# EQUALITY, RIGHTS AND PARTICIPATION IN A "COMPETITIVE" SOUTH AFRICA

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## ABSTRACT

The codification of the socio-economic rights and entitlements through the enactment of legislation has always been viewed as a critical lever in the realisation of such rights. However, more than twenty years since the enactment of the Constitution and the Competition Act, it appears that the law has not succeeded in the realisation of substantive equality (in particular, reducing inequality, concentration and increasing participation) in the South African economy.

In this this paper, I assess whether South Africa's legal framework captures and gives adequate effect to the moral and political philosophy of substantive equality and transformation, exploring the foundations of the Constitution and the Competition Act. This paper reflects on the potential of law to bring about substantive equality in an economy plagued by high levels of concentration, inequality and lack of participation. Further, this paper suggests that a dignity-based interpretation approach must be adopted when seeking to give effect to substantive equality under the Competition Act. This paper also brings to light that the law alone is not sufficient to realise socio-economic goals set out in the Constitution and the Competition Act, but the attainment of such needs to be done through a collaborative effort of all spheres of government and society.

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## INTRODUCTION

1. Inscribed in the third stanza of the Freedom Charter of 1955 are the following words –

> "*The mineral wealth beneath the soil, the banks and monopoly industry shall be transferred to the ownership of the people as a whole;*
> *All other industry and trade shall be controlled to assist the well-being of the people;*
> *All people shall have equal rights to trade where they choose, to manufacture and to enter all trades, crafts and professions*."

2. These simply worded freedoms were a cry from a people oppressed by the Apartheid State. This monstrous regime, not only denied "black"[2] people equality before the law, but did so through means that impugned their dignity, through violence and the denial of basic human rights. The South African Constitution of 1996[3] is an instrument that seeks to redress the inhumane injustices of the past, through the codification of a system of governance that seeks to uphold basic human rights placing substantive equality at the heart of it. The principle of substantive equality is not only reflected in rights set out in the Constitution, but through various other pieces of legislation such as the Employment Equity Act[4] and the Competition Act[5].

3. Twenty-two years since the birth of the Constitution, the principle of equality continues to be an elusive concept in South Africa's economy.[6] The ability for "black" businesses to meaningfully enter, participate and trade on equal footing in the South African economy is stymied by the imbalance of economic power brought on by high levels of concentration.[7] Although the Competition Act is a tool designed to advance Constitutional socio-economic goals of reducing inequality, concentration and increasing participation in the economy[8],

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[2] Throughout this paper, I use "black" and "white" in the inclusive sense familiar in South Africa. This captures the crude and broad distinction that Apartheid law made between whites and non-whites. I use "black" to refer to Indian, "Coloured" and African people, admittedly, this is not a homogeneous or stable category but one which belies vast differences and inequalities. Whites are certainly not a monolithic group either, and there may be great differences in the way individuals respond to their place in South Africa. Furthermore, there may be differences between the white Afrikaans and white English communities, as well as between different socio economic classes within the white population. In this regard, I place the terms in inverted commas to reflect the inadequacy of such an inaccurate signifier for what are quite different economic realities within the category

[3] The Constitution of South Africa Act No 108 of 1996 (the "**Constitution**")

[4] The Employment Equity Act, No 55 of 1998 (the "**Employment Equity Act**")

[5] The Competition Act, No 89 of 1998 (the "**Competition Act**")

[6] Katiyatiya, L (2014) Substantive Equality, Affirmative Action and the Alleviation of Poverty in South Africa: A Socio-Legal Inquiry; Background Note to the Competition Amendment Bill 2017, GG No 1345 published on 1 December 2017 (the "**Background Note to the Competition Amendment Bill**")

[7] Roberts, S (2013) Review of competition and industrial structure: input paper for 20 year review', mimeo, report for Presidency of South Africa

[8] The preamble of the Competition Act

the principle of substantive equality is found wanting when considering the impediments faced by "black"[9] business.[10]

4. The codification of the socio-economic rights and entitlements through the enactment of legislation has always been viewed as a critical lever in the realisation of such rights. However, more than twenty years since the enactment of the Constitution and the Competition Act, it appears that the law has not succeeded in the realisation of substantive equality (in particular, reducing inequality, concentration and increasing participation) in the South African economy.[11] In this regard, I intend to assess and seek to understand whether South Africa's legal framework captures and gives adequate effect to the moral and political philosophy of substantive equality and transformation.

5. In this paper, I intend to assess substantive equality in respect of participation by "black" business in South Africa's economy as well as the role played by the law in attempting to address such. In part 1 of the paper, I attempt to explore and assess the foundations of the Constitution and the Competition Act in light of the key drivers (overcoming concentration and increasing participation in the economy) for its enactment. In part 2, I intend to explain the moral and political philosophy underpinning substantive equality in the economy and why achieving substantive equality is a key imperative for growth. In part 3, I consider the role of the law in bringing about substantive equality. In part 4, I then consider the outcomes of my assessment and explore alternative approaches as a potential drivers for substantive equality and meaningful participation in the South African economy. I do not intend to provide solutions on how to overcome inequality and the lack of meaningful participation in the economy, I hope only to add a different perspective on an issue that many economists and legal scholars currently grapple with.

## PART 1 - FOUNDATIONS AND UNDERPINNIGS OF THE COMPETITION ACT

6. Over centuries, millions of "black" people suffered discrimination and the denial of the fullness of their human dignity at the hands of the power structures on which the systems

[9] Section3 (2) of the Competition Act refers to historically disadvantaged persons as *inter alia* one of a category of individuals who, before the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), came into operation, were disadvantaged by unfair discrimination on the basis of race. However, these people are also referred to as black, therefore the terms can be used interchangeably for purposes of this paper.
[10] Roberts, S (2017) Assessing the record on competition enforcement against anti-competitive practices and implications for inclusive growth
[11] Background Note to the Competition Amendment Bill; Roberts S, (2013) 'Review of competition and industrial structure: input paper for 20 year review', mimeo, report for Presidency of South Africa

of colonialism, segregation and Apartheid were based.[12] During these years, "black" people were stripped of their political, legal, social and economic rights and entitlements.[13]

7. In respect of economic rights, this meant that participation in the economy by "black" people was limited, as the Apartheid State sought dehumanise and exclude "black" people from economic activity. This was done to the advantage a "white" minority through various means including disposition of land and state support of "white" businesses. The Apartheid State set a clear agenda to empower "white" people in various industries such as farming and mining and confine "black" people to a class of low-skilled, cheap labour to work the farms and the mines.[14] Through various legal and policy instruments, competition in the political and the economic spheres was severely curtailed, especially with regards to "black" people, who were completely eliminated from both spheres as effective participants.[15]

8. In the mid-1990s concentration was so extreme that a small number of conglomerates effectively controlled large chunks of the economy.[16] In this regard, South Africa is plagued by a plethora of dominant firms in key industries such as mining, manufacturing and financial sectors.[17] Moreover, the dominant firms generally developed under protection, regulation and support associated with the Apartheid State's economic policies.[18]

9. In its mandate to overcome the legacies of Apartheid, South Africa's first democratically elected government, sought to give effect to the principles of equality set out in the Interim Constitution[19]. Competition legislation was identified as a key instrument for such change as it was foreshadowed in the ANC's Reconstruction and Development Programme[20]. Not only was the Reconstruction and Development Programme was based on the objectives

