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## ‘FORTUNE’ AS A GROUND OF DISCRIMINATION UNDER THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS

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### **Abstract:**

The African Charter on Human and Peoples’ Rights (African Charter) has an enumerated ground of ‘fortune’ in its discrimination clause. This chapter considers what insights a teleological interpretation of the African Charter, rooted in its ‘object and purpose’, could give to the content of fortune as a ground of discrimination. The chapter demonstrates that a teleological interpretation of fortune furthers a regionally sensitive account of a substantive conception of equality in law that seeks to transform the political marginalisation, material deprivation and disadvantage, and social stigma, harm, and prejudice vulnerable groups such as impoverished people encounter. Drawing from a substantive conception of equality in law, this article argues that fortune refers to ‘economic status’ and that poverty is included in this listed ground of discrimination. The chapter then develops normative standards to interpret impoverished people’s guarantee not to be discriminated against based on their fortune. Ultimately, it is argued that fortune as an expressed ground of discrimination is an untapped legal tool

to contest the multiple manifestations of discrimination impoverished people face.

## 1 Introduction

The African Charter on Human and Peoples' Rights (African Charter or Charter) contains the ground of 'fortune' in its discrimination clause.<sup>1</sup> To date, no interpretation of the meaning, content, obligations, and implications of fortune has been provided by the main supervisory organs of the African Charter, namely the African Commission on Human and Peoples' Rights (African Commission or Commission) and the African Court on Human and Peoples' Rights (African Court).<sup>2</sup>

In the latest report of the United Nations Special Rapporteur on Extreme Poverty and Human Rights (Special Rapporteur), fortune is aligned with the recent global interest in considering the inclusion of 'socio-economic disadvantage' as a ground of discrimination within human rights law as a tool to combat poverty.<sup>3</sup> The Special Rapporteur calls on international, regional and domestic human rights bodies to consider the inclusion of socio-economic disadvantage within '[a] comprehensive anti-discrimination framework'.<sup>4</sup> The African regional human rights system must heed this call as poverty in all its forms remains a big challenge.<sup>5</sup> The

1 African Charter art 2. See below under sec 2.2 for further regional human rights treaties that contain 'fortune' in their respective discrimination clauses.

2 See sec 2.1 below on the interpretative mandate of these organs and the specific instruments giving them legal force.

3 Human Rights Council *Report of the Special Rapporteur on Extreme Poverty and Human Rights* 'Banning discrimination on grounds of socio-economic disadvantage: An essential tool in the fight against poverty' UN Doc A/HRC/50/38/Add.5 (*UN SR Report on Socio-Economic Disadvantage 2022*) para 17 and the related footnotes.

4 *UN SR Report on Socio-Economic Disadvantage 2022* (n 3) part IV.

5 For a helpful illumination of the different manifestations of poverty from a human rights perspective, see O de Schutter 'A human rights-based approach to measuring poverty' in M Davis, M Kjaerum & A Lyons (eds) *Research handbook on human rights and poverty* (2021) 1 at 2-20. The United Nations Committee on Economic, Social and Cultural Rights (CESCR) has formulated an understanding of poverty that emphasises its intersecting conditions. They state that poverty may be defined as: '[A] sustained or chronic deprivation of resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights' in CESCR *Statement on the substantive issues arising in the implementation of ICESCR: Poverty and ICESCR* (2001) UN Doc E/C.12/2001/10 7. See a discussion in G Basson 'Poverty as a ground of unfair discrimination in post-apartheid South Africa' LLM thesis, Stellenbosch University, 2022 at 17-59 available at <https://scholar.sun.ac.za/server/api/core/bitstreams/de0273a3-5c08-4549-aeef-e3ea423fe5d2/content> (accessed 8 November 2023) for the different conceptions of poverty, such as absolute, relative, transient and chronic poverty and the implications for discrimination law.

majority of African people live in dire socio-economic conditions that are a significant source of the 'non-take-up' of rights.<sup>6</sup>

The structural conditions of stubborn poverty and widening inequality result in impoverished people in Africa facing pervasive forms of discrimination.<sup>7</sup> This includes discrimination in the form of political silencing, erasure and diminished democratic voice in influencing decisions that affect their lives.<sup>8</sup> Impoverished people are also met with invidious stereotypes, such as that they are poor because they want to be poor, are unhygienic, work avoidant, have low morals, and are an economic burden to states and better-off people.<sup>9</sup> Furthermore, the structural remnants of colonialism have morphed into neoliberal and global capitalist forces that continue to contribute to impoverished people on the African continent's material disadvantage,<sup>10</sup> such as discriminatory economic barriers to securing basic needs and services.<sup>11</sup> Together, these structural forms of discrimination impoverish people confront, intersect and manifest in, for example, brutal and unlawful incarcerations,<sup>12</sup> cruel evictions and dislocations,<sup>13</sup> and international unscrupulous lending practices that

6 UN SR Report on Socio-Economic Disadvantage (n 3) para 22; see also E Durojaye & G Mirugi-Mukindi *Exploring the link between poverty and human rights in Africa* (2020).

7 For some elaboration on the data pertaining to poverty and inequality and its concentration in sub-Saharan Africa, see Oxfam 'The tale of two continents: Fighting inequality in Africa' 19 September [https://www-cdn.oxfam.org/s3fs-public/file\\_attachments/bp-tale-of-two-continents-fighting-inequality-africa-030919-en.pdf](https://www-cdn.oxfam.org/s3fs-public/file_attachments/bp-tale-of-two-continents-fighting-inequality-africa-030919-en.pdf) (accessed 20 August 2023); International Bank for Reconstruction and Development *Poverty and shared prosperity* (2022) 27-110; For specific data sets on African nation states' poverty and inequality levels, see World Inequality Lab 'World Inequality Report 2022' <https://wir2022.wid.world/> (accessed 20 August 2023) at 179-229.

8 For one example of political suppression, see the #ENDSARS campaign in Nigeria, where citizens have contested the heightened police brutality toward socio-economically deprived people, see Amnesty International "'Welcome to hell fire": Torture and other ill-treatment in Nigeria' 18 September <https://www.amnesty.org/en/documents/afr44/011/2014/en/> (accessed 20 August 2023); Basson (n 5) 28-39; R Cline-Cole & P Lawrence 'Extractive capitalism and hard and soft power in the age of Black Lives Matter' (2021) 48 *Review of African Political Economy* 497-508.

9 D Roman 'Guaranteeing human rights in situations of poverty' in *Redefining and combating poverty* (2012) 90; M Thornton 'Social status: The last bastion of discrimination' (2019) 5 *Anti-Discrimination Law Review* 1-19.

10 W Rodney *How Europe underdeveloped Africa* (2018); S Pillay (ed) *On the subject of citizenship: Late colonialism in the world today* (2023).

11 P Lawrence 'Global capitalism and Africa after Covid-19' (2020) 46 *Review of African Political Economy* 351-362.

12 For example, the recent by-laws of the City of Cape Town in South Africa that criminalises homelessness in W Holness W 'eThekweni's discriminatory by-laws: Criminalising homelessness' (2020) 24 *Law, Democracy & Development* 468-511.

13 See the case in South Africa where police dragged Bulelani Qolani out of his shack while he was naked in *South African Human Rights Commission v City of Cape Town* 2021 (2) SA 565 (WCC).

disproportionately impact impoverished populations in African states.<sup>14</sup> Discrimination also manifests in arbitrary police and military brutality,<sup>15</sup> vaccine apartheid,<sup>16</sup> and impoverished people on the African continent bearing the brunt of climate change catastrophes and environmental decline.<sup>17</sup> Considering these persistent forms of discrimination, the absence of an interpretation of fortune and the call of the Special Rapporteur, there is a need to develop a critical framework that can assist the African Charter's supervisory organs in interpreting the meaning, scope, content, and obligations of fortune as a ground of discrimination.

