has a dual role here: it is both a principle internal to anti-discrimination law's purposes (for anti-discrimination laws can serve to enhance autonomy) and a principle external to anti-discrimination law that operates as a conceptual brake. This is exemplified, I contend in the final part of the section, in direction-sensitive and affective relationships which would founder were they to be subject to the law's dictates.

6.3.1 Coercive power of the state

The concern of state coercion is that state power should be properly limited, and that when designating conduct as being unfair discrimination (regardless of whether the conduct is public or private), the state uses law to coerce behaviour from people. Because the imposition of anti-discrimination duties on private persons is coercive, it must be legitimate.

Many influential theories on justified state coercion turn on the harm principle – that is, the state is empowered to prevent one person from harming another (but not empowered to regulate matters where there is no such harm). As originally articulated by Mill, that principle is that 'the only purpose for which power can rightfully be exercised over any member of a civilised

[54] *H v Fetal Assessment Centre* 2014 ZACC 34 [23].

community against his will is to prevent harm to others'.[55] This conception of the harm principle is non-perfectionist and non-paternalist – that is, it is no justification for coercion that the individual would themselves benefit from intervention. The account is also consequentialist: it looks at the consequences of legal regulation to determine its legitimacy. More recently, Feinberg has developed an attenuated version of the harm principle to justify the moral limits of the criminal law.[56] Much of this literature has developed in the specific context of criminal sanction and anti-discrimination laws are not typically punitive in the criminal sense.

Nevertheless, anti-discrimination duties are enforced through the law, and so coercive considerations and the harm principle may still be apposite. At least some would argue that the extensive regulation of private discrimination in South African law is unjustified, for it goes beyond the regulation of the kinds of harms that the state can coercively restrain. The harm principle, and its relationship to justifying state coercion, shifts the focus from private persons to the state. Even if the duties are ultimately imposed among private persons, the state remains an operative actor, for the legal validity or invalidity of each private act is assessed against the background law which is ultimately created by the state (through legislation, the common law or customary law).[57] This takes us back to some vertical considerations – here we are looking at the justification for the state putting in place anti-discrimination duties that operate against private persons, but the locus of the justification is happening at the level of *state* coercion. This account thus must work in lockstep with an account of why the duty can be imposed horizontally – otherwise, it is incomplete.

Proponents of the harm principle, however, must account for what kinds of harms are to be prevented. This sets the question back a step: we still need an understanding of what constitutes such a harm to delineate between legitimate and illegitimate coercion. The more plausible justification for the state's coercive powers links the harm principle to autonomy. Raz and Gardner make this argument, as I discuss below. This is true for anti-discrimination law too: the government is obliged to regulate society such that individuals can choose a range of options for a worthwhile life, which in turn means that actors who have the power or act as gatekeepers in respect of these opportunities are bound not to discriminate. In the context of

[55] John Stuart Mill, *Utilitarianism, On Liberty and Considerations on Representative Government* (Dent 1993) 9.
[56] Joel Feinberg, *Harm to Others* (OUP 1984).
[57] Bhatia (n 6) 92; see also *Du Plessis v De Klerk* 1996 ZACC 10 [79] where Mahomed DP noted that the law does not operate for the first time only when conduct is sanctioned – instead the law 'precedes it and is indeed the ultimate source for the legitimation of any conduct'.

other jurisdictions, for example, that theory has grounded the extension of the anti-discrimination duty to certain non-state actors, partially on the basis of publicness as I discussed earlier. But one need not be wedded to publicness as the reason for this extension to think that autonomy plays a critical role here.

6.3.2 Autonomy

In this next section, I turn to consider the role that autonomy can play in grounding the anti-discrimination duty, and as acting as a constraint on whether that duty is ultimately imposed, as a result of an all-things-considered enquiry.[58]

In chapter 3, I considered the argument, advanced by Gardner, Khaitan and Moreau, that the purpose of anti-discrimination law is linked to individual autonomy.[59] On this view, anti-discrimination duties are put in place to *enhance* autonomy – i.e. by prohibiting X from discriminating against Y on ground Z, we create the conditions for Y to exercise her autonomy in a way that she would not be able to had X been permitted to discriminate against her. Put differently, this view posits that 'it is freedom rather than equality which provides a better foundation for discrimination law'.[60] Discrimination's wrong, then, comprises stripping an individual of her valuable choices, or at least impeding her ability to form and access these choices.

In chapter 4, I revisited these ideas to map out different conceptions of autonomy. I juxtaposed the conception of autonomy as synonymous with negative liberty, which involves constraining state intervention in subjects' lives, with positive freedom. These debates draw heavily on Raz's perfectionist model of autonomy, which in turn operates to justify state intervention and regulation:[61] '[t]he government has an obligation to create an environment providing individuals with an adequate range of options and the opportunities to choose them'.[62] For these reasons, I concluded that there is no straightforward opposition between freedom, on the one hand, and equality, on the other, even if sometimes tensions arise.

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[58] I have also discussed autonomy at length at other points in the thesis, including South African courts' shifting treatment of autonomy. See especially 1.3.3, 2.2.3, 2.5.1 and 4.4.2.
[59] John Gardner, 'On the Ground of Her Sex(uality)' (1998) 18 Oxford Journal of Legal Studies 167; Sophia Moreau, 'What Is Discrimination?' (2010) 38 Philosophy & Public Affairs 143; Khaitan (n 24).
[60] Khaitan (n 24) 59.
[61] Joseph Raz, *The Morality of Freedom* (OUP 1986).
[62] ibid 418; John Gardner, 'Liberals and Unlawful Discrimination' (1989) 9 Oxford Journal of Legal Studies 1.

How does autonomy connect to relational egalitarianism? The version proposed by Khaitan contends that the autonomy that we are entitled to (and that anti-discrimination law protects) is bound up with those that others enjoy i.e. it is relative. On this view, even negative liberty cannot be fully enjoyed in the context of vast power imbalances. Nedelsky is helpful for extending this argument, as she takes a non-atomised approach to autonomy. She argues that '[w]hat makes autonomy possible is not separation, but relationship. This approach shifts the focus from protection against others to structuring relationships so that they foster autonomy.'[63] Nedelsky contends that because the individual self is constituted[64] by relationships, autonomy need not be pitted against relational accounts – on the contrary, an overly individualist, independent conception of autonomy misses this important dimension of identity.[65] Relationships enable, rather than impede, autonomy. When determining the extent to which the right to equality (and, more particularly, anti-discrimination law) imposes obligations on private persons, then, a relational account is helpful for understanding how legal regulation structures relationships, and thus can either facilitate or impair autonomy including by removing hierarchies.[66]

On these accounts, autonomy underpins anti-discrimination law's purposes. But it can also act as a constraining influence. Conflicts between individuals' claims to freedom, on the one hand, and the right not to be discriminated against, on the other, are not obviated or resolved simply by pointing out that both of those interests may express, or be animated by, an underlying autonomy concern. The law will still be required to make hard choices between the claims that are presented by individuals where there are clashing rights.

This is all further complicated when we consider critiques of autonomy-based accounts, on the basis that sometimes what appear to be uncomplicated exercises of autonomous choices may in fact be determined – or at least conditioned – by extant power structures. Nussbaum, for example, denies that all preferences are on a par politically and should be solely weighted according to subjective considerations or accepted as given. Instead, she argues that adaptive preference formation must be accounted for: individuals' preference may be formed or adjusted based on oppression, lack of access to basic goods or as a result of unjust social orderings.[67]

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[63] Jennifer Nedelsky, 'Reconceiving Rights as Relationship' (1993) 1 Review of Constitutional Studies 1, 1.
[64] Nedelsky clarifies, however, that individuals are not *determined* by their relationships, for they still exercise agency over how those relationships constitute their identity.
[65] Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (OUP 2011).
[66] See earlier discussion in 3.5.3.
[67] Martha Nussbaum, 'Adaptive Preferences and Women's Options' (2001) 17 Economics and Philosophy 67.

On this view, there are grounds to be wary of simply taking an assertion of autonomy at face value, as I discuss later with respect to the Tinder intuition pump. And the point links more broadly to substantive equality, which in turn requires tackling inequalities and creating the conditions required for meaningful exercises of choice.

6.3.3 Direction-sensitive and affective relationships

Further, even a thicker conception of autonomy does not mean that all instances of discrimination will be unlawful. In particular, the state should not paternalistically supervise choices and preferences that would undermine the meaning of intimate and affective relationships. These relationships are premised on and constituted by spontaneous feeling and self-expression rather than duty or reason.[68] As Gardner contends, these relationships can be described as direction-sensitive – any significant degree of directive intervention will upset or even destroy them.[69] Gardner argues for the preservation of some forms of lawful discrimination on the basis of direction-sensitive relationships. He takes the animating force of anti-discrimination duties to be that they enhance autonomy – and argues that there are instances where enforcing autonomy-based anti-discrimination duties would ultimately be destructive of personal autonomy itself, where the enforcement would 'leav[e] too little space for truly spontaneous and self-expressive activities and relationships'.[70] Romantic and sexual choices are 'paradigmatic cases of the private',[71] and exemplify direction-sensitive, affective relationships.

Nevertheless, romantic and sexual preferences do not form in vacuums – and even what seem like fully autonomous choices may be shaped by external determinants of power. Srinivasan argues that the politics of desire are not normatively neutral.[72] Instead, the formation of our sexual desires are shaped by large, external and systemic forces. Srinivasan advances a contemporary argument of the much older feminist insight that sexual desire is shaped by patterns of domination (which are not only sexist, but also determined by racism, classism, ableism, transphobia and other systems of oppression). These observations are empirically supported. For example, data from OKCupid, a large online dating platform, shows extensive

[68] Collins (n 51) 362.
[69] John Gardner, 'Private Activities and Personal Autonomy: At the Margins of Anti-Discrimination Law' in B Hepple and E Szyszczak (eds), *Discrimination: The Limits of Law* (Mansell Publishing Limited 1992).
[70] ibid 155.
[71] Fourie (n 17).
[72] Amia Srinivasan, *The Right to Sex* (Bloomsbury 2021).

racial preferences in dating which disproportionately and adversely impact Black women.[73] As Srinivasan puts it, '[t]he question, then, is how to dwell in the ambivalent place where we acknowledge that no one is obligated to desire anyone else, that no one has a right to be desired, but also that who is desired and who isn't is a political question, a question usually answered by more general patterns of domination and exclusion'.[74] It is a political question and a moral one, but not one that can be readily answered by legal proscription, as we see in case 5 of the Tinder user. Perhaps this appears not to be a principled delineation of the anti-discrimination duty. But there is something significant to affective relationships which would be undermined were the state to intervene in them, even when those have discriminatory impacts.