[12] Terreblanche, S (2002) A History of Inequality in South Africa 1652 – 2002
[13] Gutto, S (2001) Equality and Non-Discrimination in South Africa: The Political Economy of Law and Law Making; Katiyatiya, L (2014) Substantive Equality, Affirmative Action and the Alleviation of Poverty in South Africa: A Socio-Legal Inquiry
[14] Makhaya, T and Roberts, S (2014) The changing strategies of large corporations in South Africa under democracy and the role of competition law
[15] Makhaya, T and Roberts, S (2014) The changing strategies of large corporations in South Africa under democracy and the role of competition law
[16] Roberts, S (2004) The role for competition policy in economic development: the South African experience' Development Southern Africa, 21(1), 227-243
[17] Fourie, F and Smith A (2001) "Revisiting the concentration-profits relationship in South Africa: moving the debate beyond deadlock." Journal for Studies in Economics and Econometrics 25(2); Background Note to the Competition Amendment Bill
[18] Makhaya, T and Roberts, S (2014) The changing strategies of large corporations in South Africa under democracy and the role of competition law
[19] The Constitution of the Republic of South Africa, Act No. 200 of 1993 (the "**Interim Constitution**")
[20] Makhaya, T and Roberts, S (2014) The changing strategies of large corporations in South Africa under democracy and the role of competition law; Roberts, S (2004) The role for competition policy in economic development: the South African experience' Development Southern Africa, 21(1), 227-243

of mobilising people and South Africa's resources toward the final eradication of Apartheid, embedded at its core were the traditions of the Freedom Charter.[21]

10. In order to be able to move forward, it is important to recount the actions that preceded the birth of the Constitution and enactment of the Competition Act. The Constitution is a product of the balance of forces that existed at the time of its drafting. When the Berlin Wall fell in 1989, the African National Congress' (the "**ANC**") Soviet backed armed struggle against the Apartheid State suffered a massive blow due to the unwinding of communist rule. Soviet support for armed struggles in different parts of the world was drying up, including Southern Africa. This precipitated a wave of negotiated settlements by the various liberation movements with their respective oppressors.[22] In this regard, South Africa's negotiation party subsequent to Nelson Mandela's release was on the back foot when entering into negotiations with the Apartheid State.[23]

11. Formal negotiations to bring about democracy were accompanied by parallel, informal, economic negotiations with corporate South Africa. These informal negotiations led to concessions by the African National Congress (the "**ANC**") and its alliance partners on the inevitability of a neo-liberal growth path for South Africa, at least for the foreseeable future.[24] According to Sampie Terreblanche, this resulted in the ANC conceding a "50 per cent" solution for South Africa's crisis, where the upper 50 per cent of society were incorporated into the economic mainstream, while the lower 50 per cent were confined to its margins, although they were incorporated politically through franchise rights.[25]

12. During the transition talks, the ANC argued that negotiations and power sharing for an interim period were necessary to ensure the buy-in of the apartheid government and the "white" right, and to prevent the country's collapse into a full-scale civil war. This argument prevailed and subsequently, the Convention for a Democratic South Africa ("**CODESA**"), followed by the Multi-Party Negotiating Forum, negotiated the Interim Constitution and 34 constitutional principles as a framework for the final constitution.[26]

13. In light of the above, South Africa's Constitution was drafted by a Constitutional Assembly (instead of the rightful Constituent Assembly), whose work was circumscribed by the

[21] The African National Congress, 1994 The Reconstruction and Development Programme- A policy Framework
[22] Duncan, J (2001) The Problem with South Africa's Constitution available at http://www.sacsis.org.za/site/article/741.1 (accessed 16 June 2018).
[23] Terreblanche, S (2002) A History of Inequality in South Africa 1652 – 2002; Duncan, J (2001) The Problem with South Africa's Constitution available at http://www.sacsis.org.za/site/article/741.1 (accessed 16 June 2018)
[24] Terreblanche, S (2002) A History of Inequality in South Africa 1652 – 2002
[25] Terreblanche, S (2002) A History of Inequality in South Africa 1652 – 2002
[26] Duncan, J (2001) The Problem with South Africa's Constitution available at http://www.sacsis.org.za/site/article/741.1 (accessed 16 June 2018)

agreements arrived at during negotiations. In this regard, measures stripped the Constitutional Assembly of its sovereignty, as an unelected body set the framework for South Africa's future.[27] According to Jane Duncan, the effect of the Constitution is a mapping over onto Terreblanche's "50 percent solution," by extending formal political participation rights to formerly disenfranchised "black" people, while cementing political agreements that left "white" control of the economy largely intact."[28] In this regard, the Constitution fails to account for equality on all levels of the social formation, not just political participation only.[29]

14. It is on this foundation, that legislation enacted to give effect to the equality imperatives of the Constitution was passed. The newly democratically elected ANC government published a White Paper on Reconstruction and Development which set out that competition law was to promote traditional economic goals.[30] In addition, competition law had to reform market structures that underpin high prices, break down barriers to entry, control anti-competitive practices such as market domination, collusive practices and abuse as well as exploitation of markets or customers. Competition law also had to serve a broader social and political purpose to promote the interests of small and medium enterprises.

15. After an extended process of negotiation and consultation with organised business (dominated by big business in the way the constituency is composed) and labour in the National Economic Development and Labour Council ("**NEDLAC**"), the Competition Act was passed in 1998, and came into effect in 1999[31]. However, the Competition Act was negotiated in the context of liberalisation and was referred to in the government's Growth, Employment and Redistribution strategy as necessary in the context of deregulated markets.[32]

16. The objectives of the Competition Act emphasize the ability to participate in the economy, including by small and medium enterprises and by historically disadvantaged persons.

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[27] Duncan, J (2001) The Problem with South Africa's Constitution available at http://www.sacsis.org.za/site/article/741.1 (accessed 16 June 2018)
[28] Duncan, J (2001) The Problem with South Africa's Constitution available at http://www.sacsis.org.za/site/article/741.1 (accessed 16 June 2018)
[29] Duncan, J (2001) The Problem with South Africa's Constitution available at http://www.sacsis.org.za/site/article/741.1 (accessed 16 June 2018)
[30] Government Gazette G N 1954 in GG 16085 of 23 November 1994 Proposed Guidelines for Competition Policy of 27 November 1997; Terreblanche, S (2002) A History of Inequality in South Africa 1652 – 2002
[31] Roberts, S (2000) The Internationalisation of Production, Government Policy and Industrial Development in South Africa', unpublished PhD thesis, University of London
[32] Makhaya, T and Roberts, S (2014) The changing strategies of large corporations in South Africa under democracy and the role of competition law; Department of Finance (1996) Growth, Employment and Redistribution – A macroeconomic strategy.

