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ARTICLE

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The Long Legacy of *Apartheid* Geography and the Reach of the South African Constitution's Equality Clause

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Abstract
This Article explores the reach of Section 9 of South Africa's democratic Constitution which entrenches the right to equality before the law and equal protection and benefit of the law in the light of the long legacy of *apartheid* geography. It argues that the equality clause has had its most profound impact in relation to areas of the law where discrimination is embedded in legal rules, perhaps most notably in the field of family law, and that it has had less impact in addressing patterns of material inequality that run along racial lines but that are not directly furthered by legislation or legal rules. It identifies some of the reasons why the equality clause is less effective at addressing patterns of racial inequality that arise from social and economic practices.

Keywords: Equality; South African Constitution; *apartheid*; discrimination

A. Introduction

On April 27, 2024, it was thirty years since South Africa went to the polls in its first democratic elections. Its widely acclaimed constitution, drafted by the democratically elected Constitutional Assembly, came into force just under three years later, on February 4, 1997. Its preamble declares that the Constitution is to "heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights" and to "improve the quality of life of all citizens and free the potential of each person."[1] Equality is a central leitmotiv of the Constitution. Not only is the achievement of equality a founding value of the Constitution,[2] but equality, together with human dignity and freedom, is also one of the three democratic values that are the guiding principles for the interpretation of the Bill of Rights,[3] and that guide the determination whether the limitation of rights is justified and proportionate.[4] The Bill of Rights also contains a clause, subtitled "equality," Section 9, which contains three key elements: (a) The principle of equality before the law and the right to equal protection and benefit of the law,[5] (b) the prohibition on unfair discrimination[6] and (c) the

[1] *See* S. AFR. CONST., 1996, pbml.
[2] *Id.* at art. 1(a).
[3] *Id.* at art. 39(1)(a).
[4] *Id.* at art. 36(1).
[5] *Id.* at art. 9(1).
[6] *Id.* at art. 9(3).

affirmation that steps taken to remedy disadvantage arising from unfair discrimination may be taken.[7] Section 9 is often referred to as "the equality clause" and it has been invoked in many cases before the Constitutional Court in the last three decades.

Yet despite this strong equality provision and the active jurisprudence arising from it, South Africa continues persistently to have one of the highest rates of inequality in the world. The Gini coefficient of incomes, which measures inequality on a scale from 0 to 1, where higher values indicate higher inequality, was 0.67 in 2006, 0.65 in 2009 and 0.65 in 2015,[8] one of the highest rates of income inequality in the world. There is no academic disagreement that South Africa has an extremely high rate of income inequality, and the South African government has recognized that reducing the income Gini coefficient should be a national priority, with the National Planning Commission's National Development Plan targeting a reduction in the Gini coefficient to 0.60 by 2030.[9]

The disconnect between the evident ambitions of the Constitution to foster the achievement of equality and the troubling persistence of inequality in South Africa warrants further examination by constitutional lawyers. And this Article seeks to commence that examination by reflecting on the purpose and reach of Section 9 of the Constitution, which entrenches equality before the law and a right against unfair discrimination. This exercise should be of interest not only to those interested in South Africa, but to those interested in equality law more broadly, because despite the widespread adoption of anti-discrimination laws and a burgeoning jurisprudence on them in jurisdictions across the world, there is a growing global scholarly debate, and disagreement, about the purposes of equality and anti-discrimination law.[10]

But not only is there a divergence amongst legal scholars both across and within jurisdictions as to the purposes of anti-discrimination law, there is a divergence too between how law defines discrimination and how ordinary people understand discrimination, as Tarun Khaitan observed in his theoretical work in the field.[11] Khaitan notes that what counts as discrimination in law is not the same as what constitutes discrimination in the eyes of ordinary people.[12] For example, discrimination is ordinarily understood as being intentional and direct. Yet in terms of discrimination law, discrimination may arise even where discrimination is not intended, and even where it is indirect.

A similar disjuncture, I suggest, lies in how the law—and Section 9 of the South African Constitution is a useful example here—uses the word "equality," and how the word "equality" is used by ordinary people. Ordinary people, I suggest, may think of equality in economic or material terms, as Richard Wilkinson and Kate Pickett use it in their ground-breaking work, *The Spirit Level: Why Equality is Better for Everyone*.[13] Wilkinson and Pickett argue that the quality of social relations in any society is built on material foundations and, using income inequality as a key measure, they argue that reducing inequality particularly in developed societies would be

[7] *Id.* at art. 9(2).

[8] The Gini coefficients mentioned here are based on data collected by Statistics South Africa, in their Income an Expenditure and Living Conditions Surveys, and are reproduced from Murray Leibbrandt & Fabio Andrés Díaz Pabón, *Inequality in South Africa*, *in* Oxford Handbook of the South African Economy (Arkebe Oqubay, Fiona Tregenna & Imraan Valodia eds., 2021).

[9] South African National Planning Commission, National Development Plan Vision 2030 (2011), https://www.gov.za/sites/default/files/gcis_document/201409/devplan2.pdf.

[10] For a small selection of a vast field, see Philosophical Foundations of Discrimination Law (Deborah Hellman & Sophia Moreau eds., 2011); sandra fredman, Discrimination Law (2d ed, 2011); Tarunabh Khaitan, A Theory of Discrimination Law (2015); Colm O'Cinneide, *The Uncertain Foundations of Contemporary Anti-Discrimination Law*, 11 Int'l J. Discrimination & L. 7 (2011); Hugh Collins & Tarunabh Khaitan, Foundations of Indirect Discrimination Law (2018); Kasper Lippert-Rasmussen, Born Free and Equal? A Philosophical Enquiry into the Nature of Discrimination (2014); Sophia Moreau, Faces of Inequality: A Theory of Wrongful Discrimination (2020); Shreya Atrey, Intersectional Discrimination (2019).

[11] *See* Khaitan, *supra* note 10, at ch. 1.

[12] *Id.*

[13] Richard Wilkinson & Kate Pickett, The Spirit Level: Why Equality is Better for Everyone (2010).

beneficial to all inhabitants of those societies. They argue too that reducing material inequality in developing societies would also be beneficial but for slightly different reasons.[14] Their conception of equality is based on material equality, a usage widely followed in ordinary parlance. That usage is different to the concept of equality that lawyers ordinarily use when coupling it with anti-discrimination law. The use of the word "equality" in anti-discrimination law draws on the principle of equality before the law, and the principle that differentiations should not be drawn in law or practice between different groups of people in a harmful manner. Its focus is on how differentations are drawn, for what purposes and with what effects. It is a different concept to material equality or inequality.