This chapter considers what insights a teleological interpretation of the African Charter, rooted in its 'object and purpose', could give to the meaning of fortune as a ground of discrimination.<sup>18</sup> The chapter examines the extent to which a teleological interpretation of fortune furthers a substantive conception of equality in law as a framework for determining the scope and nature of the right to non-discrimination based on fortune. It does so by looking at specific provisions under the African Charter and other international and regional human rights instruments, as well as relevant cases, resolutions, and communications of the African Commission and African Court. While a total consideration of other regional systems and international human rights instruments is beyond the scope of this chapter, relevant standards of grounds similar to fortune are referred to briefly.

Section 2 sets out the legal basis for a teleological approach to interpretation and briefly considers the various elements of such an approach. The chapter then examines the appropriateness of the teleological approach to interpretation for determining what interests fortune under the

14 T Zajontz 'Debt, distress, dispossession: Towards a critical political economy of Africa's financial dependency' (2021) 48 *Review of African Political Economy* 1-12.

15 African Commission *Principles on the decriminalisation of petty offences in Africa* (2021) (*Principles on Petty Offences*); See the case in South Africa where the High Court of Pretoria ordered the South African National Defence Force to act in line with the rule of law after fatally beating an impoverished man, Collins Khosa, to impose lockdown restrictions of movement in *Khosa v Minister of Defence* 2020 (3) SA 190 (GP).

16 C Rodríguez-Garavito 'Human rights responses against vaccine apartheid' 12 June <https://www.openglobalrights.org/up-close/vaccine-apartheid/#up-close> (accessed 20 August 2023).

17 United Nations Human Rights Council *Report of the Special Rapporteur on Extreme Poverty and Human Rights: Climate Change and Poverty* (17 July 2019) UN Doc A/HRC/41/39 paras 49 & 58 specifically; P Lawrence 'Capitalism, resources and inequality in a climate emergency' (2021) 48 *Review of African Political Economy* 325-330.

18 See the references to the seminal texts on the teleological approach to treaty interpretation under sec 2.1 below.

African Charter seeks to protect and advance. Furthermore, the chapter analyses the characteristics of the elements of the teleological approach in the African Charter. In section 3, the chapter considers the basic tenets of a substantive approach to equality in law and evaluates its meaning in an African context in light of the elements of a teleological interpretation. The remainder of the chapter analyses the implications of a substantive understanding of equality in law for interpreting crucial components of the guarantee not to be discriminated against based on fortune.

## 2 A teleological interpretation of fortune

### 2.1 Teleological interpretation of human rights treaties

The African Commission is mandated to interpret the provisions of the African Charter.<sup>19</sup> The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Court Protocol) also establishes the interpretative role of the African Court.<sup>20</sup> These supervisory bodies have numerous mechanisms through which they can develop human rights norms and standards.<sup>21</sup> In developing the norms and standards of the provisions contained in the Charter, the supervisory organs may draw from established interpretative canons within human rights law.<sup>22</sup>

The Vienna Convention on the Law of Treaties (VCLT)<sup>23</sup> codifies the authoritative rules for interpreting a treaty in 'good faith' to accord with the 'ordinary meaning' of the terms in their 'context' and 'in light of' its 'object and purpose'.<sup>24</sup> Distinct interpretative modes have emanated from the VCLT, respectively favouring different entry points to determining the

19 African Charter art 45(3).

20 Court Protocol arts 3(1) and 7.

21 The procedures and mechanisms include recommendations, concluding observations, general comments to specific provisions, opinions of an advisory nature, resolutions, judgments, and decisions on communications, all of which have different legal weight. For a thorough elaboration on the different functions of these mechanisms and their required procedures and processes, see F Viljoen *International human rights law in Africa* (2012) 213-410; M Ssenyonjo 'Responding to human rights violations in Africa: Assessing the role of the African Commission and Court on Human and Peoples' Rights (1987-2018)' (2018) 7 *International Human Rights Law Review* 1-42.

22 M Fitzmaurice 'Interpretation of human rights treaties' in D Shelton (ed) *International human rights law* (2013) 739 at 744-745.

23 VCLT arts 31-33.

24 GG Fitzmaurice 'The law and procedure of the International Court of Justice: Treaty interpretation and certain other treaty points' (1951) 28 *British Yearbook of International Law* 1-28.

meaning of the terms in a treaty.<sup>25</sup> The first interpretative mode favours the intention of the drafters of the treaty.<sup>26</sup> This approach has been criticised for assuming a common intention of the parties and its overreliance on the external work of the treaty drafting, adoption and ratification processes at the expense of the treaty's provisions.<sup>27</sup>

The second school of thought favours the textual construction of the treaty provisions with the assumption that the words of the text have a clear meaning.<sup>28</sup> The textual approach is frequently the dominant approach to treaty interpretation globally and specifically in the context of African human rights.<sup>29</sup> While the text of the African Charter is the logical commencement to interpretation, a purely textual approach to ascertain the meaning of fortune will not be favourable within a human rights paradigm, as fortune can mean many things.<sup>30</sup> The textual approach is, therefore, restrictive as it privileges a self-generating and inflexible meaning of broadly formulated terms and downplays the need for other interpretative methods to inform the meaning of the text.<sup>31</sup>

The third approach refers to the teleological mode of interpretation (also known as the 'generous' or 'purposive' approach) that relates to the *telos*, meaning the 'purpose' of the treaty.<sup>32</sup> The teleological approach focuses on the 'object and purpose' of the treaty to inform the meaning of the text in its context.<sup>33</sup> Importantly, the modes of interpretation are not mutually exclusive, and the teleological approach incorporates all

25 ME Villiger *Commentary on the 1969 Vienna Conventions on the Law of Treaties* (2009) 421-422.

26 Fitzmaurice (n 22) 745.

27 A Amin 'A teleological approach to the interpretation of socio-economic rights in the African Charter on Human and Peoples' Rights' LLD thesis, University of Stellenbosch, 2017 at 23-24 available at <https://scholar.sun.ac.za/server/api/core/bitstreams/873c8f4b-253b-4b8c-b494-5151566b6b8a/content> (accessed 8 November 2023).

28 Fitzmaurice (n 22) 1-2, 7.

29 Viljoen (n 21) 323-324; Amin (n 27) 25.

30 P Gaibazzi 'The quest for luck: Fate, fortune, work and the unexpected among Gambian Soninke Hustlers' (2015) 7 *Critical African Studies* 227-242. See further sec 4.1.1 below, excavating some diverging meanings of fortune.

31 M Killander 'Interpreting regional human rights treaties' (2010) 7 *International Journal on Human Rights* 145 at 146.

32 Fitzmaurice (n 22) 4.

33 T Snyman & A Rudman 'Protecting transgender women within the African human rights system through an inclusive reading of the Maputo Protocol and the proposed Southern African Development Community Gender-Based Violence Model Law' (2022) 33 *Stellenbosch Law Review* 57 at 66.

three approaches by looking at the textual provision in its context, not in isolation from but 'in light of' its 'object and purpose'.<sup>34</sup>

The task of the interpreter is to construe the provision in question in a manner that gives effect to the treaty's 'object and purpose'.<sup>35</sup> Importantly, the teleological approach does not reserve a once-off 'object and purpose' of a treaty but encourages the 'object and purpose' to be continuously revisited by interpreters to update and augment treaty provisions in its changing context.<sup>36</sup> Furthermore, the 'object and purpose' of a treaty provides a basis for interpreters to clear up the ambiguity of provisions, reconciling contradictory provisions and giving full effect to the specific provision within the treaty's text considered holistically.<sup>37</sup> The teleological approach is not confined to the text and utilises appropriate supplementary means outside of the text to determine the object and purpose of the treaty.<sup>38</sup>

As argued by Amin and Viljoen, the modes of interpretation followed by the supervisory bodies of the African Charter are inconsistent and not conducive to establishing a functional interpretation of fortune.<sup>39</sup> These inconsistencies could lead to several issues, such as self-generating assumptions of the meaning of, for example, fortune, restrictive protection of the human rights norms emanating from the prohibition of discrimination, formalistic and normatively thin limitation analyses, and ultimately resulting in unresponsive human rights instruments.<sup>40</sup> Thus, the teleological approach provides the basis not to impose any self-generated meaning within the ground of fortune but gives guidance to interpreters to infuse its meaning in line with the 'object and purpose' of the African Charter within its current context. Furthermore, as little is known about fortune, the teleological approach to interpretation uses various helpful sub-elements to carefully construct the meaning of fortune and the related human rights obligations in a legally binding manner.<sup>41</sup> These sub-elements are excavated and explained below within the African human

34 U Linderfalk *On the interpretation of treaties* (2007) 203-331; GG Fitzmaurice 'The law and procedure of the International Court of Justice 1951-4: Treaty interpretation and other treaty points' (1957) 28 *British Yearbook of International Law* 203 at 209.