They also identify the need to address the legacy of apartheid in terms of concentrated ownership and control. However, business motivated for the narrow framing of specific provisions of the Competition Act in terms of the need for "certainty" (Roberts, 2000).[33] This certainty was to entrench their economic position established under Apartheid. Further, big business lobbied vigorously for independent institutions (the Competition Commission, the Competition Tribunal and the Competition Appeal Court) to oversee the implementation of the Competition Act, as well as limited role for the Minister of the Department of Trade and Industry[34] to maintain the "confidence" of business and international markets.[35] In light of this, the tension between addressing the Apartheid legacy and the liberalisation agenda is reflected in expansive objectives of the Competition Act, juxtaposed with the provisions contained in the legislation being quite restrictive.[36]

17. Twenty years since the enactment of the Competition Act, South Africa is still plagued by high levels of market concentration, barriers to entry and a lack of diversity of ownership plague South Africa's development.[37] The negative impact of such concentration is the prevention of participation in the economy, particularly by "black" people. In so far as the distribution of wealth in South Africa is concerned, post 1994 to date, there has little transfer, as South Africa remains one of the world's most unequal countries with the top 10% owning 90-95% of the wealth.[38]

18. Although laws were enacted to bring about change, it appears as though the preceding actions have rendered such legal instruments as nugatory. It also bears mention that liberalisation through "freeing up" markets does not appear to equate to greater participation in the economy. What is evident is that advantages gained by incumbents prior to the Competition Act are entrenched.[39]

[33] Roberts, S (2000) 'The Internationalisation of Production, Government Policy and Industrial Development in South Africa', unpublished PhD thesis, University of London, 2000.
[34] Currently, competition policy is overseen by the Minister of Economic Development.
[35] Habib, A and Padayachee, V (2000) Economic Policy and Power Relations in South Africa's Transition to Democracy, World Development, 28(2), 245-263.
[36] Roberts, S (2012) Administrability and business certainty in abuse of dominance enforcement: an economist's review of the South African record, World Competition, 35(2), 269-296; Makhaya, T and Roberts, S (2014) The changing strategies of large corporations in South Africa under democracy and the role of competition law
[37] Background Note to the Competition Amendment Bill
[38] Roberts, S (2017) Assessing the record on competition enforcement against anti-competitive practices and implications for inclusive growth, REDI 3x3 Working Paper 27; Orthofer, A (2016) Wealth inequality in South Africa: Evidence from survey and tax data', REDI 3x3 Working Paper 15
[39] Makhaya, T and Roberts, S (2014) The changing strategies of large corporations in South Africa under democracy and the role of competition law

19. The consolidation of industries and increased vertical integration that followed liberalisation compounded difficulties in respect of wider entry into various markets.[40] While large firms punted improved efficiencies through mergers and vertical integration, the effect of this was the handing over of value chains and key decisions regarding development of sectors to a handful of firms.[41] It is also important to keep in mind that while firms wish to improve the efficiency of their value chains as a whole, they are also concerned with protecting their entrenched position as well as their ability to earn rents.[42]

20. The fact that not much has changed in the South African economy in the last twenty years is a bitter pill to swallow. According to a Study conducted by the Industrial Development Corporation of South, the economy has become less diverse.[43] In addition, there is appears to be an inability to produce new products, even after the enactment of the Constitution and the Competition Act to bring about substantive equality through broad based participation in the economy.[44] In this regard, I believe it is important to assess the underpinnings of substantive equality in our laws as well as the ability of our legal framework to give effect to such.

## PART 2 – UNDERSTANDING SUBSTANTIVE EQUALITY

### *A. What is Substantive Equality?*

21. One of South Africa's democratic cornerstones is the Bill of Rights which is espoused in Chapter 2 of the Constitution. Encompassed in the Bill of Rights are *inter alia*, rights to equality[45] dignity[46], life[47], freedom of trade, occupation and profession[48] as well as housing[49]. Although the concept of equality is an essential feature of domestic laws across the world, its meaning remains contested.[50] The concept of equality contained in the South

[40] Makhaya, T and Roberts, S (2014) The changing strategies of large corporations in South Africa under democracy and the role of competition law
[41] Kaplinsky, R (2000) Globalisation and Unequalisation: What can be learned from value chain analysis?' Journal of Development Studies, 37(2)
[42] Makhaya, T and Roberts, S (2014) The changing strategies of large corporations in South Africa under democracy and the role of competition law
[43] Industrial Development Corporation – Department of Research and Information, (2017) Economic Overview, Recent Developments in the global and South African economies
[44] Industrial Development Corporation – Department of Research and Information, (2017) Economic Overview, Recent Developments in the global and South African economies
[45] Section 9 of the Constitution
[46] Section 10 of the Constitution
[47] Section 11 of the Constitution
[48] Section 22 of the Constitution
[49] Section 26 of the Constitution
[50] O'Cinneide, C (2008) The Right to Equality: A Substantive legal Norm or Vacuous Rhetoric?" UCL Human Rights Review Vol. 1; Dworkin, R (1981) What is equality? Part 1: Equality of welfare", Philosophy & Public Affairs 10 228 – 240; Sen, A (1980) Equality of What? Tanner Lectures on Human values; Westen, P (1982) The Empty Idea of Equality" Harvard Law Review

African Bill of Rights is influenced by a modern progressive understanding and developments in human rights law and practice.[51]

22. The first part of the definition of equality contained in section 9 (2) of the Constitution reads: "*Equality includes the full and equal enjoyment of all rights and freedoms*." The Constitution incorporates corrective measure as a necessary constitutional weapon for advancing equality[52] and further prohibits direct and indirect unfair discrimination.[53] In this way, practices whose purpose is to discriminate unfairly, or whose effect, impact or outcome amount to unfair discrimination irrespective of the motive or intention, are prohibited.[54]

23. According to Liebenberg and Goldblatt, the "*Constitution's transformative vision is centred on the dismantling of systematic forms of disadvantage and subordination*."[55] In this regard, the Constitution embraces a substantive conception of equality. Substantive equality can usefully be contrasted with formal equality, namely the idea that likes should be treated alike. Formal equality and substantive equality are the two distinct models that are often used to consider issues of equality and discrimination.[56]

24. Formal equality represents a symmetrical view of equality. It regards as lawful, the usage of *inter alia*, race, gender, age or disability as a criterion for decision making whether directed against or in favour of a disadvantaged group.[57] It adheres to the importance of individualism and neutral treatment. In this regard, formal equality is primarily about ensuring individual freedom from group stereotyping.[58]

25. Substantive equality is more concerned with the purpose as well as the process and the outcome or result of any legal or policy intervention which may lead to unfair discrimination or underpin existing inequalities.[59] Albertyn argues that substantive equality draws from the perception that inequality is not a result of arbitrary action, but has its "*roots in political,*

[51] Katiyatiya, L (2014) Substantive Equality, Affirmative Action and the Alleviation of Poverty in South Africa: A Socio-Legal Inquiry
[52] Section 9(2) of the Constitution
[53] Section 9(3) and (4) of the Constitution
[54] Katiyatiya, L (2014) Substantive Equality, Affirmative Action and the Alleviation of Poverty in South Africa: A Socio-Legal Inquiry
[55] Liebenberg, L & Goldblatt, B (2007) The Interrelationship between equality and socio-economic rights under South Africa's Transformative Constitution (2007), SAJHR 338
[56] Albertyn, C and Kentridge, J (1994) Introducing the right to equality in the interim constitution SAJHR 149
[57] Dupper, O (2002) Affirmative Action and Substantive Equality: The South African Experiences" Mercantile Law Journal 278
[58] Katiyatiya, L (2014) Substantive Equality, Affirmative Action and the Alleviation of Poverty in South Africa: A Socio-Legal Inquiry
[59] Katiyatiya, L (2014) Substantive Equality, Affirmative Action and the Alleviation of Poverty in South Africa: A Socio-Legal Inquiry

*social and economic cleavages between groups.*"[60] Further, substantive equality embraces "*the complexity of inequality, its systematic nature and its entrenchment in social values*".[61]

26. In addition, Rósaan Krüger argues that the Constitution's substantive view of which "*takes social and economic conditions of groups and individuals into consideration when determining the meaning of equal treatment*", tries to undo long-standing patterns of disadvantage.[62] It is important to note that substantive equality affords levelling out the playing field by requiring all initiatives to lead to three significant ends, namely (i) equality of outcome; (ii) equality of opportunity; and (iii) equality of access.[63]

27. Equality of outcome is results-oriented and defines equality in terms of full participation and fair access of groups to housing, education and other public services.[64] This aims to overcome the underrepresentation of disadvantaged groups and to ensure fair participation in the distribution of benefits.[65] This may involve special measures such as Affirmative Action as set out in the Employment Equity Act, distribution of equity in companies to "black" people under the Broad Based Black Empowerment Act[66] or the call for increased participation in the economy as set out in the Competition Act, to overcome disadvantage.