In sum, in the previous two sections I argued that substantive equality incorporates relational demands, and that this justifies more searching private anti-discrimination duties. However, there are some countervailing considerations that must be taken into account, including autonomy and privacy interests as well as direction-sensitive, affective relationships. These considerations may act as a brake on the anti-discrimination duty in certain circumstances. I now turn to consider how courts should adjudicate cases which raise these competing factors within the framework of PEPUDA.

6.4 GIVING MEANING TO SECTION 14 OF PEPUDA

In chapter 5, I briefly discussed section 14 of PEPUDA in the context of the legislative drafting process.[75] I explained that there were extensive debates about how the defence to a discrimination claim should be framed. Because the constitutional text prohibits *unfair* discrimination, much of the work involves determining what constitutes fair as opposed to unfair discrimination. The enquiry into fairness, then, is the tool 'for sifting permissible from impermissible discrimination'.[76] In the end, the drafters opted for a general defence based on fairness (rather than also providing for sector-specific defences) that applies to both direct and indirect discrimination, and that includes considerations of impact and justification. For this reason, section 14 of PEPUDA was drafted in a way that incorporates some of the justificatory dimensions, including a proportionality assessment, that appear in the limitations enquiry in section 36 of the Constitution. The effect is that factors that would otherwise have been relevant

[73] Hugh Lazenby and Paul Butterfield, 'Discrimination and the Personal Sphere' in Kasper Lippert-Rasmussen (ed), *The Routledge Handbook of the Ethics of Discrimination* (Routledge 2018).
[74] Srinivasan (n 72).
[75] See 5.3.3 in chapter 5 partem, and the sources referred to there.
[76] Judicial Services Commission, *Bench Book for Equality Courts in South Africa* (2002) 71.

to a limitations analysis are instead folded into the fairness inquiry under section 14. As I explained in chapter 5 when dealing with the drafting history of the defence,[77] this means that the enquiry under section 9 of the Constitution is slightly different from the enquiry under section 14 of PEPUDA (though not, I think, inconsistent with it in a way that impugns the latter's constitutional validity). The enquiry under section 14 also accommodates 'a consideration of other rights'[78] which is important to any balancing process.

While the anti-discrimination duty is in principle imposed on both the state and all private persons, it is true that the basis for justifying discrimination may be larger for a private person than it is for the state. If the creation of a broad class of duty-bearers extends the reach of anti-discrimination law, then the availability of a justification or defence to discrimination attenuates the onerousness of the anti-discrimination duty.[79] Although there is no requirement of intention or fault in South African law for unfair discrimination to be established,[80] there is the possibility of justifying the discrimination as being fair. One thing that is clear (and argued for in both chapters 4 and 5) is that a litigant cannot simply appeal to courts to be less intrusive in more intimate spheres without more – many egregious human rights violations take place within deeply personal spheres (such as gender-based violence, for example). Instead, a proper analysis of the competing rights and interests must be undertaken.

Notionally, then discrimination by private persons may be justified – or found to be fair – in circumstances where the right not to be discriminated against is to be balanced against other rights, interests or principles – as these may constitute 'legitimate purpose[s]' and contextual factors that inform the section 14 determination. Section 14 thus is a legislative attempt to reflect the law's recognition of pluralist rights, interests and values. However, as we saw in chapter 5, jurisprudence on this provision remains nascent and underdeveloped.

Section 14 has three subsections.[81] The first, section 14(1), targets affirmative action and restitutionary programmes, providing that it is not unfair discrimination to take measures to protect or advance persons disadvantaged by unfair discrimination. This echoes section 9(2) of

[77] See 5.3.3.
[78] Catherine Albertyn, 'Getting It Right in Equality Cases: The Evaluation of Positive Measures, Groups and Subsidiarity in Solidariteit v Minister of Basic Education' (2018) 135 SALJ 403, 419.
[79] Khaitan (n 24) 197.
[80] *City Council of Pretoria v Walker* (n 2); Ngcukaitobi, Currie and De Waal (n 2).
[81] Section 14 is reproduced in full as an annexure to this thesis.

the Constitution, and makes clear that such measures 'are not in themselves a deviation from or invasive of, the right to equality'[82] but instead a constituent part of the right to equality.

Section 14(2) and 14(3) are somewhat clumsily drafted and must be read together – the two subsections set out the factors that must be taken into account in determining whether discrimination is fair and make clear that the burden of proving fairness rests on the respondent. Section 14(2) provides that the following must be taken into account in the fairness analysis: (a) the context; (b) the factors in section 14(3); and (c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned. In chapter 5, I contended that section 14(2)(c) forms part of a justification enquiry, and is an awkward fit in the section as a whole – for one, it should be folded into the list of factors that appear in section 14(3). The drafting history of the provision shows that the inclusion of section 14(2)(c) came about after extensive lobbying from business interests as a way of incorporating expressly commercial considerations (for example, differentiation that takes place in the formation of insurance policies).[83] Section 14(3) then proceeds to list nine additional factors for determining (un)fairness, which must be assessed together with the context and section 14(2)(c).

Reading section 14 as a whole, the overall considerations can be grouped into four categories: first, considerations that go to redressing inequality and so rebut unfairness; second, complainant-oriented considerations (that focus on impact); and third, defendant-oriented considerations (that focus on justification and proportionality). Finally, there are some considerations that are overarching. In the table below, I classify the factors in section 14 according to these categories.

[82] *Minister of Finance v Van Heerden* 2004 ZACC 3 [30]; see also Van der Westhuizen J's separate judgment in *South African Police Service v Solidarity obo Barnard* 2014 ZACC 23 [136].

[83] C Albertyn, B Goldblatt and C Roederer, *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (Wits University Press 2001) 47; Anton Kok, 'A Socio-Legal Analysis of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000' (LLD Thesis, University of Pretoria 2009) 94; Barney Pityana, 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000' (2003) 44 Codicillus 2, 6.

Redressing inequality and rebutting unfairness	**Complainant-oriented (impact)**	**Respondent-oriented (justification and proportionality)**	**Overarching**
Section 14(1) It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons	Section 14(3)(a) Whether the discrimination impairs or is likely to impair human dignity	Section 14(2)(c) Whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned	Section 14(2)(a) The context
	Section 14(3)(b) The impact or likely impact of the discrimination on the complainant	Section 14(3)(f) Whether the discrimination has a legitimate purpose	Section 14(3)(d) The nature and extent of the discrimination
	Section 14(3)(c) The position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage	Section 14(3)(g) Whether and to what extent the discrimination achieves its purpose	
	Section 14(3)(e) Whether the discrimination is systemic in nature	Section 14(3)(h) Whether there are less restrictive and less disadvantageous means to achieve the purpose	
		Section 14(3)(i) Whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to— (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or (ii) accommodate diversity	

6.4.1 Methodology: a multifactorial approach

The methodology I propose for courts to use when interpreting and applying section 14 is multifactorial rather than mechanical. It is indebted to the groundwork laid by Albertyn, Golblatt and Roederer,[84] as well as the judicial bench book on PEPUDA, and the multifactorial approach developed by Bilchitz in his recent work on adjudicative balancing for determining corporate duties to realise fundamental rights,[85] where he advocates a staged analysis that begins with beneficiary-oriented factors before turning to agent-relative ones. Bilchitz argues that a multifactorial approach is especially well suited to adjudicative questions where there is normative complexity. It stems from a recognition that where there are competing rights, no single one should be given absolute (i.e. conclusive) weight.[86] This is consistent with the Razian approach to rights that I discussed earlier, in chapter 2.[87] Given the need for context-sensitivity, the methodology should avoid requiring rigid and unyielding rules. On the other hand, some structure to the analysis is needed, to avoid the balancing exercise simply being reduced to a swampy all-things-considered determination.

However, there are important differences between the multifactorial approach I propose and Bilchitz's methodology. For one, the anti-discrimination duty methodology is fundamentally framed by section 14 of PEPUDA itself and must be guided by the deliberate legislative choices reflected in that provision. Three further preliminary points must be made. The first is that I presume that PEPUDA's definition of discrimination in section 1 has already been proven when a court begins with its section 14 analysis. The second point is that sections 7, 8 and 9 of PEPUDA (which deal with prohibition of unfair discrimination on the grounds of race, gender and disability respectively) set out some specific considerations that are pertinent to assessing discrimination on these grounds, but they are all – in any event – subject to the section 14 test. I do not deal with those considerations expressly here when setting out the more general test under section 14. The third point is that the section 14 enquiry is subject to the burden of proof provided for in section 13(2). Once it is established that discrimination has taken place, the respondent bears the burden of proving that the discrimination is fair. The legislative decision for the respondent to bear this burden is warranted, given how extensive disadvantage and discrimination are in South Africa, the difficulties attendant to establishing that discrimination

[84] Albertyn, Goldblatt and Roederer (n 82); Judicial Services Commission (n 76).
[85] David Bilchitz, *Fundamental Rights and the Legal Obligations of Business* (CUP 2021) chapter 8 partem.
[86] ibid 222–225.
[87] See 2.2.1.

occurred in the first place, including that sociological and statistical detail may be difficult for a complainant to furnish, and the importance of ensuring that PEPUDA processes are accessible. All this shifts the needle in terms of the justificatory burden that a respondent must meet, but appropriately so. Put differently, section 14 (read with section 13) is structured to give presumptive weight in favour of the right to equality – evident, for example, in the allocation of onus – while still recognising that there is scope for justification. I propose a four-step enquiry for courts to undertake when assessing the fairness of private discrimination.