The use of the sub-title "equality" in Section 9 of the Constitution might thus lead to the assumption that the primary mission and purpose of Section 9 is to address deep seated forms of material inequality, such as the income inequality that is so pervasive in South Africa. Instead, a review of the text of the clause and the jurisprudence under Section 9 makes it clear that its primary focus is to ensure that differentiations as to how benefits and burdens are conferred upon different groups of people within South African society, whether by the state or by private actors, are not unfair or unjustifiable. Given South Africa's history where racial discrimination was constitutionally and legally entrenched with devastating social and economic consequences, this purpose is of crucial importance.

I pause here to note that it does not follow that patterns of material inequality are irrelevant to the interpretation of Section 9. They will be centrally relevant in determining whether a differentiation is fair or justifiable and to the interpretation of the affirmative action clause. A full discussion of these points is not possible here, but in short, the more likely a differentiation is to further disadvantage an already disadvantaged group, the more likely it will be found to be unfair. It also does not follow that the South African Bill of Rights is uninterested in questions of poverty and inequality. The Bill of Rights entrenches economic and social rights which provide, amongst other things, that everyone has the right of access to adequate housing, healthcare, education, social security, and food. The positive obligations upon government that are the correlative of these justiciable rights are of central importance in ensuring that government acts to address those living in poverty across South Africa.

In this Article, I suggest that the patterns of *apartheid* geography that persist into the democratic era are not easily addressed by reliance on the equality clause, Section 9. The roots of contemporary racially segregated neighborhoods lie, of course, in a raft of racially discriminatory laws—which will be briefly outlined below—that have now been repealed. It is important to note that if they had not been repealed, they would undoubtedly have been held to constitute a breach of Section 9. Yet it is also important that the repeal of the racially discriminatory laws did not end racial segregation. Today racial residential segregation is maintained by a complex intersection of social and economic factors. And the consequences of that segregation are severe, as I shall show. Racially segregated neighborhoods in South Africa maintain and even exacerbate inequality along a range of axes: Educational, employment, income, health and life expectancy.

To examine the question more fully, I will first provide a brief overview of poverty and inequality data in South Africa, and then explain how *apartheid* geography remains a key driver of both poverty and inequality. I will then turn to the South African Constitutional Court's jurisprudence on equality and outline the approach that has been adopted by the Court, and discuss some of the leading cases, showing that the decisions have had an important impact, especially on family law. I will conclude by suggesting that although Section 9 may in some circumstances be important in addressing government policies or practices that discriminate against people living in segregated neighborhoods, it will not be easy to litigate. I will illustrate this point by outlining the challenges that arose in a recent case concerning the allocation of police to a poor and racially segregated neighborhood in Cape Town, Khayelitsha.

[14] *See id.* at ch. 2.

B. Patterns of Poverty and Inequality in South Africa

During the *apartheid* years, reliable data on poverty in South Africa were unavailable. Data on household poverty rates nationally were produced for the first time by a survey conducted in 1993.[15] Using a relatively high measure of the poverty line—ZAR840 at the time, which was equivalent to approximately 250 U.S. dollars at the time—the survey calculated that about one half of all South Africans lived in poverty, although the survey also showed that people living in poverty were not evenly spread, as in some of the more rural provinces two-thirds of people lived in poverty.[16] Even on a less generous poverty line measure, $1 a day, 25% of all South Africans lived in poverty.[17] The alarmingly high levels of poverty in the country are perhaps not surprising given the legacies of both *apartheid* and colonialism, nor was their uneven spread. It is perhaps worth noting that South Africa's poverty rates were not as severe in 1993 as those of many of its neighbors, for example Zambia, but they were higher than in other middle-income countries, such as Chile, Mexico and Indonesia.[18]

The racial dimensions of poverty were also starkly apparent in South Africa in 1993. 57% of Black African people were classified as poor in 1993, 20% of Colored people, 7% of people of Indian origin and only 2% of white people.[19] Life expectancy was approximately ten years longer for white South Africans than Black Africans and African babies were seven times more likely to die in their first year than white babies.[20]

Seekings and Nattrass identify three reasons for the deep poverty, and inequality, of Black African people: First, over the previous decades, and centuries, colonial and *apartheid* policy deprived Black Africans of access to land and the independent African peasantry had been destroyed; second, Black Africans struggled to gain access to the labor market, for reasons of skills and location, both of which had been exacerbated, indeed driven, by *apartheid* labor market and education policy, and when they did get jobs they were generally poorly paid. And third, Black African households had until the closing decade of *apartheid,* few claims on the state for social security payments, such as pensions, and were relatively under-serviced by other state services, such as health care and education.[21]

Thirty years later the picture of racialized poverty and inequality in South Africa remains largely unchanged and is deeply concerning. If one looks at the three drivers of poverty and inequality identified by Seekings and Nattrass, the first and second remain strong drivers of poverty and inequality. There has over the last three decades been little change in relation to access to land, and unemployment remains extraordinarily high. The only factor that has declined is the increase in the payment of grants to poor South Africans. As Seekings and Nattrass argue the labor market remains arguably the primary cause of the deep patterns of inequality and poverty that characterize South Africa.[22] South Africa has one of the world's highest unemployment rates, and one of its highest rates of inequality as measured by the GINI coefficient. According to Harvard's Growth Lab, unemployment rates have been growing in South Africa on average by 0.5 percentage points a year since 1994, reaching 33.5% in 2022, from 20% in 1994.[23] The overall unemployment rate is now 39% if one includes those who have ceased seeking employment. Youth employment is

[15] Andrew Whiteford, Dori Posel & Teresa Kelatwang, A Profile of Poverty, Inequality and Human Development (1995).

[16] *See* Jeremy Seekings & Nicoli Nattrass, Policy, Politics and Poverty in South Africa 2 (2015).

[17] *Id.*

[18] *Id.*

[19] *Id.* These are the racial categories that were used by the *apartheid* government, and which continue to be used to measure social and economic development today.

[20] *Id.*

[21] *See* Seekings & Nattrass, *supra* note 16, at 29.

[22] *Id.* at 53.