28. Philosopher John Rawls argues that, distributive justice does not involve the equality of individual outcomes, but only requires that individuals face equal opportunities for outcome.[67] Equality of opportunity advances the idea that people should not be advantaged or burdened by their social background and should have the same start in competing for material rewards. Equality of opportunity calls for a platform where everyone is allowed a possibility to nurture their respective prospects. Their prospects in life should be dependent on their own efforts and abilities. Rawls calls this principle "*fair equal*

[60] Albertyn, C (2009) Constitutional Equality in South Africa in O Dupper and C Garbers (eds) Equality in the Workplace: Reflections from South Africa and Beyond
[61] Albertyn, C (2009) Constitutional Equality in South Africa in O Dupper and C Garbers (eds) Equality in the Workplace: Reflections from South Africa and Beyond
[62] Krüger R, (2011) Equality and Unfair Discrimination: Refining the Harksen Test' (2011) 128 South Africa Law Journal 479
[63] There are various types of equality which include, among others, moral equality, equality of outcome, equality of opportunity, proportional equality, equality of responsibility, utilitarianism and libertarianism. Most of these types of equalities embrace issues that are beyond the scope of this paper
[64] B Hepple "Equality and Empowerment for Decent Work" (2001) International Labour Review Vol.140, No.1 7- 8.
[65] B Hepple "Equality and Empowerment for Decent Work" (2001) International Labour Review Vol.140, No.1 7- 8.
[66] Act No 53 of 2003 (the "**BEE Act**")
[67] J Rawls, J (1971) A Theory of justice

*opportunity*".[68] The notion of equality of opportunity is introduced into political discussions when accessibility to certain goods and services is of doubtful value.[69]

29. It is important to note that equality of opportunity extends to the issue of accessibility of opportunities and resources. Access is an inclusive concept and can be viewed as a process or an outcome.[70] It is deemed necessary to achieve social connectedness and the opening of doors to opportunities in life. According to Aday and Anderson, access can be regarded as "potential access" or "realised access".[71] They posit that potential access occurs at each necessary point along the journey towards realised access. Experiences which occur at the "potential access" point have an impact on the attainment of the "realised access".[72] In other words, access involves positive engagement and response at every process point so that equality of opportunity is realised.[73] On the other hand, if the engagement is negative at the process point, it hinders a possible realisation of an opportunity.[74]

30. Issues of access are at the heart of Inclusive Growth focused competition policy. According to Ramos, Ranieri and Lammens[75], inclusive growth is explained in the following terms:

> '*Inclusive growth is both an outcome and a process. On the one hand, it ensures that everyone can participate in the growth process, both in terms of decision-making, for organising growth progression as well as in participating in the growth itself (and earning income). On the other hand, it goes some way towards ensuring that everyone equitably shares the benefits of growth. Inclusive growth implies participation and benefit sharing. Participation without benefit sharing will make growth unjust and sharing benefits without participation will make it a welfare outcome*.'

31. Taking from Ramos, Ranieri and Lammens, Roberts adds that:[76]

> "*Inclusive growth defined this way is about not just ensuring that the poor benefit from growth, but also that there is increased participation of the poor and disenfranchised*

[68] Rawls, J (1971) A Theory of Justice Cambridge 73; Rawls, J (2001) Justice as Fairness: A Restatement
[69] Katiyatiya, L (2014) Substantive Equality, Affirmative Action and the Alleviation of Poverty in South Africa: A Socio-Legal Inquiry
[70] Katiyatiya, L (2014) Substantive Equality, Affirmative Action and the Alleviation of Poverty in South Africa: A Socio-Legal Inquiry
[71] Aday L and Anderson R (1981) Equity of Access to Medical: A Conceptual and Empirical Overview
[72] Aday L and Anderson R (1981) Equity of Access to Medical: A Conceptual and Empirical Overview
[73] Owens, J (2009) The Influence of 'access' social exclusion and social connectedness for people with disabilities in Taket, A, et al Theorising Social Exclusion
[74] Owens, J (2009) The Influence of 'access' social exclusion and social connectedness for people with disabilities "in Taket, A, et al Theorising Social Exclusion
[75] Ramos, A.R, R Ranieri, J Lammens (2013) Mapping inclusive growth, Working Paper 105, International Policy Centre for Inclusive Growth.
[76] Roberts, S (2017) Assessing the record on competition enforcement against anti-competitive practices and implications for inclusive growth, REDI 3x3 Working Paper 27

*individuals in the process of growth. This would occur via an increase in employment and entrepreneurship, as well through entry and participation at the firm level (access to markets), whereas the benefits thereof are derived from rising incomes and increased social expenditure.*"

32. In reviewing the different ends articulated as well as the aims of inclusive growth, it is arguable that substantive equality seeks to equalise the starting points by providing a basis for the realisation of "*procedural rights to participate in various spheres of life and substantive rights designed to enable people to choose among real options of similar worth*".[77]

33. The idea of equalising the starting points in life embraces the transformative nature of the Constitution and its focus on the relative detriment or benefit that attaches to status groups. The aim of substantive equality is the facilitation of full social participation. According to Burchardt, Le Grand and Piachaud: "*An individual is socially excluded if he or she does not participate in key activities of the society in which he or she lives.*"[78]

*B. <u>Why is Substantive Equality Important?</u>*

34. In recognising that South Africa's past discriminatory laws resulted in excessive concentrations of ownership and control within the national economy, and that the South African economy has to be opened to a greater number of South Africans through ownership and opportunity, the Competition Act seeks to *inter alia* (i) promote the efficiency, adaptability and development of the economy; (ii) promote employment and advance the social and economic welfare of South Africans; (iii) ensure that small and medium sized enterprises have an equitable opportunity to participate in the economy; and (iv) promote a greater spread of ownership by increasing the ownership stakes of historically disadvantaged persons.