35 Fitzmaurice (n 22) 2.

36 Fitzmaurice (n 22) 8.

37 As above.

38 Villiger (n 25) 421-422.

39 Amin (n 27) 20-21; Viljoen (n 21) 323-324.

40 As above.

41 VCLT art 32; Harvard Draft Convention on the Law of Treaties (1935) 29 *American Journal of International Law* Supp 971 art 19(a); Fitzmaurice (n 34) 207-209.

rights context to further argue for the appropriateness of the teleological approach to the interpretation of fortune as a ground of discrimination.

## 2.2 The elements of the teleological approach within an African human rights context

The first element of the teleological approach refers to the historical background of the treaty and the *travaux préparatoires* (preparatory works) of the treaty.<sup>42</sup> The preparatory work of a treaty is typically a supplementary means of interpretation that is only used when there is a need to confirm a meaning or clear up ambiguities in a relevant provision.<sup>43</sup> However, the preparatory works of human rights treaties, such as the African Charter, should be a central element of interpretation due to the historical import of the Charter.<sup>44</sup> Furthermore, the historical background and the preparatory work of the African Charter are significant for understanding the scope of the anti-discrimination protections. This is so as the African Charter establishes itself as an important political moment advancing universal human rights against the widespread institutionalised discrimination and colonisation of the African continent.<sup>45</sup> The Commission has alluded to colonialism as the historical inception of the Charter. The Commission highlighted:

[C]olonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. The drafters of the Charter obviously wanted to remind African governments of the continent's painful legacy and restore co-operative economic development to its traditional place at the heart of African Society.<sup>46</sup>

42 The historical background of the treaty is, to some extent, part of the context referred to in the VCLT art 31(2), together with the circumstances of the conclusion of the treaty and the preparatory work as a subsidiary means of interpretation recognised in the VCLT art 32.

43 M Fitzmaurice 'The practical working of the law of treaties' in M Evans (ed) *International law* (2014) 167 at 181.

44 SA Yeshanew *The justiciability of economic, social and cultural rights in the African regional human rights system: Theories, laws, practices and prospects* (2011) 52-53; Amin (n 27) 42.

45 M Killander 'African human rights law in theory and practice' in S Joseph & A McBeth (eds) *Research handbook on international human rights law* 388 at 389-391; Viljoen (n 21) 323-324.

46 *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 56 (*Ogoniland*).

Thus, examining the historical background and preparatory works of the African Charter gives insight into the object and purpose of the African Charter as well as fortune as a prohibited ground. Although the codification of the drafting history of the African Charter is patchy and mostly inaccessible,<sup>47</sup> which may result in omitting important information, the available preparatory preceding drafts to the African Charter are instructive to understanding fortune as different terminology was used.<sup>48</sup>

The second element of the teleological approach refers to the treaty as a whole. Such a comprehensive view utilises the Preamble together with the substantive provisions to inform a systematic construction and interpretation of the text in its entirety.<sup>49</sup> The Preamble to the African Charter contains contextual statements and substantive interpretative demands vital for understanding fortune in the Charter's discrimination clause. The Preamble to the African Charter stresses that the purpose of the African Charter is to 'promote and protect' the human rights of all persons.<sup>50</sup> The Preamble also emphasises the aspiration to achieve the 'total liberation of Africa' by placing a duty on 'everyone' to 'dismantle' 'all forms of discrimination'.<sup>51</sup> Significantly, the Preamble reinforces a basic principle of international human rights law that all rights are indivisible and interdependent by highlighting the interrelationship between civil and political, socio-economic, group, and environmental rights.<sup>52</sup> The Preamble also provides interpretative guidelines in providing 'freedom, equality, justice and dignity' as 'essential objectives for achieving the legitimate aspirations of the African peoples'.<sup>53</sup> Furthermore, the Preamble commands that the African Charter must be considered in light of African values and philosophy that must 'inspire and characterize' a specific conception of human rights.<sup>54</sup>

The third element of the teleological approach relates to the subsequent application of the specific provisions of the treaty by interpretative organs

47 Viljoen (n 21) 323-325.

48 See further below sec 4.1.1.

49 Harvard Draft Convention on the Law of Treaties (n 41) art 19(a).

50 African Charter Preamble, para 10.

51 African Charter Preamble, para 8 (emphasis not in original text).

52 African Charter Preamble, para 7. Viljoen (n 21) 320-321. See sec 4.1.4 below on the significance of the interdependence of human rights and the interrelationship of equality and non-discrimination rights with other substantive rights under the African Charter.

53 African Charter Preamble, paras 3 & 8. (emphasis added).

54 African Charter Preamble, para 5. A Amin 'The potential of African philosophy in interpreting socio-economic rights in the African Charter on Human and Peoples' Rights' (2021) 5 *African Human Rights Yearbook* 23-51.

and states parties.<sup>55</sup> The subsequent application of the African Charter includes, for example, the decisions, resolutions and communications from the interpretative organs and the further development of other human rights instruments flowing from the African Charter.<sup>56</sup> In this respect, subsequent developments like the African Charter on the Rights and Welfare of the Child (African Children's Charter), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), and the African Youth Charter (Youth Charter), and the body of human rights norms emanating from their operation become relevant in constructing a conception of equality envisioned by the African Charter that underlies discrimination protections.

The fourth element of the teleological approach refers to the prevailing conditions or context at the time of the interpretation of a treaty.<sup>57</sup> An awareness of these conditions will arguably enhance the responsiveness to the socio-economic conditions of people during the inception of the Charter and to the changing and prevailing living conditions of African peoples.<sup>58</sup> This element aims to enable the treaty as a 'living instrument' in being responsive to prevailing and changing socio-economic and political conditions. The African Charter as a 'living instrument' also recognises that people are differently situated, and human rights must find application in a context-sensitive manner.<sup>59</sup> In this respect, the African Commission has highlighted that human rights must be 'responsive to African circumstances'.<sup>60</sup> Significantly, the Commission held that 'the African Charter should be interpreted in a culturally sensitive way, taking into full account the differing legal traditions of Africa and finding its expression through the laws of each country'.<sup>61</sup>

The fifth element concerns the reliance on the relevant international, comparative regional and national human rights instruments and jurisprudence.<sup>62</sup> This element considers universal human rights norms and

55 Fitzmaurice (n 22) 9; F Viljoen 'The African Charter on Human and Peoples' Rights: The *travaux préparatoires* in the light of subsequent practice' (2004) 25 *Human Rights Law Journal* 312 at 325-327.

56 Yeshanew (n 44) 46-49.

57 VCLT arts 31 & 32; Amin (n 27) 32-33.

58 Killander (n 31) 153 & 163. See the introduction and sec 3.2 below, elaborating on the discriminatory manifestations impoverished people encounter based on their fortune.

59 Killander (n 31) 150-152.

60 *Ogoniland* (n 46) para 68.

61 *Constitutional Rights Project v Nigeria* (2000) AHRLR 248 (ACHPR 1999) (*Constitutional Rights Project*) para 26.