[23] *See* Ricardo Haussmann, Tim O'Brien, Andrés Fortunato, Alexia Lochmann, Kishan Shah, Lucila Venturi, Sheyla Enciso-Valdivia, Ekaterina Vashkinskaya, Ketan Ahuja, Bailey Klinger, Federico Sturzenegger &

especially high at 61.5% in 2022. Even more concerning is that the widening gap in unemployment rates between Black and white South Africans—the unemployment rate of Black Africans is just under 40% while the rate for white South Africans is under 10%.[24]

Scholars debate why poverty and inequality have been so persistent in South Africa. Some scholars argue that it was the democratic South African government's adoption of neoliberal policies that resulted in the further entrenchment of racial poverty and inequality in South Africa,[25] but other scholars have argued that this is too simple an account that often ignores the important non neo-liberal elements of government policy, such as the refusal to privatise state-owned enterprises and deregulate labor markets.[26] The purpose of this paper is not to discuss what have been the major drivers of the failure to achieve the vision of South Africa's constitution, to improve the quality of life of all. Instead, it is to look at a particular characteristic of South African society that makes equality law less effective in addressing patterns of inequality. That characteristic may be described as the long legacy of apartheid geography.

C. *Apartheid* Geography

South Africa's current patterns of poverty and inequality reflect the historical processes of exclusion and marginalization set in train by the process of colonial dispossession in the seventeenth century.[27] By the early 20th century, large portions of the country were occupied by white settlers. One of the most significant pieces of legislation in the early years of union—which took place in 1910—was the Natives Land Act 1913,[28] which together with together with the Native Land and Trust Act of 1936[29] preserved 87% of South Africa's land for ownership and occupation by white people, who at that time constituted about a fifth of the population. One of the direct consequences of this legislation was to deprive peasant farmers of access to land, with severe consequences for poverty in rural areas. Most of the land that was available to Black African people for ownership and occupation fell within what came to be known during the period of *apartheid* as "homelands" or "bantustans," demarcated according to the nine main African language groups in South Africa. Over three and a half million South Africans were forcibly removed from "white" South Africa, into the homelands during the 1960s and 1980s.[30] The terms of the entry of Black African people to and residence in "white" South Africa were strictly regulated by strictly enforced pass and migrant labor laws.[31] The homelands were governed by government appointed traditional leaders under the Black Authorities Act of 1951, legislation which sparked fierce political resistance in the 1950s.

Urban areas, too, were the subject of sharp racial geography. Legislated segregated areas for Black Africans commenced under Prime Minister Smuts in the 1920s with the 1923 Native Urban Areas Act which empowered municipalities to provide for segregated residential areas. The process of urban segregation was accelerated once the National Party came to power in 1948 when

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Marcelo Tokman, Growth Through Inclusion in South Africa 14 (2023), https://growthlab.hks.harvard.edu/policy-research/south-africa.

[24]*Id.* at 15.

[25]*See, e.g.*, John Saul, *Cry the Beloved Country: The Post-Apartheid Denouement*, 89 Rev. Afr. Pol. Econ. 429 (2001); Patrick Bond, Elite Transition: From Apartheid to Neoliberalism in South Africa (2000); and Stefan Andreassen, *The ANC and its Critics: 'Predatory Liberalism', Black Empowerment and Intra-Alliance Tensions in Post-Apartheid South Africa*, 13 Democratization 303 (2006).

[26]*See* Seekings & Nattrass, *supra* note 16, at ch. 1.

[27]The following paragraph draws on Aninka Claassens & Catherine O'Regan, *Editorial Citizenship and Accountability: Customary Law and Traditional Leadership under South Africa's Democratic Constitution*, 47 J. S. Afr. Stud. 155 (2021).

[28]Natives Land Act 27 of 1913 (S. Afr.).

[29]Native Trust and Land Act 18 of 1936 (S. Afr.) (adding additional land to the areas reserved for Black African ownership and occupation, bringing the 7% set aside by the 1913 Land Act up to 13% in 1936).

[30]Laurine Platzky & Cherryl Walker, The Surplus People: Forced Removals in South Africa (1985).

[31]Muriel Horrell, Legislation and Race Relations (1971).

it introduced its policy of *apartheid*, or separation. Under the Group Areas Act enacted in 1950,[32] the government was empowered to declare neighborhoods in urban areas for occupation and ownership by specified racial groups. Thousands of people were displaced under the legislation as racialized patterns of urban segregation were strictly enforced.

Apartheid urban development policy was to build segregated neighborhoods expressly to prevent urban integration. As one civil society activist describes in the context of Cape Town:

> The archipelago of Cape Town was not created by accident. It was done so by design. Its extreme segregation was ... primarily engineered over the course of the twentieth century. There were many reasons for this, but one of the most important was to control and repress political organisation. Apartheid's urban architects needed to contain people, corralling them away from power.[33]

These racial patterns persist thirty years into South Africa's constitutional democracy, and they remain a profound driver of inequality and poverty. Figure 1 maps current rates of unemployment—the higher the rate the darker and bluer the color—against a map of the former homelands.

In the areas of the former homelands outside of the country's major metropolitan areas, unemployment rates are nearly 80%, twice as high as for the country generally.[34] Nearly a third of the population lives in these areas. The problem of unemployment, however, is not only acute in rural areas that previously formed part of the homelands.

A similar pattern is evident in urban areas. The state has built a very large number of houses since 1994. The most recent census in 2022 now suggests that nearly 90% of all South Africans live in formal housing, rather than informal housing or traditional forms of housing.[35] If accurate, and the newly released census data has been subjected to scholarly criticism,[36] this is a substantial achievement for government. Yet, challenges arising from complex planning laws, the government's ongoing commitment to providing four-room houses on individual plots rather than more dense forms of accommodation, and the cost of land in the inner-city areas, amongst other factors, have resulted in most houses being built on the periphery of cities, further embedding the patterns of *apartheid* geography and highly dispersed cities.[37]

Jobs in the formal sector are located near central business districts, whereas as a direct result of *apartheid* spatial planning and post-*apartheid* housing delivery, most Black African people continue to live in neighborhoods at the periphery of the city. The consequence is that Black Africans who live on the periphery of the cities bear very high transport costs. A recent study by Harvard's Growth Lab found that for the lowest quintile of workers, direct transport cost equate to a third of wage income on average.[38] As the authors state, given "these exceptionally high costs of

[32]Suppression of Communism Act 44 of 1950 (S. Afr.).