1. First, the courts must assess whether the discrimination is fair on the basis of the carve-out (or defence) provided by section 14(1). If the discrimination is taken for restitutionary or affirmative action measures, then this would be a defence to unfair discrimination and the section 14 enquiry would end.[88] I note, however, that the case law on restitutionary and affirmative action measures has relied on section 9(2), rather than this provision of PEPUDA,[89] and so do not return to this provision in my discussion below.
2. Second, the courts then deal with complainant-oriented factors. These include, but are not limited to, the impact of the discrimination on the complainant, and must take account of the importance accorded to equality as both a right and value in our constitutional order.
3. Third, the court then turns to respondent-oriented factors, which involve the possible justifications that can be raised to defend discrimination as being fair. As I detail below, within this sub-enquiry, it is not sufficient for the court to simply accept that the discrimination occurred for a purpose. Instead, that purpose must be legitimate, that purpose must be achieved by the discrimination, and the court must be satisfied that there are no less restrictive or less disadvantageous means of achieving that purpose.
4. Fourth, the court must then engage in a final proportionality exercise that takes account of overarching considerations such as the context, the nature and extent of the discrimination, and other constitutional values.

[88] Judicial Services Commission (n 76) 37.

[89] *Minister of Finance v Van Heerden* (n 82); *South African Police Service v Solidarity obo Barnard* (n 82); *Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association* 2018 ZACC 200; Nomfundo Ramalekana, 'Towards a Transformative Approach to Affirmative Action in South Africa' (University of Oxford 2021); Catherine Albertyn, 'Getting It Right in Equality Cases' (n 78); Chris McConnachie, 'Affirmative Action and Intensity of Review: South African Police Service v Solidarity obo Barnard' (2018) 8 CCR 163.

As discussed in chapter 5,[90] because section 14 incorporates elements of section 36 of the Constitution, a limitations analysis usually would be obsolete. The exception to this is if section 14 of PEPUDA itself were to be subject to constitutional challenge on the basis that it unduly limits rights. The prospects of success of such a challenge are dubious. In the section that follows, I discuss the second, third and fourth steps of the enquiry in more detail.

6.4.2 Impact, justification and proportionality

Complainant-oriented factors[91]

The complainant-oriented factors must account for systemic discrimination, in line with a commitment to substantive equality. As Sheppard notes, tackling systemic discrimination requires addressing 'not simply the static state of inequality but the dynamics of its reproduction'.[92]

The complainant-oriented factors include, in section 14(3)(a), whether the discrimination impairs or is likely to impair the complainant's human dignity. In chapter 3, I discussed South Africa's approach to the value of human dignity as a constituent of the right to equality, showing that this has been expressly endorsed as being central to the unfair discrimination analysis.[93] I also touched on arguments that are sceptical of the outsized role accorded to human dignity in equality jurisprudence, arguing that it is conceptually unhelpful as it is too vague, overly emphasises the individual as opposed to group disadvantage and structural inequality, and does little actual work in the analysis.[94] While dignity is not exhaustive of our conception of substantive equality, it does play a role, especially in capturing the recognition dimensions of discrimination. For that reason, it remains a component of South Africa's discrimination jurisprudence, and a salient complainant-oriented factor in the determination of unfairness. But

[90] See 5.3.3.

[91] The section that follows on complainant-oriented factors is shorter than the section immediately after on respondent-oriented factors, because a lot of the pertinent considerations regarding the former have been previously canvassed in a fair amount of detail in chapter 3.

[92] Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (McGill-Queen's University Press 2010) 34.

[93] See, for example, *President of the Republic of South Africa v Hugo* 1997 ZACC 4; *Harksen v Lane NO* 1997 ZACC 12; *South African Police Service v Solidarity obo Barnard* (n 82); *Minister of Home Affairs v Fourie* 2005 ZACC 19; Laurie Ackermann, *Human Dignity: Lodestar for Equality in South Africa* (Juta 2012); Susie Cowen, 'Can "Dignity" Guide South Africa's Equality Jurisprudence?' (2001) 17 SAJHR 34.

[94] Cathi Albertyn and Beth Goldblatt, 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 SAJHR 278; DM Davis, 'Equality: The Majesty of Legoland Jurisprudence' (1999) 116 SALJ 398; Chris McConnachie, 'What Is Unfair Discrimination? A Study of the South African Constitutional Court's Unfair Discrimination Jurisprudence' (DPhil Thesis, University of Oxford 2014).

it is not 'the fundamental criterion or "litmus test" of the enquiry into fairness',[95] instead acting as one of a number of complainant-oriented considerations, in line with the multidimensional approach to substantive equality canvassed in chapter 3.

Impact, captured by section 14(3)(b) of PEPUDA, is a critical complainant-oriented factor, and is linked to the importance that substantive equality places on context. An impact assessment of fairness 'is not concerned with abstract inquiries into the form of conduct but requires a court to examine the consequences of discriminatory conduct', foregrounding the complainant in the enquiry.[96] This factor also links to section 14(3)(c) (focusing on patterns of group disadvantage) which requires evaluating 'whether the discrimination deepens the identifiable group's disadvantage'.[97] Section 14(3)(e) requires analysing whether the discrimination is systemic in nature. As I discussed in chapter 3, substantive equality demands addressing systemic disadvantage and patterns of group disadvantage, where groups have been subject to oppression, exclusion and marginalisation.[98]

Respondent-oriented factors

There are three preliminary points to make regarding the respondent-oriented factors as part of the fairness enquiry. The first goes to the evidentiary burden. Section 14 is applicable both where the state and where a private person is the respondent in a discrimination claim and, as we saw earlier, the respondent will bear the burden of proving that the discrimination, once proven, is nevertheless fair. Given this thesis's focus, my discussion of the respondent-oriented factors is more oriented to the case of a private defendant. As already noted, section 14 does incorporate some of the standards of the section-36 limitations analysis which would apply when the state is defending a law of general application from constitutional challenge. The state is responsible for creating and implementing legislation and policies, and so is expected to provide persuasive reasons for these where they limit others' rights, in accordance with a broader culture of justification.[99] This includes an onerous obligation to place evidence before

[95] Albertyn, Goldblatt and Roederer (n 83) 44.
[96] Judicial Services Commission (n 76) 126.
[97] Gideon Basson, 'Poverty as a Ground of Unfair Discrimination in Post-Apartheid South Africa' (LLM Thesis, University of Stellenbosch 2022) 114.
[98] Owen Fiss, 'Groups and the Equal Protection Clause' (1976) 5 Philosophy & Public Affairs 107; Ruth Colker, 'Anti-Subordination Above All: Sex, Race and Equal Protection' (1986) 61 New York University Law Review; Sheppard (n 92); McConnachie (n 94); Khaitan (n 24); Catharine MacKinnon, 'Equality' (2020) 149 Daedalus 213.
[99] Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 SAJHR 31.

the court.[100] Under section 14 of PEPUDA, there is no requirement to establish a law of general application – discrimination often occurs through conduct, rather than through laws or policies. For this reason, a private person would have to defend her conduct and must meet a justification standard, even if she may not have the same burden of public reasons to discharge as a state actor would. Again, a variegated approach may be appropriate: the degree of evidence required of a natural person may be lower than that required of a large corporate entity, with the power that an entity wields factoring in as pertinent considerations. Having said that, even if there is something of a variegated approach, this does not release all private persons from the duty of putting up a justification for discrimination in order to defend that discrimination as being fair. It would not be enough to simply assert that the discrimination was in service of a private interest.

Second and relatedly, the nature of the private person is relevant not just for evidentiary purposes but more broadly for assessing both impact and justification. If a private person has extensive capacity to exploit and abuse others in a way that entrenches systemic inequality and impairs dignity, that must be factored into assessing fairness. On the other hand, the value of the autonomy interests of the private entity may be relevant for establishing that discrimination is justified. Autonomy, in turn, is dependent on the nature of the private person bearing the duty. Although publicness is not a threshold criterion for whether a private person is a duty-bearer at all, it may enter the frame as part of a fairness analysis. We have seen in recent years that courts do differentiate between kinds of private persons and so does PEPUDA, in its provisions on positive measures in Chapter 5. Some considerations that may be pertinent to an individual's interests would not be applicable to, say, a large juristic person. One clear example is that a juristic person is not a bearer of the right to dignity:[101] it cannot, then, raise dignity-based considerations as a defence to a discrimination claim. Given that South African courts have linked autonomy to the right to dignity, this means that the balancing exercise for a corporate entity attempting to defend a discrimination claim will have to factor in quite different considerations than if the defendant were a natural person, and rightly so. As

[100] *Minister of Justice and Constitutional Development v Prince (Clarke and Others Intervening), National Director of Public Prosecutions v Rubin, National Director of Public Prosecutions v Acton* 2018 ZACC 30; S Woolman and H Botha, 'Chapter 34: Limitations' in S Woolman (ed), *Constitutional Law of South Africa* (Juta 2013).

[101] *Reddell v Mineral Sands Resources (Pty) Ltd* 2022 ZACC 38 [61]; *Tulip Diamonds FZE v Minister of Justice and Constitutional Development* 2013 ZACC 19 [35]; *Investigating Director: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2000 ZACC 12 [18].

jurisprudence develops, we may also see more disambiguation and variegation among private persons, depending, for example, on their size, function and influence.