62 A Amin 'A teleological approach to interpreting socio-economic rights in the African Charter: Appropriateness and methodology' (2021) 21 *African Human Rights Law Journal* 204 at 221-222.

standards and extends their application in the African regional human rights system through human rights monitoring bodies.<sup>63</sup> In this respect, the African Commission has held,

[i]n interpreting and applying the African Charter, the African Commission relies on its own jurisprudence, and as provided by Articles 60 and 61 of the African Charter, on appropriate and relevant international and regional human rights instruments, principles and standards. ... The African Commission is, therefore, more than willing to accept legal arguments with the support of appropriate and relevant international and regional human rights instruments, principles, norms and standards taking into account the well recognised principle of universality which was established by the Vienna Declaration and Programme of Action of 1993 and which declares that 'all human rights are universal, indivisible, interdependent, and interrelated'.<sup>64</sup>

Furthermore, the African Commission has indicated that drawing from international and other regional human rights instruments is helpful for establishing 'benchmarks' to evaluate the application and interpretation of the African Charter.<sup>65</sup>

Lastly, all of the aforementioned elements are infused with the principle of effectiveness.<sup>66</sup> This principle requires the text to be interpreted in such a way that renders its object and purpose effective and consistent with the words of the text and the provisions of the treaty.<sup>67</sup> The principle of effectiveness advocates for internal and external effectiveness that harmonises the interpretation of a specific provision with the treaty as a whole, as well as its broader context within general international law of which it forms a part.<sup>68</sup> The Commission implicitly referred to the principle of effectiveness when it held, 'there is no right in the African Charter that cannot be made effective'.<sup>69</sup>

The analysis of the sub-elements of the teleological approach to the interpretation of the discrimination provisions within the African human

63 African Charter arts 30 & 31, as well as the Court Protocol arts 3 & 7.

64 *Purohit and Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2003) (*Purohit*) paras 47-48.

65 African Commission on Human and Peoples' Rights 'General Comment 2 on Article 14.1(a), (b), (c) and (f) and Article 14.2 (a) and (c)' (General Comment 2), adopted at the 55th Ordinary Session of the African Commission, 28 April-12 May 2014 para 4.

66 *Fitzmaurice* (n 34) 203 & 211.

67 *Fitzmaurice* (n 43) 182.

68 *Yeshanew* (n 44) 51.

69 *Ogoniland* (n 46) para 68.

rights system showcases that the teleological approach is a significant means to assist interpreters in generating a functional and appropriate meaning of the purposes and values fortune as a prohibited ground of discrimination is intended to serve within the African Charter as a whole. Unfortunately, the teleological approach is still in its infancy under the African human rights system and indicates a mere 'tendency' as a preferred mode of treaty interpretation.<sup>70</sup> Nevertheless, supervisory organs have shown some willingness to interpret the provisions within the African regional human rights 'holistically' and within their 'context'.<sup>71</sup> The African Court has also confirmed that the VCLT applies to the African Charter by recognising that the 'purposive theory ... is one of the tools, if not the most important, of interpreting or construing a legal instrument'.<sup>72</sup> It becomes necessary to examine to what extent a teleological approach to interpretation could assist in developing a conception of equality that could and arguably should drive the operation of the rights to non-discrimination and equality under the African Charter.

### 3 Towards an 'African' substantive equality

#### 3.1 From formal to substantive equality in law

A formal notion of equality decontextualises and depoliticises instances of discrimination through the belief that equality entails consistent treatment across differences, inequalities, and historical injustices.<sup>73</sup> The right of non-discrimination under the African human rights system has mostly been interpreted formalistically as a norm requiring 'equal treatment of an individual or group of persons irrespective of their particular characteristics'.<sup>74</sup> Chekera-Radu argues that the African

70 Viljoen (n 21) 324. For some examples indicating a tendency for preferring the teleological approach to interpretation, see *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mitikila v Tanzania* (merits) (2013) 1 AfCLR 34 para 108; *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction) (2016) 1 AfCLR 562 para 54.

71 *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) (*Legal Resources Foundation*) para 70; *African Commission on Human and Peoples' Rights v Republic of Kenya A* (merits) (2017) 2 AfCLR 9 (*Ogiek*) para 197.

72 *Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child* (5 December 2014) 1 AfCLR 725 paras 84 & 92; *Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project* (2017) 2 AfCLR 572 para 57 relying on the VCLT art 31; *Urban Mkandawire v Malawi* (review and interpretation) (2014) 1 AfCLR 299, the separate opinion by Niyungeko at para 9, referred to the VCLT art 31.

73 J Whiteman 'Tackling socio-economic disadvantage: Making rights work' (2014) 12 *Equal Rights Review* 95-108.

74 *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt* (2013) 85 (ACHPR 2013) (*Interights*) para 119.

Commission has largely chosen a formal conception of equality, which requires that people similarly situated should be treated alike.<sup>75</sup> Such an approach is not suitable for interpreting fortune-based discrimination as it is devoid of the context and the structural determinants that generate the different manifestations of discrimination, ultimately resulting in an under-inclusive and formalistic understanding of discrimination.

It is now undisputed that equality and non-discrimination guarantees in international human rights instruments must be interpreted and implemented through a substantive, as opposed to a formal, notion of equality.<sup>76</sup> Although the concept of substantive equality is contested,<sup>77</sup> critical legal theorists have introduced a substantive understanding of equality in law to contextualise instances of discrimination within its lived inequality and relationships between individuals and groups.<sup>78</sup> As there is currently no coherent approach to interpreting the equality and discrimination clauses in the African Charter, there is a clear need to examine and develop the substantive equality interpretative possibilities of discrimination based on fortune.

### 3.2 An 'African' conception of substantive equality in law

It is helpful to draw from the teleological approach to interpretation in establishing a regionally sensitive account of equality in law.<sup>79</sup> A regionally sensitive understanding of substantive equality should be aware of the limits of legal protections but, at the same time, view the law as an indispensable tool to facilitate transformation.<sup>80</sup> Therefore, a substantive

75 YT Chekera-Radu 'The relevance of substantive equality in the African regional human rights system's jurisprudence to women's land and property rights' (2017) *African Human Rights Yearbook* 41 at 57.

76 O de Schutter *International human rights law: Cases, materials, commentary* (2019) 625-666; for domestic application of substantive equality in African states to non-discrimination see, Basson (n 5) 28-39; V Miyandazi *Equality in Kenya's 2010 Constitution: Understanding the competing and interrelated conceptions* (2010).

77 See the texts of S Fredman 'Substantive equality revisited' (2016) 3 *International Journal of Constitutional Law* 713-738 and CA MacKinnon 'Substantive equality revisited: A reply to Sandra Fredman' (2016) 3 *International Journal of Constitutional Law* 739-746 documenting the various seminal debates around substantive equality in law.

78 C Albertyn & B Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *South African Journal on Human Rights* 248 at 249.

79 See above under sec 2.2 on the 'living instrument' function of the teleological approach.

80 For some reflections of the limits of human rights on the African continent, and whether and to what extent it can align itself with a project of emancipation of structural disadvantage, see J Gathii, O Okafor & A Anghie 'Africa and TWAIL' (2013) *African Yearbook of International Law* 9-13; G Mohan & J Holland 'Human rights &

conception of law aims to facilitate transformation, especially for certain groups that would find it difficult, if not impossible, to overcome their exclusion without the law's assistance and intervention.<sup>81</sup>

Paragraphs 3 and 5 of the Preamble to the African Charter stipulate that the conception of human rights must be inspired by African philosophy to re-insert the aspirations of the African peoples' of 'freedom, equality, justice and dignity'.<sup>82</sup> These values are, therefore, crucial for the interpretation of impoverished peoples' rights to equality and non-discrimination as they inform African substantive equality that stresses the utilisation of law to transform structural disadvantage so that individuals and peoples can freely and equally relate to one another with the necessary just social, material and political preconditions.