[33]Dustin Kramer, *City of Islands*, *in* Fragments of Activism (Phumeza Mlungwana & Dustin Kramer, 2022).

[34]*Id.* at 15–16. *See also* Florent Dubois & Christophe Muller, The Contribution of Racial Segregation to Racial Income Gaps: Evidence from South Africa (2020), https://hal.science/hal-04159715/document.

[35]Statistics South Africa, *Census 2022 Results*, Statssa. Gov (accessed on June 7, 2024), https://census.statssa.gov.za/#/ (publishing the 2022 Census figures on its website).

[36]*See, e.g.,* David Everatt, *South Africa's census missed 31% of people – big data could help in future*, The Conversation (Oct. 13, 2023), https://theconversation.com/south-africas-2022-census-missed-31-of-people-big-data-could-help-in-future-215560; Philip Harrison, Alison Todes, Darlington Mushongera & Graeme Gotz, *South Africa's 2022 Census: Has Johannesburg stopped growing or are the numbers wrong?*, The Conversation (Oct. 17, 2023), https://theconversation.com/south-africas-2022-census-has-johannesburg-stopped-growing-or-are-the-numbers-wrong-215610.

[37]*See* Ivan Turok, Justin Visagie & Andreas Scheba, *Inequality and Spatial Segregation in Cape Town*, *in* Urban Socio-Economic Segregation and Income Inequality: A Global Perspective 78 (Maarten van Ham, Tiit Tammaru, Rūta Ubarevičienė & Heleen Janssen eds., 2021).

[38]See Haussmann et al., *supra* note 34.

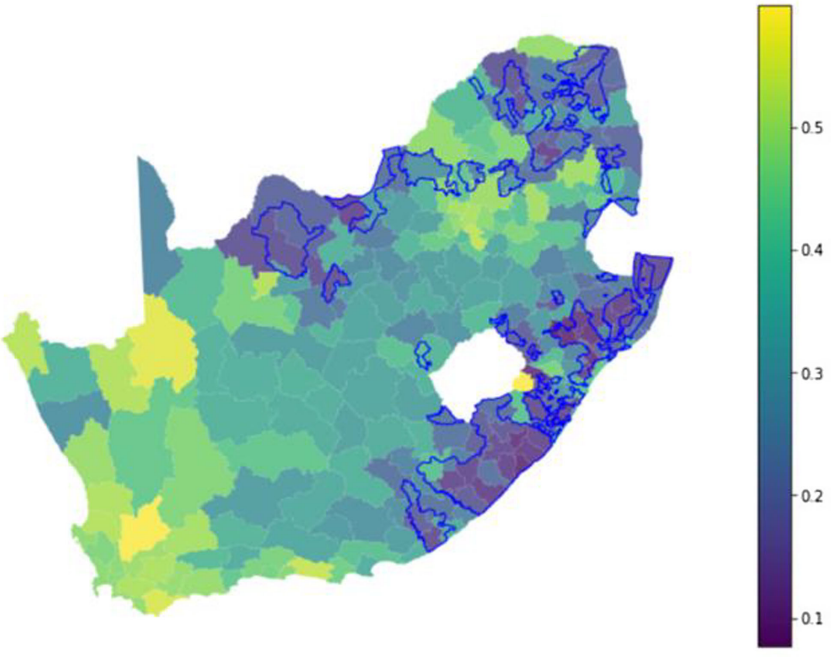

Figure 1. Unemployment rates across municipal areas in South Africa, overlaid with maps of the former homelands.[39]

getting to work, the logical decision of workers is therefore to remain out of the workforce."[40] This pattern is not unique to South Africa, but one might expect low levels of participation in the formal economy to be accompanied by higher levels of informal economic activity.[41] South Africa, however, not only has very high levels of unemployment but also relatively lower levels of informal economic activity, for reasons that are not entirely clear, although persistent *apartheid* geography which results in distant and low density residential areas may well be a factor.[42]

Material inequality in South Africa is thus driven, at least to some significant extent, by the ongoing patterns of racial residential segregation both in urban and rural areas. These patterns of segregation have their roots in colonial and *apartheid* policies, but despite the repeal of those policies, they persist. I turn now to an overview of the equality clause of South Africa's Constitution.

D. The Approach to Section 9 of the Constitution

The doctrinal approach to the prohibition on unfair discrimination was established in a decision in 1997, *Harksen v Lane NO*, which concerned provisions of the insolvency legislation which vested the property of solvent spouses of an insolvent in the official managing the insolvent estate.[43] The Court set out the test to determine whether a provision is inconsistent with Section 9.[44] The core doctrinal

[39]*See* HAUSSMANN ET AL., *supra* note 23, at 83.
[40]*Id.*
[41]*Id.* at 17.
[42]*Id.* at 17.
[43]*Harksen v. Lane NO and Others* 1998 [1997] ZACC 12 (S. Afr.).
[44]The process of adoption of the South African Constitution took place in two stages. During the first stage, which took place before the first democratic elections were held, negotiations took place between the *apartheid* government and the liberation movements, and the text of an interim Constitution was agreed and then enacted by the pre-democratic legislature, as the Constitution of the Republic of South Africa, 200 of 1993. Following the first democratic elections, the new Parliament

approach requires two separate enquiries. The first is whether legislative differentiations have a rational connection to a legitimate government purpose. Under this test it does not matter whether the differentiation is based on one of the seventeen prohibited grounds,[45] any differentiation must be rational. The second enquiry is whether the differentiation, whether legislative or by conduct, is based on one or more of the prohibited grounds—or a different but cognate ground—and if it is, whether it is unfair. Determining whether discrimination is unfair requires an assessment of the impact of the discrimination on the complainant and others in their situation.