35. The Background Note to the Competition Amendment Bill of 2017, recognises that although the Competition Act was drafted to bring about widespread ownership and participation, South Africa's economy remains highly unequal and continues to have narrow ownership structures, which contributes significantly to income inequality. A

[77] Lynch B.K, Cantillon S and Walsh J (2004) Equality: From Theory to Action
[78] Burchardt, T, Le Grand, Piachaud, J (2002) Degrees of Exclusion: Developing a Dynamic, Multidimensional Measure in J Hills, J Le Grand & D Piachaud (eds) Understanding Social Exclusion

number of recent assessments have identified the need to change the rules for competition given the rising inequality which has been observed in many economies.[79]

36. The attainment of substantive equality has not been without its challenges. The Constitutional Court has had to engage with the meaning in order to give effect to Section 9 of the Constitution in a number of cases, especially those dealing with Affirmative Action. The legal debate waged in these cases is apt in the competition realm as Affirmative Action is a close sibling to the Constitutional right to "*freedom of trade, occupation and profession*", a right echoed in the preamble of the Competition Act.

37. It is important to note that the Constitutional Court has regularly emphasised the remedial and restitutionary aspects of substantive equality.[80] In *Barnard*[81], the Court suggests a wide reading of section 9(2) of the Constitution. In this regard, the Court requires that social and economic conditions of groups and individuals are taken into consideration when determining the meaning of equal treatment in order to try and undo long-standing patterns of disadvantage.[82]

38. According to Ackerman J, in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*:[83]

> "*It is insufficient for the constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has on going negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied.*"[84]

39. In *Harksen*[85], the Court set out a test which reflected the close link between equality and dignity. The essence of the test is based on the assessment of the impact of a specific rule

[79] Baker, J and Salop, S (2015) Antitrust, Competition Policy, and Inequality, The Georgetown Law Journal Online; Atkinson, T (2015) Inequality: What Can Be Done?; Mncube, L (2016) Balancing Inclusive Growth and Competition; Roberts, S (2017) Assessing the record on competition enforcement against anti-competitive practices and implications for inclusive growth, REDI 3x3 Working Paper 27; Bonakele, T, Fox, E and Mncube, L (eds) (2017) Competition Policy for the New Era – Insights from the BRICS Countries
[80] City Council of Pretoria v Walker 1998 2 SA 363 (CC), 1998 3 BCLR 257 (CC)
[81] South African Police Service v Solidarity obo Barnard [2014] ZACC 23, 2014 (6) SA 123 (CC), 2014 (10) BCLR 1195 (CC)("**Barnard**")
[82] Krüger R, (2011) Equality and Unfair Discrimination: Refining the Harksen Test' (2011) 128 South Africa Law Journal 479
[83] National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1998 (12) BCLR 1517 (CC)
[84] National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1998 (12) BCLR 1517 (CC)
[85] Harksen v Lane NO and Others [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) ("**Harksen**")

or power or decision on the person or group complaining of discrimination to determine whether their human dignity has been affected.[86]

40. According to Justice Chaskalson, there is a direct link between the right to dignity and the various socio-economic rights in the Constitution:

> *"As an abstract value, common to the core values of our Constitution, dignity informs the content of all the concrete rights and plays a role in the balancing process necessary to bring different rights and values into harmony. It too, however, must find its place in the constitutional order. Nowhere is this more apparent than in the application of the social and economic rights entrenched in the Constitution. These rights are rooted in respect for human dignity, for how can there be dignity in a life lived without access to housing, health care, food, water or in the case of persons unable to support themselves, without appropriate assistance. In the light of our history the recognition and realisation of the evolving demands of human dignity in our society – a society under transformation – is of particular importance for the type of society we have in the future."*[87]

41. As regards the inextricable link between substantive equality and the upholding of human dignity,[88] Fredman adds that dignity (and respect for dignity) "*should be used in alliance with socio-economic rights to create a powerful means of upholding substantive equality*."[89]

42. It is important to note that the concept of dignity also revolves around stigma, hatred, humiliation or even violence directed at an individual because of group membership. This constitutes recognition inequality. Recognition as a valued, respected member of society is a basic human need and is central to our sense of wellbeing, our sense of who and what we are.[90]

43. According to Philosopher Emmanuel Kant, 'inherent dignity' is a special worth that comes from and along with being a human being.[91] Echoing Emmanuel Kant, Samantha Vice adds that:

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[86] The Constitutional Court has set out stages of enquiry for the unfairness test in Harksen:
[87] Chaskalson, A (2000) Third Bram Fischer Memorial Lecture" SAJHR 204 – 205
[88] In National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1998 (12) BCLR 1517 (CC) at para 30, the Court recognised that "the rights of equality and dignity are closely related".
[89] Fredman S (2009) Facing the Future: Substantive Equality Under the Spotlight in O Dupper & C Garbers (eds) Equality in the Workplace: Reflections from South Africa and Beyond
[90] Smith, S.B (1989) Hegel's Critique of Liberalism: Rights in Context Chicago
[91] Ackermann, L (2012) Human Dignity: Lodestar for Equality in South Africa

"*To be human, then, is to be valuable in a special way; one does not have to prove one's worthiness or earn dignity; it inheres in one regardless of what one does, solely in virtue of being rational.*"[92]

44. In this regard, it is important to keep in mind that "black" people under Apartheid were treated as if they had no dignity and little moral status - they were treated in ways that disrespected their dignity and moral equality.

45. In light of the above, the attainment of substantive equality is tantamount to the attainment of the dignity of an impugned group. The Constitutional Court has adopted a dignity-based interpretation of equality which has been lauded as it has resulted in several context-sensitive and transformative judgments.[93] Although issues of dignity and equality are moral and political claims, they are codified in South Africa's Constitution among other socio-economic rights.[94] In light of this, it begs the question whether the codification of such rights provides citizens with the ability to realise them.

## PART 3 - THE LAW AND SUBSTANTIVE EQUALITY

46. Rights are claims or entitlements which can be useful in language and in public debate.[95] Such rights and entitlements can be codified through the passing of legislation such as the Constitution and the Competition Act. Although rights can and are codified, this does not exempt them from conceptual fuzziness in their enactment and/or realisation.[96] It is important to note that, in order for one to realise and give effect to one's rights where such is contested, one must approach the courts to do so with the hope that by the time such remedy is provided, one is able to execute such right.

47. In this regard, some influential thinkers such as Judge Dennis Davis cautioned against including socio-economic claims against the government as rights in our Constitution.[97] The basis of their argument was that entrusting the effect of these rights to judges (rather than to the legislature alone) would obstruct, rather than help, democratic transformation.[98] It has also been argued that rights enable powerful groups to insulate privilege and to

[92] Vice, S (2017) Equality and Dignity in Bernard, Constitutional Court Review, 135-162
[93] H Botha"Equality, Dignity and the Politics of Interpretation" in W le Roux & K Van Marle Post-Apartheid Fragments: Law, Politics and Critique (2007) 170. See S v Makawanyane 1995 (6) BCLR 665 (CC); S v Makwanyane 1995 (3) SA 391 (CC)
[94] Section 10 of the Constitution
[95] Cameron, E (2012) What you can do with rights, The Fourth Leslie Scarman Lecture
[96] Cameron, E (2012) What you can do with rights, The Fourth Leslie Scarman Lecture
[97] Davis, DM (1992) The Case against the Inclusion of Socio-economic Demands in a Bill of Rights except as Directive Principles SAJHR 475
[98] Liebenberg, S (2010) Socio-Economic Rights – adjudication under a transformative constitution

"*silence challenges by vulnerable sectors of society to existing social power structures and … to thwart state efforts at social redistribution*".[99]