As indicated in the introduction, the widespread 'non-take-up' of rights resulting from persistent poverty and rising inequality on the African continent starkly contrasts the African Charter's object and purpose to 'promote and protect' the full and equal enjoyment of all rights and freedoms.<sup>83</sup> The political marginalisation of impoverished people contradicts various provisions under the African Charter and other human rights instruments that seek to foster complementary forms of representative and participatory democracy.<sup>84</sup> Together, these forms of democracy envisage a form of equality of voice where people must deliberate and participate, sometimes embracing agonistic engagements

development in Africa: Moral intrusion or empowering opportunity?' (2007) 28 *Review of African Political Economy* 177-196; OC Okafor 'Poverty, agency and resistance in the future of international law: An African perspective' (2006) 27 *Third World Quarterly* 799-814.

81 S Fredman *Discrimination law* (2011) 31-34.

82 It should be emphasised that the notion of 'African philosophy' is subject to contestation and should not be epistemically stigmatised to encompass one strand or authoritative perspective. At the same time, drawing from precolonial African ways of doing and being should also not be romanticised to the extent that it generalises and loses sight of complexity and differences of current realities, just as one should not lose sight of the centuries of colonial ravages erasing (and continuing to in its neo-colonial forms) the impossibility of deeper justice. See T Fernyhough 'Human rights and precolonial Africa' in R Cohen, G Hyden & WP Nagan (eds) *Human rights and governance in Africa* (1993) 39-56; M Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 339-380.

83 African Charter Preamble, para 10.

84 African Charter art 13(1) referring to 'direct' participation and 'elected representatives'; African Charter on Democracy, Elections and Governance (adopted 30 January 2007 entered into force 5 February 2012) Preamble and arts 2(10), 4(2) & 8(3); Maputo Protocol Preamble and arts 9, 10 & 18.

and conflicting views, to enhance collective problem-solving.<sup>85</sup> Therefore, an African notion of substantive equality should aim to upend political exclusion and its related effects of diminished and silenced democratic voice and participation. The prevailing circumstances of poverty and inequality suggest that African nation-states, in varying degrees, rather mimic feudalistic, oligarchic, or plutocratic conditions that preclude impoverished people from the necessary political voice to shape their own life projects.<sup>86</sup>

The deeply undemocratic conditions are inimical to the African conception of political personhood, where the individual finds identity, belonging and solidarity through community participation.<sup>87</sup> Such a conception of political personhood strikes at the core of human dignity as one of the animating human rights norms under the African Charter.<sup>88</sup> In this respect, the African Commission has held that ‘human dignity is an inherent basic right to which all human beings’ are entitled without any qualifications.<sup>89</sup> Importantly, the Commission shed light on the interconnections between human dignity and equality by stating that human dignity is a context-sensitive right that everyone is entitled to ‘without discrimination’.<sup>90</sup>

Recognising human dignity as an integral part of substantive equality is indispensable to combat discriminatory stereotypes, violence and prejudices impoverished people encounter.<sup>91</sup> The conceptual relationship between equality and human dignity also assists in coming to terms

85 For different accounts of democracy in Africa and proposals for a more participative and materially egalitarian idea of democracy, see C Ake ‘The unique case of African democracy’ (1993) 69 *International Affairs* at 239-244; H Brooks, T Ngwane & C Runciman ‘Decolonising and re-theorising the meaning of democracy: A South African perspective’ (2020) 68 *Sociological Review* 17-32; TW Bennet, AR Munro & PJ Jacobs *Ubuntu: An African jurisprudence* (2018) 124-158; MA Raufu ‘The public sphere in 21st century Africa: Broadening the horizons of democratisation’ (2012) 37 *Africa Development* 27-41.

86 MR Myambo ‘Capitalism disguised as democracy: A theory of “belonging,” not belonging in the new South Africa’ (2011) 63 *Comparative Literature* 64-85; DE Uwizeyimana ‘Democracy and pretend democracy in Africa: Myths of African democracies’ (2012) 16 *Law, Democracy and Development* 139-161.

87 T Metz ‘African conceptions of human dignity: Vitality and community as the ground of human rights’ (2012) 13 *Human Rights Review* 19-37; A Nwoye ‘An Afrocentric theory of human personhood’ (2017) 54 *Psychology in Society* 42-66; SH Kumalo ‘An Afro-communitarian compatibilist view on rights?’ (2019) 66 *Theoria* 142-154.

88 African Charter Preamble and art 5.

89 *Purohit* (n 64) para 57.

90 As above.

91 Fredman (n 77) 730-731; Basson (n 5) 50-60.

with how poverty remains stubbornly gendered,<sup>92</sup> as well as leading to and exacerbating the discrimination experienced by other vulnerable groups, such as indigenous people and certain ethnic groups.<sup>93</sup> Substantive equality, therefore, aims to infuse legal protections with a heightened sensitivity to the socio-economic and political context in which it applies to consider differences within and between individuals and groups.<sup>94</sup> An intersectional understanding of disadvantage specifically enables such an infusion.<sup>95</sup> An intersectional view of disadvantage highlights that some groups and individuals encounter subordination and erasure because their disadvantage is constitutive of a combination of systems of domination pertaining to, amongst others, cis-hetero-patriarchy, white supremacy and privilege, ableism and neoliberal global capitalist exploitation.<sup>96</sup> In this sense, substantive equality must be historically sensitive in its efforts to disrupt the series of disadvantages that vulnerable and marginalised groups continue to encounter.<sup>97</sup>

Furthermore, as noted above, colonialism and its continuing neo-colonial and globalised capitalist forms continue to exploit and deprive most African peoples of their ability to access basic needs and resources.<sup>98</sup> It is critical for any understanding of fortune-based discrimination to be aware of the context of the conditions during the inception of the African Charter and the possible role this ground of discrimination sought to play in combatting poverty and inequality. The inception of the African Charter points to a deep commitment to liberating African states from the colonial strongholds that exploited the natural wealth and resources of the continent at the expense of catering for the basic needs of African peoples.<sup>99</sup>

92 SA Omotoso 'Hairiness and hairlessness: An African feminist view of poverty' in V Beck, H Hahn & R Lepenies (eds) *Dimensions of poverty* 115-130; L Debuysere 'Between feminism and unionism: The struggle for socio-economic dignity of working-class women in pre- and post-uprising Tunisia' (2018) 45 *Review of African Political Economy* 25-43; V Reddy & T Moletsane 'Gender and poverty reduction in its African feminist practice' (2009) 81 *Agenda: Empowering women for gender equity* 3-13.

93 BE Bedasso 'For richer, for poorer: why ethnicity often trumps economic cleavages in Kenya' (2016) 44 *Review of African Political Economy* 10-29.

94 C Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *South African Journal on Human Rights* 253 at 259.

95 S Atrey 'Intersectionality from equality to human rights' in S Atrey & P Dunne (eds) *Intersectionality and human rights law* (2020) 1-17.

96 K Crenshaw 'Demarginalizing the intersection of race and sex: A Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics' (1989) 1 *University of Chicago Law Review* 139 at 139-140; Atrey (n 95) 1-17.

97 Fredman (n 77) 728-729.

98 See above in the introduction in sec 1 with accompanying sources in footnotes 12 and 13.

99 C Robinson *Black Marxism: The making of the black radical tradition* (1983); Rodney (n 10).

The African Charter is clear in its object and purpose that people's basic needs must be fulfilled as it caters for a range of socio-economic rights.<sup>100</sup> Furthermore, African views on justice<sup>101</sup> would not tolerate basic needs being conflated with current survivalist human rights thresholds that set basic rights provisioning at limits not consonant with human dignity.<sup>102</sup> Importantly, African views on justice would enable any developmental efforts to be geared towards restructuring production and redistribution relations so that everyone's basic needs are systemically internalised and prioritised.<sup>103</sup> Thus, an African view of substantive equality in law strongly resists any manifestation of poverty and advocates for production and redistribution to fulfil basic needs.<sup>104</sup> Critically, basic needs fulfilment must accord with dignified human conditions and enable people to fully and equally participate in meaningful relationships and political life. As such, any deprivation of basic needs is an unjustifiable impediment to the full and equal enjoyment of all rights and freedoms as it stifles communal solidarity.<sup>105</sup>

Drawing from the African view of substantive equality in law highlighted above, the following part investigates whether a teleological interpretation of fortune under the African Charter could serve as a legal tool to hold relevant stakeholders accountable in terms of their obligations to halt, minimise or prevent, and redress discrimination based on fortune. To this end, the next section first briefly explains the general steps to a discrimination analysis in terms of the African Charter.