The approach in *Harksen v Lane NO* is thus focused on differentiation, whether arising from a legislative provision or conduct, and whether it has happened, and if it has, on what grounds and with what impact. The approach has been applied relatively consistently since 1997 across a range of areas of law. Perhaps most notably, it has been important in family law. South Africa has a pluralist system of family laws: The common law system based on Roman Dutch law, now substantially codified by legislation which regulates divorce, matrimonial property, intestate succession and provides a duty of maintenance for surviving spouses, the system based on African customary law, which also has been developed by legislation, including provision for registration of marriages, the regulation of polygynous unions, and matrimonial property. In addition, there are several systems of family law based on religious systems of law, notably Muslim personal law, Hindu marriages and Jewish marriages. Section 9 has been a key driver extending recognition and protection across these systems and extending protections to life partnerships that are not formalized by marriage under any of these systems.[46]

For example, a recent decision held that the key legislation regulating marriage that originally applied only to common-law marriages, was inconsistent with the Constitution because it failed to provide protection to wives in marriages solemnized according to Muslim personal law and to children born of such marriages, and the Court gave the legislature two years to address the unconstitutionality, but the Court also ordered that for the meantime, the protections of the legislation should be afforded, with effect retrospective to 2014, to spouses and children in such marriages.[47] In order to comply with this order, an amendment to the Divorce Act, 1979 was adopted in May 2024, which recognized Muslim marriages and regulated divorce between people married accorded to Muslim rites.[48] A similar series of important decisions have declared invalid rules and practices that prevent Black African women from holding property.[49]

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sat also as a Constitutional Assembly and adopted the Constitution of the Republic of South Africa, 1996. *See* Matthew Chaskalson & Dennis Davis, *Constitutionalism, the Rule of Law and the First Certification Judgment*, 12 S. AFR. J. HUM. RTS. 430 (1997); THEUNIS ROUX, THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995 – 2005, 162–65 (2013); Stu Woolman, *Humility, Michelman's Method and the Constitutional Court: Rereading the First Certification Judgment and Reaffirming a Distinction between Law and Politics*, 24 STELLENBOSCH L.REV. 281 (2013). *Harksen v Lane NO* was decided under the interim Constitution, and so was concerned with the equality clause in that constitution, Section 8. Subsequently, however the Constitutional Court adopted the *Harksen* test as applicable to the interpretation and application of Section 9 of the 1996 Constitution, the equality clause. *See National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others* 1998 (1) SA 6 (CC) at 17 (S. Afr.).

[45]The listed grounds in the 1996 Constitution are race, gender, sex, pregnancy, marital status, ethnic or social orgin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. S. AFR. CONST., 1996.

[46]*See Bhe and Others v. Magistrate, Khayelitsha and Others* [2004] ZACC 17 (S. Afr.); *Gumede v. President of the RSA* [2008] ZACC 3 (S. Afr.); *Mayelane v. Ngwenyama* [2013] ZACC 14 (S. Afr.); *Sithole v. Sithole* [2021] ZACC 7 (CC) (S. Afr.); *Hassam v. Jacobs NO* [2009] ZACC 19 (S. Afr.); *Women's Legal Centre Trust and Others v. President of the RSA and Others* [2022] ZACC 23 (S. Afr.).

[47]*Women's Legal Centre Trust and Others v President of the RSA and Others* [2022] ZACC 23 (S. Afr.).

[48]*See* Divorce Amendment Act 1 of 2024 (S. Afr.).

[49]*Bhe and Others v. Khayelitsha Magistrate and Others* [2004] ZACC 17 (S. Afr.) (declaring invalid male primogeniture as a principle in the context of inheritance of property; *Gumede v. President of the RSA and Others* [2008] ZACC 23 (S. Afr.) (declaring a legislative provision that provided that customary marriages entered before 2000 would continue to be governed by a previous rule that husbands have control over all family property); *Rahube v. Rahube and Others* [2018] ZACC 42 (S. Afr.) (holding that a legislative provision that upgraded title was unconstitutional as it converted rights to ownership in

The equality clause too was the basis for ruling that the prohibition on the marriage of same-sex partners was inconsistent with the Constitution,[50] and also the basis on which a range of other legislation withholding protection or benefits from same-sex couples was declared unconstitutional.[51]

Harksen v. Lane NO has been employed in other areas too, notably social security law. For example, in an early case, the court held that legislation that the exclusion of permanent residents from means-tested social grants constituted unfair discrimination in breach of the equality clause.[52] In another recent case, the court held that the exclusion of domestic workers from legislation that provides compensation for workers who are injured at work was, amongst other things, indirectly unfairly discriminatory because the majority of domestic workers are Black women.[53] The order of invalidity of the legislation was backdated to April 1994.

These decisions have been important and have resulted in the provision of benefits to those who would not have otherwise received them. There have been disappointing decisions under Section 9 as well. Although early cases extended the protection of Section 9 to some non-citizens,[54] in other cases, the Constitutional Court has not afforded refugees and non-citizens remedies under the clause.[55]

There is an established, though perhaps less well developed, jurisprudence in the field of affirmative action. The leading case established the principle that measures aimed at remedying past discrimination should be neither punitive, nor retaliatory, should not infringe the dignity of others and should advance the position of those who have suffered previous discrimination.[56] Although the application of this test has led at least on one occasion to sharp disagreement on the court, the principles themselves are generally accepted.[57]

E. The Reach of the Constitution's Equality clause

Understanding the drivers and the patterns of racial inequality and poverty in South Africa is important to understanding the reach of the Constitution's equality clause in addressing inequality and poverty. The enduring character of *apartheid* geography means that Black South Africans who live in those rural areas, originally designated as homelands or *bantustans*, are not similarly situated to those who live in urban areas, and especially not to those who have jobs in the formal sector in urban areas. Similarly, those who live in the periphery of the cities in what were originally neighborhoods segregated by law, designed for exclusion and control, struggle to gain

circumstances where the original rights afforded during the *apartheid* period had excluded women and requiring notice to be given to interested parties before title is upgraded).

[50]*Minister of Home Affairs and Another v. Fourie and Another* [2005] ZACC 19 (S. Afr.).

[51]*See, e.g., NCGLE v. Minister of Justice* [1998] ZACC 15 (S. Afr.) (criminalizing of male sexual intercourse unconstitutional); *NCGLE v. Minister of Home Affairs* [1999] ZACC 17 (S. Afr.) (concerning same sex life partners to be treated as spouses for immigration purposes); *Satchwell v. President of RSA* [2002] ZACC 18 (S. Afr.) (concerning pension rights of same sex partners); *Du Toit and Another v. Minister for Welfare and Population Development and Others* [2002] ZACC 20 (S. Afr.) (concerning joint adoption of children by same sex couples).