48. According to Carol Smart, law does not have a unified monolithic character, instead law operates through varied principles which when deployed may produce conflicting and contradictory effects.[100] In this view, law is a contested system of knowledge which is a site of power struggles. This system regulates the margins of privilege and disadvantage in social, political and economic life.[101]

49. Smart argues that while the belief in the law's ability to right wrongs is pervasive, there is less recognition of its ability to cause harm through its operations.[102] Madlalate concurs with this notion, adding that:

> "*the discourse of law must not be viewed as intrinsically good or bad, instead it exercises 'two parallel mechanisms power', one as expressed negatively through directive and disciplinary power and another expressed positively through the creation of spaces for resistance and struggle.*"[103]

50. In this regard, the law is a dialogic space which can serve as a tool to marginalise people and as a means of resistance in the hands of the marginalised.[104]

51. The role of law in society is to resolve conflicts, and to protect against mistakes in the exercise of power by public bodies, it does not plan or initiate social change, nor does it make the public policy choices essential to it.[105] Geoff Bundlender echoed this sentiment stating that: "*to trust legal regulation and legal rights too much overloads the legal system.*"[106] Therefore, the law may strain, crack or even break under the resultant political and social burden.[107]"

52. However, Justice Cameron argues that the law and legal rights can, despite rightful misgivings about them, play a practical part in securing what a decent society should

[99] Pieterse M (2007) Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited, Human Rights Quarterly 29
[100] Smart, C (1989) Feminism and the Power of Law
[101] Madlalate, R (2017) (In)Equality at the intersection of race and space in Johannesburg, SAJHR
[102] Madlalate, R (2017) (In)Equality at the intersection of race and space in Johannesburg, SAJHR
[103] Madlalate, R (2017) (In)Equality at the intersection of race and space in Johannesburg, SAJHR
[104] Madlalate, R (2017) (In)Equality at the intersection of race and space in Johannesburg, SAJHR
[105] Cameron, E (2012) What you can do with rights, The Fourth Leslie Scarman Lecture
[106] Budlender, G (2011) People's Power and the Courts, Bram Fischer Memorial Lecture
[107] "For reasons of institutional legitimacy, resources, expertise, capacity and clout, the legislative and executive branches are typically regarded as being best placed to articulate specific socio-economic entitlements and to establish the administrative and other processes through which these may be effectively claimed" – Marius Pieterse, M (2010) Legislative and executive translation of the right to have access to health care services"

promise its citizens.[108] Therefore, what rights can bring lies not only in tangible goods consisting in bricks and mortar, but also in less tangible benefits that resonate in people's sense of civic well-being and entitlement."[109] This belief is evident in the legal victories in respect of *inter alia*, equal rights for homosexual people[110], women's rights against subordination in society[111] as well as access to healthcare[112].

53. However, the *Grootboom*[113] case exposed the shortcomings of legal remedies in the attainment of socio-economic rights.[114] Mrs Grootboom was handed down a favourable order by the Constitutional Court in the attainment of her right to adequate housing after successfully challenging the government's housing programme generally for making no express provision for those in desperate need. The Constitutional Court declared government's housing programme was invalid on the basis that it failed to provide those "*who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations*". However, the Constitutional Court did not provide Mrs Grootboom with specific relief. Sadly she died in August 2008, almost 8 years after the judgement, while still living in a shack.

54. Subsequent to Mrs Grootboom's death, an influx of well-directed criticism was levelled at the court for the fact that socio-economic litigation failed to provide her with a home.[115] This is a sobering reminder of the limits of rights litigation.[116]

55. However, to paint only a bleak picture of role of law in society, would be remiss in recognising its ability to play a meaningful part in improving the lives of citizens. Cameron argues that although Mrs Grootboom died without a house, the legal fight for the realisation of her socio-economic right resulted in the enactment of Chapter 12 of the National housing

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[108] Though with distinction, Cameron explores the following cases as examples of legal victories, Government of the Republic Of South Africa And Others v Grootboom and Others 2001 (1) SA 46 (CC); TAC v Minister of Health, National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC); National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC)
[109] Cameron, E (2012) What you can do with rights, The Fourth Leslie Scarman Lecture
[110] National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC); National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC)
[111] *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC) at para 62; K v Minister of Safety and Security [2005] ZACC 8; 2005 (6) SA 419 (CC); F v Minister of Safety and Security [2011] ZACC 37 (judgment of 15 December 2011)
[112] TAC v Minister of Health, National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC)
[113] Government of the Republic Of South Africa And Others v Grootboom and Others 2001 (1) SA 46 (CC)
[114] Cameron, E (2012) What you can do with rights, The Fourth Leslie Scarman Lecture
[115] Joubert, P (2008) Grootboom dies homeless and penniless", Mail and Guardian 8 August 2008, available at http://mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-pennilessB (accessed 12 July 2018)
[116] Cameron, E (2012) What you can do with rights, The Fourth Leslie Scarman Lecture

Code[117] which is an obligatory guide that requires national, provincial and municipal government to plan for and act where people are in desperate need.[118]

56. Criticism has been levelled at the Competition Act's inability to give legal effect to equitable opportunity and participation in the economy by small to medium enterprises as well as "black" people. According to Roberts, the restrictive framing of the provisions contained in the Competition Act especially regarding abuse of dominance are at odds with the expansive objectives set out in the Preamble.[119]

57. Prohibited abuses of a dominant position are set out in section 8 of the Competition Act, with separate sub-sections. Prohibited price discrimination by a dominant firm is covered in section 9. South Africa differs from most other countries in specifying separate conduct in South Africa as discrete contraventions rather than having one over-arching provision proscribing abuse of dominance, within which particular forms of conduct fall.

58. Under section 8(a) it is prohibited for a dominant firm to charge an excessive price to the detriment of consumers, with such a price defined under the Act as a price which bears no reasonable relation to the economic value of the good or service, and is higher than such value (Section 1.(1) (ix) Definitions and interpretation). Economic value is not defined in the Act.

59. Exclusionary conduct is covered under sections 8(b), (c) and (d) of the Competition Act. Section 8(b) prohibits a dominant firm from denying access to an essential facility.

60. Section 8(c) prohibits a dominant firm from engaging in exclusionary conduct defined in general terms. However, there is no penalty for a first contravention and with the onus on the complainant to demonstrate that the anti-competitive effect outweighs its technological, efficiency or other pro-competitive benefits. An exclusionary act is defined as that which impedes or prevents a firm entering into, or expanding within, a market.

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[117] National Housing Programme: Housing Assistance In Emergency Circumstances – Policy Prescripts and Implementation Guidelines (April 2004), available at http://www.bloemfontein.co.za/docs/Emergency%20Housing%20Programme.pdf (accessed 7 December 2011).
[118] Socio-Economic Rights Institute of South Africa (SERI) "A Review of Housing Policy and Development in South Africa since 1994" (September 2010) (Grootboom "gave rise to a right to emergency housing and a means for its enforcement", quoting Stuart Wilson), available at http://www.spii.org.za/agentfiles/434/file/Research/Review%20of%20the%20Right%20to%20Housing.pdf (accessed 12 July 2018).
[119] Roberts, S. (2012) Administrability and business certainty in abuse of dominance enforcement: an economist's review of the South African record; Makhaya, T and Roberts, S (2014) The changing strategies of large corporations in South Africa under democracy and the role of competition law;

61. Section 8(d) identifies particular types of exclusionary acts that are prohibited as an abuse of dominance, and for which a penalty may be imposed, as follows:

> *(i) requiring or inducing a supplier or customer to not deal with a competitor;*
> *(ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;*
> *(iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of the contract, or forcing a buyer to accept a condition unrelated to the object of the contract;*
> *(iv) selling goods or services below their marginal or average variable cost; or*
> *(v) buying-up a scarce supply of intermediate goods or resources required by a competitor.*

62. This section also provides that the firm concerned (the respondent) 'can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act' which means that, assuming the respondent can put up some arguments for pro-competitive gains, the anti-competitive effect must be evaluated by the Commission and found to be of significance.