The final preliminary point to make is that where holding a private person to the anti-discrimination duty would totally obliterate the core of their countervailing right, then the discrimination would likely be justified. This links to the points made earlier about affective, directive-sensitive relationships. If the state were to circumscribe natural persons' decisions about who to be romantically and sexually involved with, this may go too far in denuding the person of the right to autonomy and privacy in a way that strikes at the core of the right.[102]

Having made those three initial points, I now begin with the first respondent-oriented factor, which is in section 14(2)(c). This defence would not always arise in the context of private discrimination. I have discussed this section already in chapter 5 and earlier in this chapter. The provision allows for discrimination to be fair if it 'reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned'. As already noted, the inclusion of this provision came about through extensive lobbying by commercial interests. It amounts to a 'test within a test' – that is, a nested test regarding reasonableness and justifiability within the overarching fairness enquiry.[103] Although it came about because of robust industry pressure, the threshold that must be met is an exacting one: the discrimination must be according to objectively determinable criteria, must be reasonable and justifiable (with reasonableness incorporating proportionality elements), and must not only be connected to the concerned activity but *intrinsic* to it. What section 14(2)(c) does is provide for the express possibility of taking into account commercial considerations – such as an insurance policy that assesses risk in a way that discriminates on a protected ground – as part of the fairness analysis.[104] It is not a trump provision, and it must be read as a whole alongside section 14, including with the requirements that such discrimination, to be fair, is subject to the stringent threshold requirements.

The next set of respondent-oriented factors involves a cluster of considerations. First, a respondent must show that the discrimination was animated by a legitimate purpose (in terms of section 14(3)(f)). The Constitutional Court noted in *Harksen* that the purpose must not be manifestly directed at impairing the complainants, but instead 'aimed at achieving a worthy

[102] This is subject to some important exceptions: for example, the state does regulate under-age sex as being non-consensual and thus rape, and rightly so.
[103] Judicial Services Commission (n 76) 129.
[104] Albertyn, Goldblatt and Roederer (n 83) 47.

and important social goal',[105] which could include the exercise of a right by the respondent. It can include commercial purposes but there is no free-for-all – as the Constitutional Court has recognised, '[w]e must guard against allowing stereotyping and prejudice to creep in under the guise of commercial interests'.[106] These cases were decided in relation to state action. The possible range of purposes that can be drawn on by private actors is potentially broad, including religious, commercial and personal. However, it is not enough to simply point to a purpose per se. Instead the respondent must also establish that the purpose is legitimate – i.e. one that is recognised by law and does not simply give expression to naked bigotry or prejudice.

Second, in terms of section 14(3)(g) a respondent must show that there is a relationship between the discrimination and its purpose: both whether the discrimination achieves its purpose, and also to what extent it does so. This component of the enquiry goes beyond mere rationality,[107] which only requires that a means-ends relationship is shown.[108] If the discrimination is underpinned by a legitimate purpose – say, the exercise of the right to freedom of religion – but does not achieve this purpose – for example, because it is asserted by a commercial entity running a business that refuses to allow for same-sex marriages on its property, as in the *Beloftebos* case discussed in chapter 5 – then it would not meet this test.[109]

Third, the respondent must show both that there were not less restrictive and less disadvantageous means to achieve the purpose, in terms of section 14(3)(h). This incorporates aspects of the section-36 limitations analysis, and so jurisprudence developed around giving meaning to the requirement in section 36(e) regarding less restrictive means is relevant. Arguably, section 14(3)(h) incorporates and goes beyond this (by requiring also that a respondent shows that there are no less disadvantageous means to achieve its purpose). If the purpose could be vindicated by less burdensome means, then the discrimination would not be fair. This is effectively a proportionality enquiry, and an exacting one (although just how exacting may vary, depending on the private person in question). It emphasises that the justification raised by the respondent cannot hollow out the complainant's right to equality.

Finally, as a rebuttal to establish that the discrimination was fair, the respondent could draw on section 14(3)(i) to show the steps taken to address the discrimination or to accommodate

[105] *Harksen v Lane NO* (n 92) [52].
[106] *Hoffmann v South African Airways* 2000 ZACC 17 [34]; discussed in Judicial Services Commission (n 76) 128.
[107] Cf Basson (n 97) 145.
[108] *South African Police Service v Solidarity obo Barnard* (n 82); McConnachie (n 89).
[109] See 5.5.1.

diversity. For example, a religious institution (in case 4) could demonstrate that although it does not permit female religious leaders, that is nonetheless fair when understood against the background of other steps it has taken, say, to include women leadership in non-spiritual roles.

Overarching considerations

Finally, the court must assess several overarching considerations. I identify three here: context; the nature and extent of the discrimination; and ultimate balancing.

Context-sensitive factors are critical, and these speak to why the duty is extended beyond a publicness criterion in the first place. Context also explains asymmetric considerations relating to patterns of group disadvantage and socio-economic contexts, and the various conceptions of (in)equality traversed in chapter 3.[110] Those considerations may often militate in favour of holding the respondent liable in respect of the anti-discrimination duty. Context, then, is critical. We saw in chapter 3 that substantive equality mandates a contextually sensitive and historically rooted assessment of disadvantage and impact on a multidimensional basis. In her work on inclusive equality, Sheppard argues for multiple levels of contextualism: a micro context that examines the realities of disadvantage in individuals' lives from the perspective of the affected individual or group; a meso context that considers institutional relations of equality and inequality; and a macro context that situates broad legal questions in a larger socioeconomic and political frame.[111] This captures individual, relational and broader systemic societal or institutional dimensions. The parties cannot be considered in normative vacuums – instead, the relationships among the parties to a dispute, including their respective power, colours the assessment. Contextual considerations are not only applicable to the complainant, but also may be relevant for weighing respondent-oriented factors. For example, in a case involving a clash between the right not to be discriminated against on the ground of sexual orientation, and the right to freedom of religion and association, the relevant context, history and nature of the religious institution and practice may be pertinent.

Next, the nature and extent of discrimination, as set out in section 14(3)(d), incorporates both complainant- and defendant-oriented considerations. If the nature of the discrimination is such that it impairs dignity and entrenches group disadvantage along existing tracks of systemic inequality, then that should weigh heavily with the court. If, instead, the discrimination is not extensive in its impact, or by its nature relates to an affective, directive-sensitive personal

[110] See Basson (n 97) for an analysis of the fairness enquiry in the context of poverty as a ground of discrimination.
[111] Sheppard (n 92).

decision then that may factor in favouring of justifying it as fair. There is another important consideration. If the essence (or core) of the competing right would be obliterated, then there may be grounds for limiting the scope of the anti-discrimination duty.[112] This is another way of stating the direction-sensitivity concern engaged with earlier. Put differently again, the countervailing right should not be reduced to a vanishing point. Having said that, given the history, context and lived realities of inequality in South Africa, presumptive weight must be given in favour of the right not to be discriminated against unfairly.[113]

In the end, a court must make a call about how to strike the balance between the various rights, interests and values at stake. In chapter 2, I considered and rejected a few objections to balancing as a form of judicial decision-making.[114] I argued that balancing does not strip rights of their normative force, that rights can be compared and weighed up as the balancing exercise requires, and that, institutionally, both the legislature and courts are equipped to undertake this exercise. What section 14 of PEPUDA amounts to, in effect, is a legislative proportionality test. Proportionality allows the balancing of pluralistic values.[115] Bhatia, for example, argues that a balancing enquiry is often inapposite for determining the scope of horizontal duties, on the basis that such an enquiry is too closely associated with the presumption of formal equality and parity of power between individuals.[116] This is too hasty, for the balancing enquiry is sufficiently supple to allow for context-sensitive factors to form part of the assessment, including institutional power differentials between the relevant parties.

Section 14 of PEPUDA is an example of this – the legislature has set an overarching framework, and then mandated the courts with determining the appropriate balance to be struck in a particular case, in a way that is structured without being mechanical. For this reason, the clash between rights need not collapse into a balancing enquiry that straightforwardly sets unencumbered freedom (that is, negative liberty interests as understood, shorn of any institutional or structural context) in opposition to equality.[117] This need not mean, however, that a balancing enquiry is not at all germane. One can endorse a more comprehensive understanding of the personal autonomy interests that may be captured in other rights without rejecting that, in the context of specific adjudication, a balancing or proportionality process

[112] Collins (n 51) 367.
[113] David Bilchitz, 'Should Religious Associations Be Entitled to Discriminate?' (2011) 27 SAJHR 219.
[114] See 2.6.
[115] Collins (n 51).
[116] Bhatia (n 6) 157.
[117] See criticism in Bhatia (n 6); A Barak, 'Constitutional Human Rights and Private Law' in D Friedmann and A Barak (eds), *Human Rights in Private Law* (Hart 2001).

ought to be undertaken. That balancing can accommodate the structural and institutional concerns that are apt for understanding both the relational context of the parties and the underlying demands of substantive equality without presuming parity of power among individuals.

6.4.3 Applying the analysis to the five intuition pumps

I now briefly apply the analysis to the five intuition pumps discussed throughout this thesis.

Case 1 involves a bed and breakfast owner who refuses to provide accommodation to a Black couple, citing a biblical verse and religious beliefs as a reason. We begin by assessing the complainant-oriented factors. The discrimination is an indisputable impairment of the couple's dignity. It expresses to them that they are less deserving of respect and do not have equal moral worth. The impact of this discrimination is serious, given the context of systemic oppression and degradation of Black people on the grounds of race, and its entrenchment of historic and extant patterns of group disadvantage. Given that the discrimination has occurred on a protected ground, the owner must discharge a presumption of unfairness. Turning to the respondent-oriented factors, the justification proffered by the owner is not compelling. The bed and breakfast is a business that offers services to the public generally, which means that any claim to autonomy falls short. If the owner's conduct is prohibited and a finding of unfair discrimination is reached, that would not obliterate the core of their right to freedom of religion, which the owner can still exercise and enjoy in their personal capacity. The discrimination is not saved by being intrinsic to the activity concerned, as is required by section 14(2)(c). Although freedom of religion may be a legitimate purpose in terms of section 14(3)(f), here the relationship between the discrimination and the purpose is remote – rejecting the couple does not achieve the purpose of giving expression to a natural person's freedom of religion. In any event, there are less restrictive and less disadvantageous means of achieving the right to freedom of religion. Looking at the discrimination as a whole it is clearly unfair: the context of the subjugation of Black people in South Africa and the nature of the discrimination militate against finding that it is justified, and the impairment of the right to equality far outweighs the countervailing right to freedom of religion. This was indeed the conclusion reached by a High Court on these facts.[118]

[118] *iSimangaliso Wetland Park v Sodwana Bay Guest Lodge* 2018 ZAKZDHC 62.