[52]*Khosa and Others v. Minister of Social Development and Others, Mahlaule and Another v. Minister of Social Development* [2004] ZACC 11 (S. Afr.). *See also* the earlier decision of the court, *Larbi-Odam and Others v. Member of the Executive Council for Education (NW) and Another* [1997] ZACC 16 (S. Afr.) (holding that regulations that provide that only South African citizens may be appointed to permanent teaching positions was unfairly discriminatory).

[53]*Mahlangu and Another v. Minister of Labor and Others* [2020] ZACC 24 (S. Afr.).

[54]*See Khosa and Others v. Minister of Social Development and Others, Mahlaule and Another v. Minister of Social Development* [2004] ZACC 11 (S. Afr.). *See also* the earlier decision of the court, *Larbi-Odam and Others v. Member of the Executive Council for Education (NW) and Another* [1997] ZACC 16 (S. Afr.).

[55]*See, e.g., Union of Refugee Women and others v. Director, Private Security Industry Regulatory Authority and Others* [2006] ZACC 23 (S. Afr.); *Rafoneke and others v. Minister of Justice and Correctional Services and others (Makombe intervening)* [2022] ZACC 29 (S. Afr.).

[56]*Minister of Finance and Another v. Van Heerden* [2004] ZACC 3 (S. Afr.).

[57]*See South African Police Service v. Solidarity on behalf of Barnard* [2014] ZACC 23 (S. Afr.).

access to the formal labor market. It is hard to overstate how deep these patterns of inequality run and how multi-faceted, and how powerfully they drive processes of exclusion and inequality. Yet to those who do not experience them they may be scarcely visible.[58] But these patterns of inequality are not caused by current discriminatory legislative provisions. They are a result of long complex historical processes, including now repealed discriminatory legislation, that have not been arrested or reversed in the first thirty years of democratic rule.

During the first thirty years of democratic government relatively little has been done to address the consequences of *apartheid* spatial planning. The National Development Plan Vision for 2030 does note that South Africa's inherited spatial structure perpetuates exclusion and asserts as a key principle the need to reverse the "historic policy of confining particular groups to limited space (ghettoisation and segregation)."[59] Although there has been some small reduction in the pattern of segregation, it remains very high.[60]

We have seen already that unemployment is deeper in segregated neighborhoods, where poor people live, both in the cities and the rural areas. And there is clear evidence that racial segregation in schools, especially for Black African learners, remains very high. According to a recent study, the average Black African student attended a school that comprised 96.4% Black African learners and only 0.9% white learners, whereas the average white student attended a school that was 68.5% white, 3.3% Indian, 8.5% Colored or mixed race, and 19.6% Black.[61] The same study confirms that the data shows that a large majority of South Africans from all backgrounds favor racially diverse schools, but that residential segregation makes this very difficult, especially for Black African families.[62]

Equality and discrimination law have thus not yet had a material impact on the patterns of disadvantage that accompany the persistent *apartheid* geography of South Africa. Racially segregated neighborhoods, whether in urban or rural areas, may at times be subject to policies or practices that are racially discriminatory, but even then, identifying and proving that government policies or actions are discriminatory is hard. Establishing that legislation is discriminatory is easier, which is why much of the key equality jurisprudence has been directed at legislative provisions, rather than conduct.

Just how hard it is to establish that government policies as they affect neighborhoods that are rooted in *apartheid* geography are unfairly discriminatory is illustrated by the recent decision of the Equality Court in *Social Justice Coalition v Minister of Police*.[63] This case concerned whether the South African Police Service (SAPS) discriminates in the human resources—that is, number of police officers—it allocates to poor segregated neighborhoods in Cape Town that are occupied, almost exclusively, by Black African people.

The case arose following the report of a commission of inquiry tasked with investigating complaints of inefficiency against the SAPS at the three police stations in Khayelitsha, Cape Town and whether there was a breakdown in the relationship between the local community and the SAPS in that neighborhood.[64] The Commission of Inquiry was established following a long

[58]Iris Marion Young makes a similar point about racial segregation in the United States, arguing that segregation "obscure[s] the fact of their privilege from those who have it." *See* IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 205 (2002).

[59]*See* SOUTH AFRICAN NATIONAL PLANNING COMMISSION, *supra* note 9, at 233–59.

[60]*See* Kevin Parry & Amanda van Eeden, *Measuring Racial Residential Segregation at Different Geographical Scales in Cape Town and Johannesburg*, 97 S. AFR. GEOGRAPHICAL J. 31 (2014).

[61]*See* Rob J. Gruijters, Benjamin Elbers & Vijay Reddy, *Opportunity Hoarding and Elite Reproduction: School Segregation in Post-apartheid South Africa*, 103(1) SOCIAL FORCES, 173, 181 (2024).

[62]*Id.* at 175.

[63]*Social Justice Coalition and Others v. Minister of Police and Others* 2019 (4) SA 82 (WCC) (S. Afr.).

[64]I served as the chairperson of the Commission of Inquiry. The other commissioner was Adv Vusi Pikoli. The Commission was appointed by the Premier of the province of the Western Cape in terms of Section 1 of the Western Cape Provincial Commission Act, 10 of 1998, and in terms of the power conferred upon the province in terms of Section 206(3) of the South

campaign by six civil society organizations[65] active in Khayelitsha to achieve better policing in the neighborhood. When their efforts directed at SAPS proved unsuccessful, the organizations wrote to the premier of the Western Cape province asserting that there were widespread inefficiencies, apathy, incompetence and system failures of policing in Khayelitsha and requesting her to establish a Commission of Inquiry, which she eventually did.[66]

Khayelitsha is a large neighborhood on the eastern urban edge of Cape Town, with a population of approximately 400,000 people in 2014. It was established in the last years of the *apartheid* government and its residents are overwhelmingly poor Black African people. The median household income in Khayelitsha is half that of the median household income for the City of Cape Town[67] and 75% of households in Khayelitsha live below the poverty line.