100 See below under 4.1.4 on the various recognised socio-economic rights under the African Charter.

101 For some examples pertaining to *ubuntu* and *ujamaa*, see L Praeg & S Madadla (eds) *Ubuntu: Curating the archive* (2014); PL Raikes 'Ujamaa and rural socialism' (1975) 3 *Review of African Political Economy* 33-52.

102 S Moyn *Not enough: Human rights in an unequal world* (2018) 295-359 where he criticises the global survivalist human rights thresholds; AM Fischer *Poverty as ideology: Rescuing social justice from global developmental agendas* (2018) 74-90.

103 Raikes (n 101); JT Gathii 'Africa and the radical origins of the right to development' (2020) 1 *Third World Approaches to International Law Review* 28-50.

104 See further below sec 4.1.4 on the interrelationship between the rights to equality and non-discrimination and the right of all peoples to freely dispose of their wealth and natural resources enumerated in the African Charter art 12(1).

105 J Nyerere *Ujamaa: Essays on socialism* (1968); A Mayer 'Ifeoma Okoye: Socialist-feminist political horizons in Nigerian literature' (2018) 45 *Review of African Political Economy* 335-344.

#### **4 Discrimination based on 'fortune' within a reconsidered African conception of substantive equality established through a teleological interpretation**

The rights to equality and prohibition of non-discrimination based on fortune are stipulated in articles 2 and 3 of the African Charter.<sup>106</sup> The African Commission has held that article 2 establishes the 'principle of non-discrimination' and article 3 the 'principle of equality'.<sup>107</sup> A broad two-step analysis of the rights to equality and non-discrimination can be distilled from the communications of the African Commission and jurisprudence of the African Court.<sup>108</sup>

The first step is to determine 'the recognition of the right and the fact that such a right has been violated'.<sup>109</sup> Thus, during various stages of a claim of discrimination based on fortune, the African Commission and/or<sup>110</sup> the African Court will have to interpret the content of fortune discrimination to determine whether the right has been violated. Such an interpretation would need elucidation on whether fortune could encapsulate poverty or socio-economic disadvantage. If it is found that fortune means something distinct from the latter, the possibility remains that poverty or socio-economic disadvantage could still be included under the African Charter. This is so since article 2 does not contain an exhaustive list of grounds but is 'merely indicative' of group-based exclusion.<sup>111</sup> Article 2 being non-exhaustive means that the catch-all criteria of group-based vulnerability

106 African Charter art 2 encompasses the following:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Furthermore, Article 3 of the African Charter sets out that:

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

107 *Antonie Bissangou v Congo* (2006) AHRLR 80 (ACHPR 2006) (*Antonie Bissangou*) para 68.

108 R Murray *The African Charter on Human and Peoples' Rights: A commentary* (2020) 56; for one example utilising this two-step approach, see *Good v Botswana* (2010) AHRLR 43 (ACHPR 2010) paras 219 & 222.

109 *Legal Resources Foundation* (n 71) para 67.

110 Court Protocol art 2; A Rudman 'The Commission as a Party before the Court: Reflections on the Complementarity Arrangement' (2016) 19 *Potchefstroom Electronic Law Journal* 1 at 3.

111 *Open Society Justice Initiative v Côte d'Ivoire* (2006) AHRLR 62 (ACHPR 2006) (*Open Society Justice Initiative*) para 145.

could recognise other grounds of discrimination.<sup>112</sup> Furthermore, during the first step of the interpretative process, interpreters must consider fortune's intersectional relationship with other prohibited grounds. Interpreters must also consider what constitutes *discrimination* based on fortune by examining the legal duties on state and non-state actors emanating from the right, as well as the equality and non-discrimination rights' interrelationship with other substantive provisions under the African Charter.

Once discrimination on the basis of fortune has been established, the discrimination is presumed to be unjustifiable, and the burden to prove that the discrimination was justifiable moves onto the state.<sup>113</sup> Therefore, the second step of the interpretative process considers whether the violation is justifiable in law.<sup>114</sup> Even though article 2 does not contain a limitation or 'clawback clause', it is not an absolute right.<sup>115</sup> Given the different standards postulated by jurisprudence, it is unclear how supervisory organs should scrutinise the reasons provided for fortune-based discrimination.<sup>116</sup> A substantive framework of equality informed by a teleological approach provides formidable insights into how any justifications for discrimination based on fortune should be reviewed. The following parts draw from the teleological approach to interpretation and the subsequent African substantive conception of equality in law to develop the normative content and evaluative standards of discrimination based on fortune.

112 For example, the African Commission has recognised disability, including albinism, HIV/AIDS, and age in terms of 'other status' under the African Charter art 2. See some references to these grounds of discrimination in African Commission Resolution on the Right to Dignity and Freedom from Torture or Ill-Treatment of Persons with Psychosocial Disabilities in Africa (2004) ACHPR/Res 343(LVIII); African Commission Resolution on the Appointment of the Chairperson and Members of the Committee on the Protection of the Rights of People Living with HIV (PLHIV) and those at Risk, Vulnerable to and Affected by HIV (2011) ACHPR/Res 195; African Commission Resolution on the Rights of Older Persons in Africa, (2007) ACHPR/Res. 106; African Commission Resolution on the Right to Water Obligations (2015) ACHPR/Res 300 (EXT.OS/ XVII) para 8; M Heikkilä & M Mustaniemi-Laaksa 'Vulnerability as a human rights variable: African and European developments' (2020) 20 *African Human Rights Law Journal* 777-798.

113 *Thomas Kwoyelo v Uganda* (2018) ACHPR 129 (ACHPR 2018) para 164.

114 *Legal Resources Foundation* (n 71) para 67.

115 There is, therefore, a crucial distinction between a limitation of a right and a justification posed for its violation. The Commission has indicated that a limitation amounts to a lower threshold of the enjoyment or content of a right by, for example, a 'clawback clause' such as the African Charter art 27(2), whereas a justification refers to instances where a justification is sought to 'set perimeters on the enjoyment of the right', see *Legal Resources Foundation* (n 71) para 70.

116 Murray (n 108) 55-58.

## 4.1 Discrimination on the basis of fortune

### 4.1.1 The meaning of fortune

As is argued above, a purely textual approach to interpreting 'fortune' is undesirable as interpreters could self-generate any meaning to fortune as fortune has many meanings.<sup>117</sup> Some meanings are instilled in everyday linguistic expressions where people often refer to the 'less fortunate ones', the 'misfortune' of others or 'unfortunately' in its sentence function as an adverb.<sup>118</sup> Fortune is also captured in idiomatic expressions like 'fame and fortune', 'make a fortune', or 'we are very fortunate'. It can also simply refer to a 'large sum of money', 'good or bad luck' in 'telling someone's fortune', or it can be the corollary of 'wealth'.<sup>119</sup> Such expressions unhelpfully normalise<sup>120</sup> impoverishment and inequality as a natural outcome of neutral market principles, thereby hiding its legal, political, economic and social structural drivers that substantive equality in law must seek to expose and upend. The teleological approach's utilisation of the history of the African Charter and its preparatory documents become useful in elaborating on what fortune means within the context of the Charter.