Case 2, where a cakeshop refuses to bake a wedding cake for a queer couple, would be analysed very similarly. Sexual orientation is an expressly protected ground, arising from systemic discrimination against queer people and the importance of sexual orientation in living an autonomous life. Again, the cakeshop owners' rights to freedom of association and religion are not reduced to a vanishing point – instead, they can be exercised fully outside of the context of running a business that provides goods to the general public. The balance to be struck here must favour equality.

Case 3 draws on the *Wilkinson* judgment,[119] discussed at length in chapter 5.[120] Can a testator justifiably discriminate in a private will by specifying that only biological grandchildren, and not grandchildren who are adopted, will benefit from the will? The complainant-oriented factors must be considered. The discrimination does impair the dignity of the adopted grandchildren – again, it conveys that the testator does not consider them to be of equal moral worth. The impact of this discrimination on the adopted grandchildren is that it reinscribes patterns of disadvantage, given the context of adoption in South Africa, and the potential psychological consequences of a message conveying to adopted children that they are not fully members of a family unit. It also has important distributive consequences.[121] The discrimination is not defensible on the basis of section 14(2)(c) – it is not intrinsic to the activity of testation. Although it may be underpinned by a legitimate purpose – the exercise of freedom of testation, recognised as a component of autonomy and the right to privacy – there are less disadvantageous and less restrictive means of vindicating that purpose. Proscribing this discrimination would not denude a testator of the core of their freedom to testate entirely, but would only circumscribe it. Balancing the countervailing sets of rights and interests, the discrimination is not justified as being fair. The intrusion into the testator's decision is warranted, on the basis that it is proportional given the need to vindicate the right not to be discriminated against unfairly, not least because the intrusion regulates but does not obliterate the right to testamentary freedom.

Case 4 is harder. It involves a religious institution that refuses to recognise and provide access to a woman who has trained as a religious leader, on the grounds that the religion only accepts male religious leaders and that this is a legally protected exercise of the rights to freedom of association and freedom of religion. On the complainant-oriented side, the discrimination does

[119] *Wilkinson v Crawford NO* (n 4).
[120] See 5.5.2.
[121] On the distributive consequences of freedom of testation, see Victor AJ's concurring judgment in *King NO v De Jager* (n 3) [205]–[209].

impair the complainant's right to dignity, on the basis that it treats her as less worthy of moral consideration on the grounds of gender. Gender discrimination is systemic in nature, given patriarchal structures of society that have entrenched extensive patterns of discrimination in ways that include denying women access to positions of leadership across many spheres of social life. The impact on the woman is also serious – she has trained to be a religious leader, presumably an exercise of a deeply held choice consistent with her right to lead an autonomous life. These are all weighty considerations in favour of finding the discrimination to be unfair. However, the countervailing considerations are also compelling. It may be open to the religious institute to invoke section 14(2)(c), on the basis that the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity of religious leadership. To do so, the institute would need to establish that it is intrinsic to their religious beliefs and practices that only men, and not women, can serve as religious leaders. The institute also could turn to the factors in section 14(3)(f) to (h) to argue that the discrimination serves a legitimate purpose and achieves that purpose, and that there are no less restrictive or less disadvantageous means to achieve the exercise of a sincerely held religious belief. In the end, the court would need to carefully balance these factors in the context of the specific facts which may tip the scales either way. It will also need to take into account contextual considerations – for example, whether the institute had previously recognised women as religious leaders, whether a different entity provided the training, etc. Depending on these considerations, the discrimination by the religious institute may be found to be fair, but the institute would be required to meet the high evidentiary and justificatory burden to discharge its onus. There is another way of approaching this case. The court could find that the discrimination in this instance is unfair on balance, but then attenuate the effects of this finding through its remedial powers in terms of section 21 of PEPUDA, as I discuss in the section that follows.

Finally, we have case 5 of the Tinder user who exclusively swipes to match only with opposite-sex persons of the same race and religion. One preliminary point is that this case may not even get off the starting blocks: it is not clear who the complainant or respondent would be, and enforcing laws around wrongful private discrimination in the deeply personal sphere is difficult, costly and ineffective. There are some evidentiary concerns too: the internal decision-making processes of individuals in very private spheres are not easily accessible.[122] One

[122] Matt Zwolinski, 'Why Not Regulate Private Discrimination?' (2006) 43 San Diego Law Review 1043.

possible workaround in this case is that online platform themselves could be regulated to preclude users from expressly setting screening settings that track, say, racist preferences.

On the merits of the case, the complainant-oriented factors are clear (and see the discussion of Srinivasan earlier in this chapter on how sexual desire is shaped by patterns of power and dominance). However, the respondent-oriented factors are very weighty. Concluding that the Tinder user discriminates unfairly in a manner that is prohibited by law may be too deep an incursion into the right to privacy (setting aside the possibility of regulating Tinder, even if not individual users), whereas prohibiting domestic violence (which occurs within intimate partnerships, classically understood to form part of the private sphere) is not, no matter how morally questionable one might think the user's selective swiping is. For it is impermissible for the law to intrude into such deeply direction-sensitive decisions. Affective relationships, along with the epistemic limits to law's regulation, helps explicate why this particular exercise of autonomy and the right to privacy would be obliterated were the state to prohibit it. So, the respondent could argue that the discrimination is for a legitimate purpose which is achieved by the exercise of their choice in sexual and romantic partners, and that there is no less restrictive or less disadvantageous means available for the exercise of these rights that would not hollow them out. This is not because there are spheres which are immune from the law's reach, but instead because the person's competing autonomy interests are given more weight: 'there are no legal questions left in South Africa to which the Bill of Rights is simply and inherently irrelevant'.[123]

6.5 ROLE OF REMEDIES AND THE LIMITS OF THE LAW

6.5.1 The remedial repertoire

Remedies constitute important litigious and adjudicative tools that are available in the context of private discrimination law. In chapter 5, I discussed Bilchitz and Woolman's contributions on the role that remedies can play in dealing with cases where the right not to be discriminated against on the grounds of sexual orientation clashes with the right of freedom of religion.[124] Section 21 of PEPUDA confers broad remedial powers on Equality Courts, including the power to order payment to an appropriate body or organisation; to implement special measures to

[123] Stephen Ellmann, 'A Constitutional Confluence: American "State Action" Law and the Application of South Africa's Socioeconomic Rights Guarantees to Private Actors' (2001) 45 New York Law School Law Review 21, 49.
[124] See 5.5.1.

address unfair discrimination; to pay damages to the complainant; or to make an unconditional apology. This provision of PEPUDA has a lot of potential, in part because it is so open-ended – and again it has been underused. Courts' remedial powers can play a role in helping to nuance findings on the competing rights at play, and remedial innovations can be particularly important in the context of addressing systemic discrimination, including in particular industries.[125]

A court could thus make a finding that conduct amounts to unfair discrimination, but instead of ordering the respondent to rectify this by, for example, appointing a woman religious leader (in case 4), it could issue a declarator that includes that an institute is not required to take this step, but nevertheless is liable for damages, or the court could mandate a dialogic process that requires participation from a range of interested parties. Particularly where there is a clash of rights at stake, the possibility of employing creative remedies may be helpful not only for resolving the litigation, but for facilitating important democratic dialogue.

In this respect, lessons can potentially be drawn from South Africa's remedial jurisprudence on meaningful engagement.[126] This jurisprudence originally developed in the context of eviction disputes but has been expanded to other areas. Indeed, the eviction context itself often involves private persons asserting negative liberty interests, against occupiers who are frequently disadvantaged, and of course takes place in the contested domain of land and housing tenure. In this way, eviction jurisprudence as anti-discrimination clash cases require a sobering reckoning of the limits of law – and courts in adversarial processes – to resolve 'contradictory values that are so intrinsic to the way our society functions'.[127]

In *De Lange*, where the Court declined to determine the complex balance to be struck between the right not to be discriminated against on the grounds of sexual orientation, and freedom of religion and association rights, the concurring judgment makes the following point:

> It is of course one thing to say that the Constitution with its values and rights reaches everywhere, but quite another to expect the courts to make rulings and orders regarding people's private lives and personal preferences. Courts are not necessarily the best

[125] See the recommendations proposed in T Ngcukaitobi, K Williams and A Hassim, 'Inquiry into Allegations of Unfair Racial Discrimination and Procedural Unfairness by Medical Schemes' (Section 59 Investigation Panel 2021) <https://cmsinvestigation.org.za/wp-content/uploads/2021/01/Section-59-Interim-Report-19-Jan-2021.pdf> accessed 30 January 2023.
[126] *Port Elizabeth Municipality v Various Occupiers* (n 36); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 ZACC 1; *Head of Department, Department of Education, Free State Province v Welkom High School* 2013 ZACC 25.
[127] *Port Elizabeth Municipality v Various Occupiers* (n 36) [38].

> instruments to balance competing rights and values in intimate spheres where emotions and convictions determine choices and association.[128]

Given this, I do not want to overstate the helpfulness of remedial repertoire in all cases – not least because some of the remedial solutions may impose ongoing difficulties, burdens or costs on complainants and those already in a position of disadvantage to continue to engage with their discriminators. Remedial innovation must be sensitive to these concerns, including by bringing in non-governmental organisations and civil society entities so that the hard work of meaningful engagement is not displaced onto individual complainants.

6.5.2 The limits of the law

The need for creative remedies stems from a recognition that legal prohibition alone is insufficient. Put differently, there are limits to law's ability to secure widescale social and material change.[129] South Africa's equality legislation envisages that, for equality and social justice to be achieved, broadscale shifts in the hearts and minds of all social actors are needed – the social structures, practices and attitudes in which discrimination and inequality are deeply embedded must change.[130]

But law – and perhaps, particularly, adversarial litigation – is an imperfect, even blunt tool for securing this change, notwithstanding a Constitution that sets out to be transformative.[131] As Kok notes, PEPUDA 'is unlikely to achieve its stated purpose of effecting large-scale societal change in South Africa',[132] even if can provide effective individual redress. It would be naïve to think that simply putting in place anti-discrimination laws, even ones that are extensive, would address massive private inequality in South Africa. Anti-discrimination law is, at best, a partial and imperfect tool for addressing the multifarious manifestations of inequality.