63. One of the key impediments to giving effect to the Competition Act is the under enforcement of dominant firms in the economy. This has meant that dominant firms are able to maintain their position to the detriment of actual and potential rivals and entrants.[120]

64. In addition, at the crux of a successful prosecution of an abuse of dominance case, is the ability to demonstrate anti-competitive effect. Moreover, the effect on competition has to be significant and capable of quantification, with the onus being on the respondent to demonstrate that efficiencies or pro-competitive effects outweigh the harm to competition.[121] In this regard, the economic analysis in quantifying the effects on competition economic analysis is central to the case. The difficulties faced by a smaller rival and/or potential competitor is quantifying the negative effects felt by it on overall competition, whereas the dominant firm is able to aptly produce information to argue efficiencies, countering the harm raised by the rival.[122]

[120] Roberts, S (2017) Assessing the record on competition enforcement against anti-competitive practices and implications for inclusive growth, REDI 3x3 Working Paper 27
[121] Roberts, S (2017) Assessing the record on competition enforcement against anti-competitive practices and implications for inclusive growth, REDI 3x3 Working Paper 27
[122] Roberts, S (2017) Assessing the record on competition enforcement against anti-competitive practices and implications for inclusive growth, REDI 3x3 Working Paper 27

65. It is important to keep in mind that South Africa is currently encumbered with a long legacy of generations who experienced structural advantage and disadvantage.[123] The injustices and inequalities produced by past discrimination do not just go away simply because the laws which enforced the discrimination have been abolished. Inequalities replicate themselves from generation to generation.

66. In this regard, entrenched incumbents in particular sectors of the economy continue to earn high profits with low levels of investment and little effort and innovation.[124] It is important that a broad view is taken when assessing barriers to the entry and expansion faced by small to medium business as well as business controlled by "black" people. This must be done as the ability for such firms to compete may be negatively impacted by substantial incumbent advantages where the incumbent is able to recoup its investment costs, while the prospective rival incurring the same costs is likely to be deterred.[125]

67. The strategic behaviour of the incumbent may also negatively impact prospective rival, thereby, exacerbating the incumbent's advantage. According to Roberts, "*the range of barriers reinforce the advantage of inherited incumbency and, in the context of very unequal ownership and the ability to exert market power, reinforce and exacerbate inequality*".[126]

68. The current powers conferred upon the Competition Commission or the Competition Tribunal in the Competition Act do well to address only collusion and market abuse, but not concentration.[127] In this regard, the ability of competition regulators to respond to issues of concentration is severely limited. In addition, due to the adversarial nature of the process in prosecuting an abuse of dominance contravention, the investigation process as well as the hearing take long. Further, the Competition Tribunal has generally taken a step back from identifying the necessary evidence required to make a determination (Roberts 2017).

69. The identified shortcomings in dealing with market concentrations have not gone unnoticed by the Minister of Economic Development (the "**Minister Patel**"). Minister Patel recognises that the inability of the Competition Act to bring about its broad objectives

[123] Katiyatiya, L (2014) Substantive Equality, Affirmative Action and the Alleviation of Poverty in South Africa: A Socio-Legal Inquiry
[124] Roberts, S (2017) Assessing the record on competition enforcement against anti-competitive practices and implications for inclusive growth, REDI 3x3 Working Paper 27
[125] Roberts, S (2017) Assessing the record on competition enforcement against anti-competitive practices and implications for inclusive growth, REDI 3x3 Working Paper 27
[126] Roberts, S (2017) Assessing the record on competition enforcement against anti-competitive practices and implications for inclusive growth, REDI 3x3 Working Paper 27
[127] Background Note to the Competition Amendment Bill

requires amelioration. In this regard, he has identified the proposed Competition Amendment Bill of 2017 (the "**Competition Amendment Bill**") as one of many complementary policy instruments to achieve the objectives set out in the Preamble. In light of this, we need to ask ourselves whether the Competition Amendment Bill is sufficient to bring effect to the objectives of the Preamble and whether there are complimentary tools to the Competition Amendment Bill which can assist.

## PART 4 – AN ALTERNATIVE APPROACH IN ADDRESSING EXCLUSION AND PARTICIPATION IN TERMS OF THE COMPETITION ACT

70. The Background Note to the Competition Amendment Bill sets out the important rationale for the legislation in terms of the role for competition policy in addressing concentration and exclusion. It is stated that in order to address concentration and exclusion, the Competition Amendment Bill requires broader provisions dealing with dominance issues, as well as increased resources and powers of the competition regulators. According to Minister Patel:

> "*the Competition Amendment Bill is a significant policy shift by government, as it introduces economic concentration as an explicit consideration in all competition proceedings."*[128]

71. However, it is important that in dealing with entrenched dominance, the Competition Amendment Bill encapsulates South Africa's history and prevailing conditions. In this regard in order to attain balanced enforcement, such enforcement must take into account country specific priorities and standards, as has been done in comparisons between North America and Europe, as well as comparisons with some Asian countries such as Japan and South Korea.[129]

72. In light of this, it would be prudent for the Minister Patel and his advisory team to keep in mind comparative jurisdictions such as South Korea and how they have dealt with issues of concentration. The mandate of the South Korean Fair Trade Commission ("**KFTC**") includes evaluating 'unreasonable' practices and 'unjustifiable' restrictions on

[128] Engineering News (2018) Competition Amendment Bill to be submitted to Parliament, accessed at http://www.engineeringnews.co.za/article/competition-amendment-bill-to-be-submitted-to-parliament-2018-07-05 (accessed on 15 July 2018)
[129] Roberts, S (2017) Assessing the record on competition enforcement against anti-competitive practices and implications for inclusive growth, REDI 3x3 Working Paper 27

competition.[130]. Kyu-Uck Lee (1997, as cited in Fox, 2002 and Roberts 2017) observes the following regarding competition law and policy in Korea:[131]

> "*Competition is the basic rule of the game in the economy. Nevertheless, if the outcome of competition is to be accepted by the society at large, the process of competition itself must not only be free but also conform to a social norm, explicit or implicit. In other words, it must also be fair. Otherwise, the freedom to compete loses its intrinsic value. Fair competition must go in tandem with free competition. These two concepts embody one and the same value. This may be the reason that competition laws of several countries such as Korea and Japan clearly specify 'fair and free competition' as their crown objective. . . . I believe that the abstract notion of fairness rests, inter alia, on equitable opportunities, impartial application of rules and redemption of past undue losses. . . . Fairness, then, does not imply absolute libertarianism but instead takes the form of socially redefined freedoms.*
>
> *Viewed from this perspective, the polemic whether competition laws should aim only at enhancing economic efficiency rather than at promoting some social policy goals such as fairness may appear to be irrelevant. After all, efficiency is intrinsically not a value-free concept.*
>
> [I]*n a developing economy where, incipiently, economic power is not fairly distributed, competition policy must play the dual role of raising the power, within reasonable bounds, of underprivileged economic agents to become viable participants in the process of competition on the one hand, and of establishing the rules of fair and free competition on the other. If these two objectives are not met, unfettered competition will simply help a handful of privileged big firms to monopolize domestic markets that are usually protected through import restrictions. This will then give rise to public dissatisfaction since the game itself has not been played in a socially acceptable, fair manner.*"