In the first draft of the African Charter, namely the M'Baye Draft, the expressed ground was not fortune, but rather 'economic status'.<sup>121</sup> The subsequent draft of the African Charter, the Dakar Draft, replaced economic status with fortune. In the recorded preparatory documents, it is not clear why the formulation of the ground changed.<sup>122</sup> 'Economic status' in the M'Baye Draft is influential as it suggests that, at most, fortune and economic status are interchangeable, or at the very least, signal a strong denotation. As such, economic status in the M'Baye Draft indicates that fortune is aligned with the material resources people have to fulfil or

117 See sec 2.1 above.

118 M Gardini 'Where does fortune come from? Agrarian work ethics and luck in Togo' (2015) 7 *Critical African Studies* at 210-226.

119 P Gaibazzi & M Gardini 'The work of fate and fortune in Africa' (2015) 7 *Critical African Studies* at 203-209.

120 D Brand, S de Beer, I de Villiers & K van Marle 'Poverty as injustice' (2013) 17 *Law, Democracy & Development* at 273-297.

121 M'Baye Draft African Charter on Human and Peoples' Rights OAU Doc CAB/LEG/67/1 (M'Baye Draft).

122 One explanation may be related to language and different drafters using the French of 'economic status' as 'defortuna' as documented in *UN SR Report on Socio-Economic Disadvantage* 2022 (n 4). However, to engage in a guessing endeavour would amount to speculation that would not clarify the meaning of fortune.

access various rights under the Charter aimed at creating the conditions for people to determine their self-chosen destinies.

Economic status is also the chosen ground of discrimination under article 1 of the American Convention on Human Rights.<sup>123</sup> Furthermore, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) interpreted 'other status' under article 2(2) of the International Covenant on Economic, Social and Cultural Rights to include 'economic and social situation'.<sup>124</sup> Significantly, the CESCR defined 'economic and social situation' as:<sup>125</sup>

Individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society. A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places.

On the domestic level, as an example, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA), one of the legislative expressions of the right to equality and non-discrimination under the Constitution of the Republic of South Africa, 1996, has 'socio-economic status' as a directive principle. In this context, 'socio-economic status' is defined as:

[Including] a social or economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status or lack of or low-level educational qualifications.<sup>126</sup>

A South African High Court has recently elevated 'socio-economic status' from a directive principle to a prohibited ground of discrimination by finding that 'poverty' as part of 'socio-economic status' meets the test for analogous grounds of discrimination.<sup>127</sup> The High Court indicated that

123 American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 143.

124 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3; UNCESCR General Comment 20 Non-discrimination in economic, social and cultural rights (art 2, para 2) (2009) UN Doc E/C.12/GC/20.

125 General Comment 20 (n 124) para 35.

126 PEPUDA sec 1(1)(xxvii).

127 *Social Justice Coalition v Minister of Police* 2019 (4) SA 82 (WCC) (*Social Justice Coalition*).

poverty is analogous to listed grounds of discrimination as poverty causes and perpetuates systemic disadvantage, severely undermines impoverished people's human dignity and seriously obstructs people's ability to fully and equally enjoy all rights and freedoms.<sup>128</sup>

The element of the teleological interpretation that stresses reliance on international law, other regional treaties, and relevant domestic sources attaches significant weight to the abovementioned grounds in understanding the meaning of fortune. The explicit reference to 'economic status', 'economic and social situation' and 'socio-economic status' strongly suggests that fortune is a pivotal ground under the African Charter to create an awareness of how peoples' fortune and, by implication, their material disadvantage and deprivation, impedes the enjoyment of all rights and freedoms contained in the African Charter. Murray also argues that poverty is implied in the expressed ground of fortune as the African Commission has stated that fortune may refer to the 'inequality of income and wealth' concerning human rights issues affecting youth.<sup>129</sup>

The acknowledgement that fortune refers to 'economic status' is further strengthened by a review of how the African Commission displays an awareness of the material deprivation and the connected discrimination marginalised groups encounter in the subsequent practice of the African Charter relating to two seminal decisions on communications.<sup>130</sup> In *Purohit*, the African Commission considered various rights violations experienced by mental health patients detained in a psychiatric unit under dire conditions managed by outdated laws governing health practices.<sup>131</sup> The Commission shed light on how disabled people, specifically poor, disabled people, experience intersecting dimensions of discrimination. Regarding their political exclusion, the Commission found that people detained under the impugned legislation 'are likely to be people picked up from the streets or people from poor backgrounds'.<sup>132</sup> The Commission emphasised that such a vulnerable group of people would need legal representation to have their cause heard otherwise, fundamental political

128 *Social Justice Coalition* (n 127) paras 56-65.

129 Murray (n 108) 76; African Commission Resolution on the human rights issues affecting the African youth (2015) ACHPR/Res. 347 (LVIII).

130 For a more sustained engagement with the responsiveness of the African human rights system's jurisprudence to impoverished people more generally, see O Okafor 'Have the norms and jurisprudence of the African human rights system been pro-poor' (2011) 11 *African Human Rights Law Journal* at 396-421.

131 *Purohit* (n 64) paras 3-8.

132 *Purohit* (n 64) para 53.

rights would ‘only be available to the wealthy and those that can afford the services of private counsel’.<sup>133</sup>

*Purohit* also showcases the crucial relationship between human dignity and material deprivation, which are key characteristics of substantive equality.<sup>134</sup> The Commission held that labelling people with mental illnesses as ‘lunatics’ and ‘idiots’ has a dehumanising effect, and it denies them their right to human dignity, which encompasses being treated equally and with respect.<sup>135</sup> Significantly the Commission indicated that the denial of human dignity exacerbates the structural barriers to ‘enjoy[ing] a decent life’.<sup>136</sup>

Regarding the basic need for healthcare entrenched as the human right to health, the Commission highlighted that impoverishment severely restricts access to fundamental resources, goods, services, and facilities. It stated that,

[M]illions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right.<sup>137</sup>

The Commission, therefore, indicated that all human rights and freedoms must be guaranteed without discrimination.<sup>138</sup>

In *SERAC*, the Commission considered the violation of various rights enumerated under the African Charter of a small ethnic group in Nigeria, the Ogoni, through unlawful exploitation and extractive activities of the Ogoniland.<sup>139</sup> In terms of the political exclusion of the Ogoni, the communication alleged that the community’s rights were violated as they were not consulted in developmental operations, directly threatening their communal and individual lands.<sup>140</sup> The Commission indicated that the Charter requires vulnerable communities to be informed of any activities that may affect them and that stakeholders are obligated to provide

133 As above.

134 See sec 3.2 above.

135 *Purohit* (n 64) para 59.

136 *Purohit* (n 64) para 61.

137 *Purohit* (n 64) para 84.

138 *Purohit* (n 64) para 80.

139 *Ogoniland* (n 46).

140 *Ogoniland* (n 46) para 6.

'meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities'.<sup>141</sup>

Importantly, the *Ogoniland* decision also shows that the political marginalisation of the Ogoni has had a deleterious effect on the ability of the community to use their natural wealth and resources to meet their material needs. The applicants indicated that the destruction of indigenous farmlands, crops, rivers, and animals has led to 'malnutrition and starvation among certain Ogoni Communities'.<sup>142</sup> The Commission accentuated that the material exploitation of the community has led to the denial of the inherent worth and collective human dignity of the group. It held,

The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation.<sup>143</sup>

The above analysis demonstrates that a teleological approach to interpreting fortune as a prohibited ground appropriately harnesses the substantive equality impetus of the non-discrimination right under the African Charter. Substantive equality, therefore, gives substance to the overarching 'object and purpose' of the right not to be discriminated against based on fortune by providing poor people with a legal tool to challenge the material disadvantage and deprivation they encounter. It is therefore not necessary to consider whether poverty should rather be found as a ground of discrimination on 'other status' under article 2 of the Charter, as fortune already provides an appropriate and listed ground to contest the discriminatory manifestations impoverished people face on the basis of their fortune. However, fortune alone would not be able to faithfully reckon with, for example, the structural drivers of gendered poverty.<sup>144</sup> It is, therefore, necessary to consider fortune's relationship with other prohibited grounds of discrimination under the African Charter.