Khayelitsha has a very high crime rate.[68] According to expert testimony received by the Commission, if one combines the crime rates in the three police stations in the area, greater Khayelitsha is the neighborhood with the highest number of murders, attempted murders, sexual offences, serious assaults and aggravated robbery in South Africa.[69] The Commission concluded from its examination of the expert evidence on crime statistics that, 'the residents of Khayelitsha are faced with extremely high levels of contact crime, which included murder, sexual offences and aggravated robbery' and it also concluded that reported crime rates probably significantly understate the prevalence of crime, by as much as 40%.[70]

Members of the complainant organizations testified before the Commission as to why they had sought its establishment and what outcomes they hoped for from the Commission. Simply put, the organizations wanted the police to provide a fair and competent service to the people of Khayelitsha. The police were not seen as an enemy but rather as a service that was deeply unsatisfactory, something that the organizations wished to correct. For example, Ms Funeka Soldaat of Free Gender, an organization established to defend the rights and interests of the lesbian and bisexual community in Khayelitsha, explained that for 'gays and lesbians the police are the most important people in our lives, because you must know that we have a problem in our community, we also have problems in our homes, and therefore that is the most important place to us because they are objective, they don't take sides so the SAPS or police are very important to us."[71]

Expert evidence received by the Commission showed that the most understaffed police stations in the Western Cape, calculated on the basis of police personnel per capita, were in the poorest neighborhoods, often those established under *apartheid* on the periphery of the city for Black African people. Two of the three police stations in Khayelitsha were among the ten most understaffed police stations in the Western Cape province. The SAPS sought to rebut this evidence but without success. The Commission concluded that, "the residents of the poorest areas of Cape Town that bore the brunt of *apartheid* are still woefully under-policed twenty years into our new democracy."[72] The Commission also noted that the mechanism for human resource allocation was neither accessible to the public nor monitored by key oversight agencies and that there appeared to

African Constitution, 1996. *See* Proclamation 9 of 2012, Provincial Gazette (Western Cape), No. 7026 dated August 24, 2012. The Commission reported on August 18, 2014.

[65]The six civil society organizations were The Social Justice Coalition, the Treatment Action Campaign, Equal Education, Free Gender, the Triangle Project and Ndifuna Ukwazi.

[66]*See* Towards a Safer Khayelitsha, Report of the Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations between SAPS and the Community of Khayelitsha 9, ¶ 1 (Aug. 2014), https://www.westerncape.gov.za/police-ombudsman/sites/police-ombudsman.westerncape.gov.za/files/atoms/files/khayelitsha_commission_report_0.pdf.

[67]*Id.* at 30–46, 402–33, 405.

[68]*Id.* at 45 at ¶ 51.

[69]*Id.* at 44 at ¶ 46.

[70]*Id.* at 45 at ¶ 51.

[71]*Id.* at 107 at ¶ 75.

[72]*Id.*

be no check to ensure it did not result in anomalies.[73] The Commission recommended an immediate urgent overhaul of the system for allocating human resources by SAPS and also recommended that there was no reason for the system of human resources allocation by the police to be kept secret, and that whatever mechanism SAPS chose to replace its existing system of human resource allocation be subjected to oversight by the key oversight agencies.[74]

The data examined by the Commission that resulted in its conclusions and recommendations, were not available in the public domain. The evidence was provided to the Commission, following subpoenas issued by the Commission to senior personnel in the South African Police Service (SAPS) requiring them to produce the data, amongst other data. After an initial challenge to the subpoenas failed, SAPS did provide an extensive amount of information, which the Commission estimated to be more than 50,000 pages, including the information concerning the allocation of human resources within SAPS.[75]

It appeared from the documentary evidence, as well as the oral testimony provided by a senior SAPS officer, Brigadier Rabie, who was responsible for the design of the system, that the system SAPS used for allocating human resources between police stations was based on a calculation of what SAPS called the Theoretical Human Resource Requirement (the THRR). The THRR calculation is complex. Put simply, each year information is gathered from the more than 1,100 police stations in South Africa relating to a range of measures including crime rates for the previous four years within the precinct of each police station, as well as a range of environmental data including population density, the number of businesses, schools and other institutions within the precinct, and the condition of infrastructure in the precinct, which is then used to calculate a baseline figure. That baseline figure is then adapted in light of the demographic analysis of each police station, and then a process of allocation takes place.[76]

The provincial commissioner of SAPS, Lieutenant General Lamoer commented that he continuously disputed the human resource allocations provided to police stations in his province and he testified that the other provincial commissioners had done so as well.[77] He said there was something "fundamentally irrational" with how the resource allocation was calculated.[78]

An expert witness, Ms. Jean Redpath, analyzed the police evidence on human resource allocation.[79] She argued that if there were marked differences in police to population ratios in the police system of human resource allocations, the police needed to explain and justify them.[80] She suggested that the marked and apparently irrational variations in human resource allocations probably arose from a range of factors.[81] These included the poor quality of data provided by individual police stations, the wide range of factors included in the calculation that may result in "double counting" in a manner that might prejudice poor neighborhoods, and the failure to account adequately the human resource challenges that arise in policing informal neighborhoods.[82]

Having considered the evidence, the Commission concluded as noted above, that the system of human resource allocation used by SAPS was unacceptable and recommended that the system be overhauled as a matter of urgency. The Commission also recommended that the Minister of Police establish a task team to investigate the question of human resource allocation. In the meantime,

[73] *Id.* at 449–50 at ¶ 32.
[74] *Id.* at 450 at ¶¶ 34–35.
[75] *See* Towards a Safer Khayelitsha, *supra* note 66, at 195 at ¶ 9.
[76] *Id.* at 243–47.
[77] *Id.* at 274 at ¶ 218.
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.* at 317.

the Commission recommended that additional uniformed police be allocated to the Khayelitsha police stations.[83]

Following the Khayelitsha report, several of the civil society organizations that had driven the establishment of the Commission sought to engage with SAPS to ensure that the Commission's recommendations be implemented, but to little avail. When their efforts proved fruitless, they turned in March 2016, to the Equality Court in the Western Cape, seeking an order declaring that the system used by SAPS for the allocation of human resources in the Western Cape unfairly discriminates against Black and poor people on the basis of race and poverty.[84] The Equality Courts are set up in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000, legislation mandated by s 9 of the Constitution. The evidence placed before the Equality Court was drawn from the evidence placed before the Commission, outlined above. In December 2018, the Equality Court upheld the challenge, finding that the system for human resource allocation adopted by the police discriminated unfairly on the grounds of race and poverty.[85] The Equality Court issued a declaratory order stating that the allocation of police human resources was unfairly discriminatory on the grounds of race and poverty, and then postponed the question of remedy for hearing on a date to be arranged between the parties.[86]

SAPS initially sought to appeal the order made by the Equality Court, and the complainant organizations sought a cross appeal, but sometime later both withdrew their applications for leave to appeal. The parties then sought to find a date for the hearing on remedy. A date was provisionally set in March 2020, but the hearing did not proceed, and despite several attempts, no date was set by the Equality Court for the hearing on remedy. Frustrated by the failure of the Court to determine a date for the remedies hearing, the Social Justice Coalition approached the Constitutional Court in April 2021 for an order declaring that the Equality Court had "constructively refused to grant them a remedy" and to grant them direct access to the Constitutional Court.[87] The Constitutional Court, by a majority, refused relief on the basis that the Court could not entertain an appeal against a decision of the Equality Court when it had failed to give a decision, as the matter remained pending before the Equality Court. As at the time of writing in July 2024, the Equality Court has still not formulated a remedial order flowing from its decision that the human resource allocation system in the Western Cape is unfairly discriminatory on the grounds of race and poverty.