73. Fox and Roberts also cite Nam-Kee Lee (2002), then Chairman of the Korea Fair Trade Commission, as follows:[132]

> "*…developing countries cannot avoid concerns about the competitiveness of domestic businesses. In this context, it would not be well advised to suggest that developing countries adopt the same level of competition policy as developed countries, when their markets are not as mature and businesses not as competitive."*

[130] Fox, E. (2002) What is harm to competition? Exclusionary practices and anticompetitive effect, Antitrust Law Journal, 70, 371-411

[131] Kyu-Uck Lee, A (1997) Fairness" Interpretation of Competition Policy with Special Reference to Korea's Laws, in The Symposium in Commemoration of the 50th Anniversary of the Founding of the Fair Trade Commission in Japan, Competition Policy for the 21st Century (KFTC 1997)

[132] Nam-Kee Lee, (2002) Korean Economic Development Policy Lessons—The Shift from Industrial to Competition Policy', Keynote Speech at the Intergovernmental Group of Experts on Competition Law and Policy (Fourth Session) of UNCTAD, July 3, 2002, available at http://ftc.go.kr/data/hwp/200207.doc.

74. In light of the above, possible amendments to South Africa's Competition Act need to give effect to concerns about competitiveness as is advised by Nam-Kee Lee. The current version of the Competition Amendment Bill seeks to address *inter alia* market concentration through the market inquiry mechanism, and on that basis, develop evidence-based and reasoned measures to promote more developmental market structures.[133]

75. According to Roberts, South Africa's competition authorities should adopt the Chile Tribunal's ("**TDLC**") so-called *auto de prueba* (the resolution of proof) in respect of abuse of dominance cases. In terms of the resolution of proof, the TDLC identifies what it believes is the scope of the case and the relevant facts. This also guides the hearing of factual witnesses and expert witnesses, normally local economic experts.[134] According to Roberts, Tapia and Bar, although the resolution of proof has been challenged, it makes the hearing of the case proceed quickly and ultimately, the Chile legal framework has allowed the TDLC to apply a broad test of 'no economic sense' to much of the conduct, to assess whether the conduct is rational absent an exclusionary effect.[135]

76. However, over and above the legislative intervention, changing the structure of the economy requires a competition policy which actively opens up participation including through a wider set of interventions beyond competition enforcement including in terms of the regulatory framework, the provision of economic infrastructure, development finance and industrial policy.[136] In line with this proposal, the Competition Amendment Bill seeks to also propose amendments to the Competition Act aimed at enhancing the policy and institutional framework, and procedural mechanisms for the administration of the Act.

77. These measures are premised on improved policy coherence, as well as to promote institutional and procedural efficiency. Further amendments provide the Minister of Economic Development with more effective means of participating in competition-related inquiries, investigations and adjudicative processes in order to allow the Executive to engage in the decision-making processes, ensure the consideration of policy-related matters, enable better integration of policies across the state and provide the necessary

[133] Background Note to the Competition Amendment Bill
[134] Roberts, S (2017) Assessing the record on competition enforcement against anti-competitive practices and implications for inclusive growth, REDI 3x3 Working Paper 27
[135] Roberts, S (2017) Assessing the record on competition enforcement against anti-competitive practices and implications for inclusive growth, REDI 3x3 Working Paper 27; Roberts, S., J. Tapia and M. Ybar (2013) The same and the other: A comparative study of abuses of dominance in Chile and South Africa, CCRED Working Paper 2/2013
[136] Roberts, S (2017) Assessing the record on competition enforcement against anti-competitive practices and implications for inclusive growth, REDI 3x3 Working Paper 27

connection between concerns of the electorate and the work of the competition authorities.[137]

78. In light of the relationship between the legal provisions and the economic outcomes in competition law, it is thus critical to consider the proposed amendments. Do the amendments go far enough to address the challenges set out? On the other hand, do the amendments represent over-reach, addressing issues for which competition law is ill-suited and where other policies should be used instead?

79. Whether the above amendments will give adequate effect to the socio-economic goals of the Competition Act, such analysis can only take place once the amendments are enacted. What is important to keep in mind is the acknowledgment of a lack of participation by and exclusion of "black" people in the economy as well as the attempt to ameliorate such.

80. It is important to avoid the costly lessons of the Grootboom case. Therefore, it is encouraging that bringing about the objectives of the Preamble of the Competition Act will not only be done through the proposed amendments, but also through better integration of policies across the state.[138]

## CONCLUSION

81. The history of Apartheid has left a legacy of disenfranchisement of "black" people. In this regard, the pursuit of substantive equality is a call not only for Parliament, the Legislature, the Executive and the Judiciary to address, but a call to all South Africans – "black" and "white". Citing Justice van Der Westhuisen in *Bernard*:

> *…the responsibility for the difficulties of poverty is shared equally as a community because "wealthier members of the community view the minimal well-being of the poor as connected with their well-being and the well-being of the community as a whole".[139] this would also hold in the context of substantive equality. First, the way in which individuals interact with social groups and society generally has a direct bearing on their dignity.[140] This is true for members of both advantaged and disadvantaged groups. Second, this idea also gives effect to another Kantian way of understanding dignity – that it "asks us to lay down for ourselves a law that embraces every other individual in a manner that extends beyond the interests of our more parochial*

[137] Background Note to the Competition Amendment Bill
[138] Background Note to the Competition Amendment Bill
[139] Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) at para 74
[140] Cowen "Can 'Dignity' Guide South Africa's Equality Jurisprudence?" (2001) 17 SAJHR 34 at 51

*selves".*[141] *Measures to further substantive equality recognise this and embrace the importance of advancing societal members' welfare, material position and interests. The dignity of all South Africans is augmented by the fact that the Constitution is the foundation of a society that takes seriously its duties to promote equality and respect for the worth of all. Because affirmative substantive equality measures are one way in which these duties are given effect, these measures can enhance the dignity of individuals, even those who may be adversely affected by them.*[142]

82. Although rights and entitlements have limits, if supported by robust policy and effective regulation can confer the dignity of moral citizenship. Moral citizenship is a person's sense that he or she is a fully entitled member of society, undisqualified from enjoyment of its privileges and opportunities by any feature of his or her humanhood. The law can lay the foundation for moral agency and civic dignity, thereby, play a humanising, expansive and inspiring role in human society.

83. To achieve this, hard decisions must be taken. The needs and dignity of those people harmed by apartheid must be recognised and ameliorated. The utilisation of law and policy to undo the systemic advantages conferred upon incumbents in pursuit of an open and inclusive economy for all to participate in freely and fairly can play a crucial role in the pursuit of attaining substantive equality.

[141] Woolman, S (2011) Dignity" in Woolman et al (eds) Constitutional Law of South Africa Service vol 2(2)
[142] Bernard Case, para 175