What is the role of the law here, then? In additional to the remedial tools offered in PEPUDA, there are indirect, non-legal options in the state's toolbox to address the drivers of private

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[128] Van der Westhuizen J's concurring judgment in *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being* (n 52) [79].
[129] Catherine Albertyn, 'Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion towards Systemic Justice' (2018) 34 SAJHR 441; J Brickhill and M Finn, 'Ethics and Politics of Public Interest Litigation' in J Brickhill (ed), *Public Interest Litigation in South Africa* (Juta 2018); Thandiwe Matthews, 'Interrogating the Debates Around Lawfare and Legal Mobilization: A Literature Review' (2022) 14 Journal of Human Rights Practice 1.
[130] Kok (n 83).
[131] Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 SAJHR 146.
[132] Kok (n 83) 304.

discrimination.[133] These are partially addressed by positive measures that the state can put in place to tackle private discrimination.

Against this backdrop, there are some serious questions regarding which kinds of legislated shifts alone could be effective in a large-scale structural way. Put more starkly, it is clear that anti-discrimination law can never comprehensively address the many drivers of material inequality, exploitation and injustice – not least because many of these drivers are embedded in far broader and deeper political, social and economic structures or institutions. Anti-discrimination law is also not a perfect tool for large-scale intersectional struggle, particularly with respect to political and economic forces.

That does not mean that anti-discrimination law is pointless and should be abandoned, however. Instead, anti-discrimination law has more modest, but still vital, aims. It is classically situated at the level of a discrete litigant, and an individual form of conduct or policy, and seeks some form of justice or redress within this frame. Of course, that is not to elide the fact that anti-discrimination legislation and precedent can have a wider impact than only on the individual litigants who seek enforcement, or that anti-discrimination law continues to play a critical role – including an expressive and symbolic one – in advancing incremental gains and setting its face against the entrenched, legally sanctioned discrimination that characterised the colonial and apartheid regimes.

6.6 CONCLUSION

What is the scope of, and justification for, the imposition of anti-discrimination duties on private persons? What are the arguments for its expansion, and what are its brakes and limitations? This chapter has explored these central questions.

I argued that South Africa's approach to private anti-discrimination duties is justified by several normative imperatives, most principally a commitment to context-sensitive substantive equality that is informed by histories of subjugation, oppression and ongoing injustice, including a form of relational egalitarianism that takes some of anti-discrimination law's claims to exert force on the social and interpersonal relationships between individuals.

Nevertheless, this does not mean that South African law will always find that an anti-discrimination duty is imposed in every discriminatory act committed by a private person.

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[133] K Lippert-Rasmussen, *Born Free and Equal? A Philosophical Inquiry into the Nature of Discrimination* (OUP 2013).

Instead, there are important conceptual and normative brakes on the duty. These brakes include limitations on the coercive power of the state, the role that autonomy plays as a value internal to anti-discrimination law but also as an external constraint, and the direction-sensitive and affective character of particular relationships which would be undermined by state intervention. Ultimately, this is consistent with a recognition that while South Africa's legal regime centres equality as a critical right and value, there are other non-equality values which need to be accounted for and which, in certain instances, may trump egalitarian concerns. Determining this does not take place at the threshold stage of delineating the class of duty-bearers, but rather at the justification stage, which is where section 14 of PEPUDA's fairness analysis is pertinent.

From this discussion, I proposed a multifactorial approach for courts to employ when interpreting and applying section 14 of PEPUDA. So what can help in charting a course forward? Two important sets of concerns will shape South Africa's jurisprudence as it develops: the role of justification and proportionality in an anti-discrimination claim (particularly when assessing whether discrimination is unfair); and the repertoire of remedies that are available to litigants and the courts.

CHAPTER 7

CONCLUSION

7.1 INTRODUCTION

South Africa is a staggeringly unequal country. Legacies of colonialism, apartheid, patriarchy, heterosexism, global capitalism and other forms of power, oppression and subjugation mar South African society, and have caused a fundamental rupture in social relations. Discrimination in South Africa still cuts across both public and private spaces. Worldwide, too, there is increasing recognition that exertions of private power can threaten human rights as violations by the state do. Although the state is the primary duty-bearer of constitutional rights, South Africa's constitutional scheme envisages that private persons can bear constitutional obligations. This is in terms of section 8(2) of the Constitution, which sets out that a provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, and makes this subject to the right and nature of the duty in question. Section 8 – the broad horizontal application provision – is not the only constitutional provision that envisages the application of constitutional duties to private persons. Section 9(4) of the SA Constitution sets out that 'no person' may unfairly discriminate, directly or indirectly, against anyone on protected grounds. PEPUDA, South Africa's equality legislation, follows suit and provides for the more extensive – though sometimes confusingly crafted – regulation of private actors.

Other jurisdictions have grappled with the question of private anti-discrimination duties, and the tension between the right to equality and other rights and interests. The somewhat more narrow approach taken to discriminatory acts by private individuals in many other jurisdictions is frequently determined by publicness, and justified by a combination of two grounds: first, that by legally proscribing that discrimination the state is effectively coercing its subjects to behave in a particular way and, as with any state coercion, this must be legitimate (and where such behaviour takes place in deeply private spheres, it would not be); and second and relatedly, that individuals have a negative liberty or autonomy interest in their actions not being subject to state interference.

But the correct balance to be struck in South Africa must be informed by the gaping inequalities, stemming from oppression and disadvantage, that continue to characterise society,

and by the constitutional commitment to substantive equality which exerts relational demands. This not only sees the state as a site for justice, but also recognises claims that individuals assert among each other. For these reasons, South African law creates a universal class of anti-discrimination duty-bearers. This class is not unified by features of publicness. Instead, the duty is imposed in principle on all persons, as well as the state. The effect of this is that private spheres and relationships classically thought to be immune from the reach of anti-discrimination law are open to regulation. The enquiry, then, turns on whether a legal duty is imposed in the circumstances, rather than whether a private person qualifies as a duty-bearer in the first place. Ultimately, what determines whether that duty is imposed is not a threshold enquiry of the publicness of the bearer or the activity in question, but instead a contextually sensitive balancing enquiry at the justification leg of an anti-discrimination claim.

7.2 THE ARGUMENT OF THIS THESIS

Against this backdrop, this thesis has examined two primary issues: first, the scope of private persons' anti-discrimination duties in South African law, as determined by the Constitution, PEPUDA and the courts; and second, the underlying normative justifications for these duties.

In addressing these issues, the thesis explored a number of ancillary questions:

- How have South African courts understood horizontal application under the Constitution generally? What lessons can be drawn from jurisprudence on the broad horizontal application provision in section 8(2) of the Constitution, to inform the more targeted horizontal anti-discrimination duty in section 9(4) and PEPUDA?
- What conception, or conceptions, of equality does the Constitution require? How have these conceptions of equality been formulated, articulated and understood in case law and legislation? How do these conceptions of equality, which have primarily been developed with the state as duty-bearer, apply in respect of private persons?
- How do comparative jurisdictions approach private anti-discrimination duties? What theoretical accounts are advanced in comparative constitutional law to justify the boundaries of these duties? Do these accounts have salience in the South African context?
- How does South African law's commitment to substantive equality translate to regulating private anti-discrimination duties in legislation and case law? What lessons

can be drawn from the legislative drafting history? What principles emerge from recent doctrine on private anti-discrimination duties?

- How should courts' reasoning on private anti-discrimination duties be developed and deepened? How should courts strike the balance in the private sphere between one person's right to equality (including the right not to be discriminated against unfairly) and another person's rights, when the two are in tension? What interpretive content should be given to the unfairness enquiry housed in section 14 of PEPUDA, and what prospects does this enquiry have as a balancing or proportionality mechanism?

Chapter 1 laid the foundational ground for answering these questions. I explained the animating research questions and themes that run through the research, including relational equality, the public/private divide, autonomy, and the need to balance competing rights. I mapped out my research methodology which has been theoretical and doctrinal, sometimes using a set of five intuition pumps to explore the content and boundaries of the private anti-discrimination duty.

In chapter 2, I explored horizontality in a general sense. I demonstrated that South African law departs from the approach taken in many other jurisdictions, which are typically more restrictive regarding the imposition of horizontal obligations on non-state actors. Instead, although the state is the principal duty-bearer with respect to constitutional rights, the South African constitutional scheme nevertheless envisages that, in appropriate circumstances, private persons do owe each other constitutional obligations. I argued that ordinarily this should be through indirect application as mediated through more subsidiary, discrete legal rules rather than through direct reliance on the right itself, for these rules can better account for the competing interests which may be at play in private legal relationships. South Africa's approach to horizontality more generally is informative for, and operates as the doctrinal backdrop to, the approach to the more specific private anti-discrimination duty. Arguably the latter duty is more extensive: unlike section 8(2), the anti-discrimination duty on private persons is not textually qualified, and has been given force in legislation and content in recent case law.

In practice, however, some lessons can be drawn from the approach taken by South African law to the broad horizontal duty (where there is more developed case law) and the more specific duty borne by private persons to not discriminate unfairly. First, we see the development of a variegated approach that recognises that private persons are not presumed to be insulated from constitutional obligations but nevertheless differentiates among kinds of private persons.

Second, we can track the importance of autonomy in the developing jurisprudence. In determining the ultimate scope of horizontal duties – both broadly and for anti-discrimination law – autonomy continues to play a significant role, albeit a contested one. There is some inconsistency in courts' treatment of autonomy. Some judgments suggest that autonomy must be understood as protecting negative freedom and constraining state interference in private decisions, while others endorse a thicker conception of autonomy which is not necessarily inconsistent with holding private persons to duties in particular circumstances. Third, in both areas, courts have favoured outcomes-based decision-making. Judgments are often very qualified and limited to the distinct factual circumstances. So, we see some resistance in the courts to creating consistent and clear tests in favour of more flexible, context-dependent reasoning. What has been missing is the development of any sort of coherent balancing exercise as a vital part of adjudicating competing rights. The development of a substantive balancing jurisprudence is critical for giving content to both broad horizontal constitutional duties and the specific private anti-discrimination duty.