This account of the *Social Justice Coalition* case illustrates how difficult it may be to succeed in discrimination claims on behalf of communities who live in the periphery of the cities, or in rural areas, where it is claimed that the discrimination arises from government conduct or practice. The case suggests that there are at least four reasons for the difficulty. First, and perhaps most importantly, it will often be hard to obtain the evidence necessary to establish that the conduct of a state agency, such as SAPS, is discriminatory as between poor neighborhoods and wealthy ones. The evidence will often not be in the public domain, and it may require significant efforts to obtain it. In this case, even when subpoenas had been issued, SAPS was unwilling to make the evidence available, and it was only obtained after litigation to the highest court, on the part of the complainant organizations. Other avenues for obtaining such evidence may be found in the Promotion of Access to Information Act, 2 of 2000, which gives effect to the constitutional right to freedom of information, or alternatively using questions in Parliament.[88] But all these avenues will present challenges. In this respect, challenging a legislative provision is more straightforward, especially where the discrimination is direct, and relatively little evidence is required, as was the

[83]*Id.* at 450.

[84]*Social Justice Coalition and Others v. Minister of Police and Others* [2022] ZACC 27 at 3 ¶ 2 (S. Afr.).

[85]*Id.* at 22 ¶ 65. Poverty is not a ground listed in Section 9 of the Constitution, so the judgment is groundbreaking particularly in this respect.

[86]*Id.* at 33 ¶ 94.

[87]*Social Justice Coalition v Minister of Police* 2022 (10) BCLR 1267 (CC) (S. Afr.).

[88]Promotion of Access to Information Act 2 of 2000 (S. Afr.).

case in many of the discrimination cases discussed above. These cases are therefore easier to litigate than the factually dense cases seeking to declare that an internal policy or practice of a state department has an unfairly discriminatory effect.

Second, once the evidence has been obtained, the question arises whether unfair discrimination has been established. One of the challenges is that the differences between wealthier residential areas and poorer areas are significant and so differences in practices and policies in relation to those areas are to be expected. The question will be whether those differences are appropriate or not. In the policing case, for example, one of the key issues is how the police assessed the human resources requirements of policing informal neighborhoods such as Khayelitsha. Informal neighborhoods have few, if any, access roads for vehicles, often no street addresses to locate places where crimes have occurred and poor street lighting, if any. These difficulties had not been given sufficient weight in the human resource calculation. The differences between poor and wealthy neighborhoods in this respect are often stark, evade simple comparisons and warrant different policy interventions. Assessing whether the different interventions are unfairly discriminatory may be challenging. In the Khayelitsha case, following expert analysis, it became clear that the police population ratios in poor neighborhoods were far higher than in the wealthier neighborhoods. That differential was counter-intuitive given the high crime rates in Khayelitsha. The Equality Court concluded that the human resourcing allocation system was unfairly discriminatory given that no justification was provided by SAPS for the differential between poor and wealthy neighborhoods. However, assessing whether any differential is justified may be challenging in some cases.

Third, even if a court concludes that a state policy or practice is unfairly discriminatory between different neighborhoods, the question of appropriate remedies might not be straightforward. As mentioned in the Social Justice Coalition case, the Equality Court has not yet formulated a remedy. The challenge the Court faces in formulating a remedy will be to ensure on the one hand that the remedy removes the unfair discrimination, but at the same time the remedy must be practicable and enforceable, and result in appropriate levels of human resourcing across a wide range of neighborhoods.

Finally, even once a finding of unfair discrimination has been made and a remedial order made, further difficulties may arise with implementation. There is a difference between declaring an internal policy of the police to be in breach of Section 9 of the Constitution or of the Equality Act, and declaring a legal provision to be in breach of Section 9 of the Constitution. In the latter case, as happened in all the discrimination cases discussed earlier, the effect of an order of invalidity is that unless the Court tempers the effect of the order of invalidity, attempts to implement or rely on the provision may be challenged in court. There is less clarity with a remedial order relating to a policy or practice.

These four difficulties illustrate why reliance on the constitutional principle of equality will often be challenging when seeking to assert that government policies or practices are unfairly discriminatory in the context of long-established *apartheid* geography.

F. Conclusion

The equality clause, Section 9 of South Africa's Constitution, has been an important instrument for addressing unfair discrimination that arises from legislative provisions and it has led to profound changes in several areas of the law, perhaps most notably the system of family law. However, it has so far proved less effective for addressing the material inequalities that are the legacy of *apartheid* geography, apparent in the lasting, deep racially based segregation of both South African cities and rural areas. That legacy is no longer enforced by law, but persists as a result of deeply embedded social, economic and historical forces. In this respect, calling Section 9,

the "equality" clause may lead to a disconnect between what people think the provision can and should achieve and its actual purpose and effect.

Even when material inequalities are reinforced by government policies or practices, it may be challenging to seek to remedy those inequalities by litigation. Proving that a government policy or practice is unfairly discriminatory will require an assessment of the relevant policy and its effects. It may often be hard for citizens or civil society actors to obtain the detailed information necessary to conduct that assessment, and even where that is possible, and it is found that the policy is unfairly discriminatory, it may be a challenge to determine an appropriate remedy, as the *Social Justice Coalition* case illustrates. Unravelling the deep material inequality produced by *apartheid* geography that persists in South Africa requires robust and responsive attention from government as the National Development Plan Vision 2030 recognizes. It also requires courts when interpreting and applying the Constitution to be alert to the ways in which those material inequalities have been constructed and watchful in seeking to ensure that laws, policies and practices do not entrench them.

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