Chapter 3 then shifted from a discussion of horizontality to consider the conceptions of equality that have found favour in South African courts and legal academic literature. The chapter was therefore a broad excursus on competing (and, sometimes, complementary) theories of (in)equality. However, as I argued, these conceptions were developed (in doctrine, and in academic literature) with the state as the principal duty-bearer. I contended that South Africa's endorsement of and approach to substantive equality warrants the imposition of private anti-discrimination duties. Put differently, while substantive equality has predominantly been theorised with the state as the duty-bearer, its norms can (and, I argued, should) be extended to apply to private persons. I thus made the case that substantive equality necessitates private duties. However, in application the state's duties cannot be grafted onto private persons wholesale, for there are a number of significant theoretical and normative divergences. These divergences justify a somewhat differentiated approach, at least insofar as the enquiry regarding fairness of discrimination is concerned in the justification leg of the enquiry. This does not mean that there is nothing to be drawn from the conceptions of equality that have developed within the state-centric paradigm. On the contrary, those conceptions mandate a creative and more context-sensitive treatment of private anti-discrimination duties.

In chapter 4, I shifted from this broad theoretical framework laid in chapters 2 and 3 to consider the approach taken to private anti-discrimination duties in foreign contexts. I drew on comparative law as a conceptual backdrop to South Africa's own doctrinal and jurisprudential

development of private anti-discrimination duties. I looked at the approach taken in five jurisdictions: the United States, Canada, the United Kingdom, India and Kenya. Most other jurisdictions require that organs of state do not discriminate, but do not extend that duty to non-state actors, save for particular kinds of private persons – typically, private persons operating in particular spheres of activity such as employment and the provision of goods and services. Publicness, then, is key to the extension of anti-discrimination duties beyond the state in most of the surveyed jurisdictions.

To illustrate, Title II, III and VI of the United States' Civil Rights Act 1964 proscribes discrimination in public accommodation and facilities, and in programmes that receive federal funds. Section 5 of the Canadian Human Rights Act 1985 prohibits discriminatory practices by denying access to goods, services, facilities, accommodation or premises that are 'customarily available to the general public'. Section 29 of the United Kingdom's Equality Act 2010 prohibits discrimination in the 'provision of a service to the public or a section of the public (for payment or not)'. Article 15(2) of the Indian Constitution 1950 prohibits private discrimination in respect of denying access to shops, public restaurants, hotels, places of public entertainment, and broader public amenities (such as wells and roads) that are 'dedicated to the use of the general public'. Kenya and South Africa are outliers in this, as both jurisdictions envisage the imposition of more sweeping anti-discrimination duties, with Kenya's Constitution and doctrine influenced by the South African model.

I discussed the dominant justificatory accounts that have been advanced in other jurisdictions, which largely turn on a conception of publicness. In the final section of the chapter, I examined the role that the public/private divide plays in determining the content and scope of these duties, and considered some objections to the divide. I argued that a strict divide between public and private spheres does not capture the actual descriptive state of legal regulation, and is also not normatively compelling. Instead, substantive equality mandates a different approach to the divide that does not differentiate between a legally regulated public sphere and a legally insulated private sphere, but instead allows for autonomy and privacy interests to play a role when balancing competing rights.

In chapter 5, I examined South Africa's legislative and doctrinal approach to regulating anti-discrimination duties in the private sphere. I considered the drafting history of section 9(4) of the Constitution and of PEPUDA. The legislative drafting process demonstrates a deliberate attempt to put in place regulatory machinery to achieve substantive equality, which in turn

requires the regulation of the private sphere. However, the legislation has been underused by both litigants and courts, which were tasked with striking the balance between competing rights and interests, especially in the context of private discrimination. I traced the evolution of the case law on the right to equality and duties on private persons, showing that section 14 of PEPUDA remains neglected in our law. I examined two doctrinal case studies on competing private rights and duties: the clash between LGBTQI+ rights and freedom of religion, and the regulation of private testamentary bequests. From these case studies, I charted divergent approaches to governing private persons' anti-discrimination duties: an approach that favours insulating the private sphere; an approach that advocates for the duties of private persons to mirror those of the state; and an approach that advocates for the private sphere to be regulated, but subject to a lower level of judicial scrutiny. This leaves several important questions open for development, including the appropriate intensity of review for private discrimination, and the role of section 14 of PEPUDA in informing this balancing exercise.

In chapter 6, I explored several normative considerations that inform the doctrinal approach to private anti-discrimination duties in South African law. I argued that substantive equality requires a form of relational egalitarianism which is sensitive to context and to power in social and interpersonal interactions. These insights also find expression in the indigenous value of ubuntu. Any commitment to autonomy must be understood against this background. However, this does not mean that the anti-discrimination duty is always imposed on a private person, regardless of the justifications they may raise in the context of a discrimination claim. I considered normative and conceptual brakes that may operate against the duty, including considerations of direction-sensitive, affective relationships. I then shifted to section 14 of PEPUDA, arguing that the range of normative considerations traversed in the chapter should inform its interpretation. I proposed a multifactorial approach to adjudicating whether discrimination is fair in the context of private anti-discrimination duties, which proceeds by looking at complainant-oriented considerations such as impact and the existence of systemic discrimination, and then considering respondent-oriented justification considerations such as legitimate interests that may be at play – but which nevertheless are subject to a proportionality assessment. I finally argued that the large toolbox of remedies afforded to courts by PEPUDA also play an important role in adjudicating private anti-discrimination claims.

7.3 CONTRIBUTION OF RESEARCH

This thesis has provided an excursus on private anti-discrimination duties in South African law. It has benefited from the rich and deep scholarship developed both locally and globally on substantive equality and the application of rights to non-state actors. The lacuna that it attempts to fill is the intersection of those two areas: what substantive equality means for the imposition of anti-discrimination duties on private persons. As far as I am aware, this thesis is the first extended scholarly project on this question in South African law, and thus tackles an area of law that, as recent jurisprudence demonstrates, is burgeoning and calls out for scholarly engagement.

The main contributions that the thesis has made are as follows. First, it synthesised the existing doctrine and academic work on horizontal duties in South African law and provided a novel analysis of the lessons that can be drawn from the broad horizontal duty governed by section 8 of the Constitution for giving content to the private anti-discrimination duty. Second, it engaged with comparative law on private anti-discrimination duties, showing how most jurisdictions take a somewhat different approach that turns on publicness. Although South African law also differentiates between private actors through something of a variegated approach, it creates a universal class of duty-bearers and then loads much of the adjudicative work into the fairness test. Third, the thesis is a contribution to the literature because it pulls out the normative strands that underpin South Africa's approach by tracing the legislative drafting history and underlying moral commitments that are woven into the regulatory regime. Finally, the thesis attempts to provide guidance for the future expansion of doctrine by suggesting an interpretive approach to section 14 of PEPUDA that involves a multifactorial balancing enquiry. The thesis thus hopes to have both theoretical and practical implications for the development of South African law.

7.4 FUTURE WORK

The scope of this thesis and the research methodology I used give rise to a number of topics for further research. There are two clear areas for future research that would be extensions of the themes explored in this thesis that I discuss briefly below.

Positive duties[1]

The first area for future research that stems from this thesis is the imposition of positive duties on private persons to advance equality. At certain points in the thesis, I discussed chapter 5 of PEPUDA, which was put in place to bring about structural change and encourage the achievement of equality by imposing positive duties on both state and non-state actors. That chapter has never been brought into force, and is currently the subject of proposed legislative amendments which would operationalise the chapter.[2] Positive measures are important for tackling systemic injustices and so are a constituent part of substantive equality. They are given force by section 9(2) of the Constitution, which provides for measures that are designed to protect or advance disadvantaged persons, in order to promote the achievement of equality.

A number of other jurisdictions have also put in place legislative measures that govern positive (or mainstreaming) duties with respect to equality and anti-discrimination.[3] Chapter 5 is thus not without precedent, although South Africa's particular context calls for more exacting duties to eliminate unfair discrimination, promote equality and, on an aspirational and ongoing basis, achieve equality.

For these reasons, positive measures are proactive, requiring institutional and policy-oriented steps, as opposed to being reactive (i.e. concerned with litigation arising from particular complaints in respect of discrete discriminatory acts). As Fredman notes, inequality and discrimination are caused not simply by individual acts or wrongdoers but instead are structurally embedded and so should be addressed through innovative legal methods.[4] She contends that proactive duties – which primarily fall on those with power and capacity to bring about change – are significant, as 'they require steps to be taken which are also forward-looking, structural and group-based', as opposed to being reactive and individualised.[5] This is

[1] Please note that some of what follows is drawn from passages that I drafted as part of a 2021 submission made by the South African Research Chair in Equality, Law and Social Justice, School of Law, University of Witwatersrand, Johannesburg, 'Submission to the Department of Justice and Constitutional Development on Amendments to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000' (2021) <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/law/documents/sarchi-equality-chair/SARChISubmission.pdf> accessed 20 February 2023.

[2] Promotion of Equality and Prevention of Unfair Discrimination Amendment Bill (X-2021).

[3] See, for example, the UK's Equality Act sections 1, 149–157 and Sandra Fredman, 'Positive Duties and Socio-Economic Disadvantage: Bringing Disadvantage onto the Equality Agenda' [2010] European Human Rights Law Review 290, 290; Aileen McColgan, 'Litigating the Public Sector Equality Duty: The Story So Far' (2015) 35 Oxford Journal of Legal Studies 453; C McCrudden, 'Mainstreaming Equality in the Governance of Northern Ireland' in C Harvey (ed), *Human Rights, Equality and Democratic Renewal in Northern Ireland* (Hart 2001).

[4] Sandra Fredman, 'Breaking the Mold: Equality as a Proactive Duty' (2012) 60 American Journal of Comparative Law 257.

[5] S Fredman 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23 SAJHR 232.

consistent with substantive equality, which envisages tackling existing systemic inequalities, and so requires positive action from the state as well as other actors.[6]

Developments of positive duties within PEPUDA parallel a shift in the courts' approach to positive duties on private actors more generally.[7] A frequent feature of the horizontality debate (particularly with respect to socio-economic rights) is whether private persons can bear positive duties, or if the duties are restricted to being negative in character. Negative obligations typically are understood as constraining or prohibiting action, while positive obligations are understood as requiring action.[8] Shue, however, famously argues that the distinction between negative and positive duties is overstated, and that protecting a negative right will often require the performance of a positive duty.[9] That is borne out in South Africa's broad socio-economic jurisprudence on the nature and scope of the state's duties: 'the analysis of negative and positive duties are often closely intertwined, so much so that the Court often collapses the distinction'.[10]

In chapter 2 of this thesis, I discussed some of the judicial developments regarding horizontal application of rights in the form of positive duties imposed on private actors. I argued that the restrictive line established in *Juma Musjid*[11] that the duties imposed on private persons should only be negative in nature has yielded somewhat. More recent jurisprudence by the Constitutional Court has endorsed an all-things-considered value-driven approach to determine the nature of the duty borne by a private person, and has expressly allowed for the possibility that private actors can bear positive duties even in the context of socio-economic rights.[12]

However, courts have still been somewhat hesitant to articulate full-bodied positive horizontal duties. Instead, duties that appear to require positive steps are rather tortuously framed in negative forms. It would be welcome for the court to clarify that even if the duty-bearer is private, this does not preclude the imposition of positive duties even in the context of socioeconomic rights. As Van der Sijde points out, positive obligations are regularly imposed

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[6] Catherine Albertyn and Beth Goldblatt, 'Equality' in S Woolman (ed), *Constitutional Law of South Africa* (Juta 2013) 35-4; P Shin, 'Is There a Unitary Concept of Discrimination Law?' in D Hellman and S Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013) 180.

[7] Some of the discussion that follows is drawn from an article that was published during the course of writing this thesis: Meghan Finn, 'Befriending the Bogeyman: Direct Horizontal Application in AB v Pridwin' (2020) 137 SALJ 591.

[8] Onora O'Neill, 'The Dark Side of Human Rights' (2005) 81 International Affairs (Royal Institute of International Affairs 1944–) 427.

[9] Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (Princeton University Press 1980).

[10] Sandra Liebenberg, 'Interpretation of Socio-Economic Rights' in S Woolman (ed), *Constitutional Law of South Africa* (Juta 2013) 33-17.

[11] *Governing Body of Juma Musjid Primary School v Essay NO* 2011 ZACC 13.

[12] *Daniels v Scribante* 2017 ZACC 13; *Baron v Claytile (Pty) Limited* 2017 ZACC 24; *AB v Pridwin Preparatory School* 2020 ZACC 12; Finn (n 7).

on private individuals in other (common-law and statutory) contexts, and so 'is less alarming than some might think'.[13] The sharp, and seemingly normatively significant, distinction between negative and positive duties should be abandoned.

Socioeconomic rights, the right to equality and duties of private persons

The second area for future research is related to the discussion immediately above on positive duties, and involves the relationship between equality, anti-discrimination duties and socioeconomic rights as a manifestation of substantive equality.

Liebenberg and Goldblatt argue that equality jurisprudence must be more responsive to material disadvantage, and that equality and socioeconomic rights must be read interdependently. They compellingly contend that 'the value of equality should inform the interpretation of socio-economic rights to make that jurisprudence more responsive to systemic group-based disadvantage'.[14] Equality, then, can act as a fulcrum for conceiving of private parties' duties in respect of socioeconomic rights. It enables the consideration of systemic drivers and manifestations of disadvantage.

Whether and the extent to which private persons should bear any duties with respect to socioeconomic rights is a controversial and urgent question in South African law. The wording of socioeconomic rights in the Constitution may be an initial hurdle, as the rights require *the state* to take reasonable measures to progressively realise the rights. As Pieterse points out, however, this depends on an overly simplistic reading of the text,[15] and incorrectly precludes the possibility of indirect application (in part, through the state's duty to protect rights).

Nevertheless, a dominant view in academic literature and shared by at least some judges is that private persons do not bear any duties with respect to socioeconomic rights – save for, at most, a duty not to interfere with another's exercise of or access to the right.[16] Socioeconomic rights typically require positive action on the part of the duty-bearers. Private persons' ability to advance social goods is more constrained than the state's, as a result of capacitation, financial and expertise limitations, and so some argue that the imposition of such duties would be uneven

[13] E van der Sijde, 'Tenure Security for ESTA Occupiers: Building on the Obiter Remarks in Baron v Claytile Limited' (2020) 36 SAJHR 87.
[14] Sandra Liebenberg and Beth Goldblatt, 'The Interrelationship Between Equality and Socio-Economic Rights under South Africa's Transformative Constitution' (2007) 23 SAJHR 335, 337.
[15] Marius Pieterse, 'Indirect Horizontal Application of the Right to Have Access to Health Care Services' (2007) 23 SAJHR 157.
[16] Alfred Cockrell, 'Private Law and Bill of Rights: A Threshold Issue of "Horizontality"', *Bill of Rights Compendium* (LexisNexis 2001) 3A-18; Jafta J in *Daniels v Scribante* (n 12).

and ad hoc.[17] Private persons have their own interests (which the state does not), and these interests (including autonomy interests) are generally understood to be infringed when a private person is actively required to fulfil another's rights. The imposition of such duties on private persons thus requires political and social good will, and must confront the limits of the law in putting in place massive social programmes.[18] Some take this to mean that the state ought not to intervene in private relationships, for distributive justice is best served through taxation and the state.[19] Similarly, others argue that because socioeconomic rights flow from a social democratic vision of the role of the state,[20] it is the state's role, and not that of private persons, to fulfil social welfare rights.[21] This concern is ameliorated when the duties are legislatively imposed, because that imposition is more uniform and (given how legislation is made) comes about through participative, policy-laden and polycentric processes.

In any event, that argument is predicated on a particular commitment to a state-centric understanding of power, which this thesis has engaged with and ultimately rejected. While it is true that the state may have higher duties, or be more constrained in the set of justifications that it can raise as a defence for a rights infringement, that does not mean that only the state bears duties to realise fundamental rights. Instead, private actors – especially well-resourced corporate entities – can and should bear duties to realise socioeconomic rights, particularly where there is a 'need to prevent exploitation by the powerful of those who are more vulnerable'.[22] This is itself an egalitarian imperative. There is important literature on the basis for extending socioeconomic duties to private actors in South African law,[23] and the

[17] Michael Dafel, 'The Constitutional Rebuilding of South African Private Law' (DPhil Thesis, University of Cambridge 2018) 72; *Daniels v Scribante* (n 12) para 40.
[18] Dafel (n 17) 72.
[19] Edwin Cameron and Leo Boonzaier, 'Venturing beyond Formalism: The Constitutional Court of South Africa's Equality Jurisprudence' (2020) 84 Rabel Journal of Comparative and International Private Law 786, 816, citing C Fried *Contract as Promise* (Harvard University Press 2015) 106.
[20] H Cheadle and DM Davis, 'The Application of the 1996 Constitution in the Private Sphere' (1997) 13 SAJHR 44.
[21] *Government of the Republic of South Africa v Grootboom* 2000 ZACC 19 [35]. It is not only the state who is responsible for the provision of houses; other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing.
[22] Cameron and Boonzaier (n 19) 30.
[23] DM Chirwa, 'Towards Economic, Social and Cultural Rights Obligations of Non-State Actors in International and Domestic Law: A Critical Study of Emerging Norms' (PhD Thesis, University of Cape Town 2005); A Nolan, 'Holding Non-State Actors to Account for Constitutional Economic and Social Rights Violations: Experiences and Lessons from South Africa and Ireland' (2014) 12 ICON 61; Liebenberg and Goldblatt (n 14); Sandra Liebenberg, 'Grootboom and the Seduction of the Negative/Positive Rights Dichotomy' (2011) 26 SAPL 37; Mbuyiseli Madlanga, 'The Human Rights Duties of Companies and Other Private Actors in South Africa' (2018) 29 Stell LR 359; Marius Pieterse, 'Relational Socio-Economic Rights' (2009) 25 SAJHR 198.

development of these arguments in light of recent judicial decisions is an area for further research and engagement.

7.5 THE WAY FORWARD

Much work lies ahead in dismantling systemic inequality and regulating the multifarious forms of power – political, economic, social and relational – that create and reinscribe this inequality. While anti-discrimination law is an imperfect and even blunt tool for this change, the conceptual and adjudicative framework developed in this thesis is an attempt to provide some guidance for a very small part of this work, for both courts and lawyers in shaping litigation strategies. In recent years, courts have shown an increasing appetite for extending private duties to realise rights, emphasising that private persons are not insulated from the Constitution's demands. This provides a firm basis for further development of doctrine that taps into the transformative potential of PEPUDA. These developments must take seriously the need for reasoned, coherent jurisprudence in service of substantive equality, given our history of entrenched disadvantage that cuts across public and private spheres, and the profound moral and legal ruptures in the social and relational fabric of South Africa.

ANNEXURE

PEPUDA – SECTION 14

14 Determination of fairness or unfairness

(1) It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.

(2) In determining whether the respondent has proved that discrimination is fair, the following must be taken into account:

(a) the context;

(b) the factors referred to in subsection (3);

(c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.

(3) The factors referred to in subsection(2)(b) include the following:

(a) Whether the discrimination impairs or is likely to impair human dignity;

(b) the impact or likely impact of the discrimination on the complainant;

(c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;

(d) the nature and extent of the discrimination;

(e) whether the discrimination is systemic in nature;

(f) whether the discrimination has a legitimate purpose;

(g) whether and to what extent the discrimination achieves its purpose;

(h) whether there are less restrictive and less disadvantageous means to achieve the purpose;

(i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to—

(i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or

(ii) accommodate diversity.

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