#### **4.1.2 Intersectionality: fortune's intersection with other grounds**

The political exclusion, material disadvantage, and social prejudices and violence that certain groups are disproportionately faced with often becomes

141 *Ogoniland* (n 46) para 53.

142 *Ogoniland* (n 46) para 9.

143 *Ogoniland* (n 46) para 65.

144 See sec 3.2 above elaborating on intersectional disadvantage and poverty and the related footnotes of gendered poverty.

a catalyst that moves them toward or into poverty.<sup>145</sup> In addition, poverty and inequality are significant contributors that enlarge or exacerbate the discrimination certain groups encounter.<sup>146</sup> Poverty, therefore, intersects with interrelated but different systems of subordination.<sup>147</sup> In this respect, intersectionality becomes vital in furthering substantive equality as it enables a greater awareness of how structural disadvantage converges for differently situated persons and groups.<sup>148</sup>

Bond argues that intersectionality in international discrimination law does not merely add different grounds on top of each other to show the depth of discrimination some groups face, but it is also a way of detecting how different grounds of discrimination converge for differently situated persons.<sup>149</sup> Such awareness has the potential to be more responsive and faithful to the context and lived experiences of impoverished people. For example, African women are often pushed into poverty due to their patriarchal subordination, resulting in discriminatory inheritance and divorce laws<sup>150</sup> or placing extra burdens of childrearing, domestic duties and the caretaking of the elderly overwhelmingly on women.<sup>151</sup> Other times, impoverished women struggle to overcome their patriarchal subordination because they often have to bear the brunt of living in poverty.<sup>152</sup> As an example, impoverished women disproportionately confront no or inadequate access to reproductive and gender-responsive healthcare services.<sup>153</sup> Or when they do have access to reproductive health

145 JA Thompson, SJ Gaskin & M Agbor 'Embodied intersections: Gender, water and sanitation in Cameroon' (2017) 31 *Agenda* at 140-155.

146 S Fredman 'The potential and limits of an equal rights paradigm in addressing poverty' (2011) 22 *Stellenbosch Law Review* 556 at 584.

147 S Atrey 'The intersectional case of poverty in discrimination law' (2018) 18 *Human Rights Law Review* at 411-440.

148 See sec 3.2 above.

149 J Bond *Global intersectionality and contemporary human rights* (2021) 79.

150 For example, see para 24 of the African Commission General Comment 6 On the Protocol to the African Charter on Human and Peoples' Right on the Rights of Women in Africa (Maputo Protocol): The Right to Property During Separation, Divorce or Annulment of Marriage (Article 7(D)) where the African Commission indicated that the discriminatory laws involved when women enter divorce proceedings 'can be a precursor to poverty and destitution for many women'.

151 S Valiani *The Africa care economy index* (2022) secs A & B.

152 B Goldblatt 'Violence against women and social and economic rights: Deepening the connections' in S Harris Rimmer & K Ogg (eds) *Research handbook on feminist engagements with international law* (2019) 359 at 368-372.

153 United Nations General Assembly *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Tlaleng Mofokeng 'Sexual and reproductive health rights: Challenges and opportunities during the COVID-19 pandemic'* (2021) UN Doc A/76/172 (Mofokeng 'Sexual and reproductive health rights') parts I-II & V.

services, impoverished women are more exposed to being forcibly sterilised because of discriminatory assumptions that they are unable to provide for their children, they merely want the children for access to grants, or they are promiscuous without the intellect and education for family planning, and sex practices that prevent pregnancy.<sup>154</sup>

The African human rights system has not explicitly recognised intersectional discrimination within its textual protections. Furthermore, the African Commission and African Court have not fully grasped the challenges intersectional vulnerabilities pose to the realisation of human rights and freedoms for certain groups.<sup>155</sup> However, with a teleological interpretation that infuses a treaty with living qualities and looking at subsequent interpretative practices of supervisory organs and other treaty expressions, the intersectional potential of fortune as a ground of discrimination can be developed as follows.

The African Commission has expressed in its Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Principles and Guidelines) that 'intersectional or multiple discrimination occurs where the effect of certain imposed requirements, conditions or practices has an adverse impact disproportionately on one group or other'.<sup>156</sup> The Principles and Guidelines also provide that '[s]tates should recognise and take steps to combat intersectional discrimination based on a combination of [grounds]'.<sup>157</sup> This acknowledgement is also expressed in subsequent human rights instruments focusing on specific marginalised groups, such as the Maputo Protocol.

The Maputo Protocol is an exemplary human rights instrument that captures the gendered dimensions of poverty. It significantly extends fortune as a prohibited ground of discrimination in its Preamble.<sup>158</sup> Article 24 of the Maputo Protocol further places a special duty on states parties to protect 'Women in Distress' and refers to women living in poverty in article 24(a):

154 Human Rights Council *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Tlaleng Mofokeng* 'Violence and its impact on the right to health' (2022) UN Doc A/HRC/50/28.

155 Bond (n 149) 445.

156 As adopted on 24 October 2011 part 1 interpretation subsec I <http://archives.au.int/handle/123456789/2063> (accessed 20 August 2023).

157 Principles and Guidelines (n 156) para 38.

158 Maputo Protocol Preamble, para 2.

[E]nsure the protection of poor women and women heads of families including women from marginalized population groups and provide an environment suitable to their condition and their special physical, economic and social needs.

State parties are also obligated to promote women's access in various fields to 'provide women with a higher quality of life and reduce the level of poverty among women'.<sup>159</sup> The Protocol also implicitly furthers an intersectional awareness of discrimination as it places duties on states parties to be cognisant of women in rural areas, elderly women, and women with disabilities.<sup>160</sup>

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (Protocol on the Rights of Persons with Disabilities)<sup>161</sup> also finds its inception in an intersectional recognition of people living with disabilities 'which often lead[s] to consequences such as poverty, illiteracy and health issues'.<sup>162</sup> In its Preamble, the Protocol on the Rights of Persons with Disabilities notes that 'persons with disabilities experience extreme levels of poverty'.<sup>163</sup> The Preamble also initiates an intersectional awareness of vulnerability by expressing the concern of 'multiple forms of discrimination, high levels of poverty and the great risk of violence, exploitation, neglect and abuse that women and girls with disabilities face'.<sup>164</sup>

Fortune as an expressed ground of discrimination in article 5(1) of the Protocol on the Rights of Persons with Disabilities should be understood in light of the concerns expressed in the Preamble and direct various protections in the Protocol to ensure political voice, the eradication of material disadvantage and the recognition of poor people with disabilities' inherent human dignity. Although not litigated or decided explicitly on intersectional grounds, and before the adoption and entry into force of the Protocol on the Rights of Persons with Disabilities, the *Purohit* case illustrates how an awareness of intersectional discrimination on the grounds of disability and poverty enabled a contextual consideration of the various rights and freedoms that were violated of the patients in the psychiatric unit.<sup>165</sup>

159 Maputo Protocol art 19(d) on the right to sustainable development.

160 Maputo Protocol arts 14(2)(a) & 19(d), 22, 23 respectively.

161 Adopted 29 January 2018 and not yet entered into force.

162 Centre for Human Rights *A guide to the African human rights system* (2016) 19.

163 African Disability Protocol Preamble, para 15.

164 African Disability Protocol Preamble, para 19.

165 *Purohit* (n 64). See sec 4.1.1 above for a further exposition of the various rights' violations present in the case.

Other grounds of discrimination and group vulnerability also intersect with the discrimination impoverished people face based on their fortune, which have been acknowledged by the supervisory organs and other human rights forums to the African Charter. These groups include children, the youth, indigenous people, people with HIV/AIDS, the elderly, refugees, asylum seekers, internally displaced persons and migrants, victims of forced evictions and homelessness, women seeking abortions and poor people in the criminal justice system.<sup>166</sup>

#### **4.1.3 Discrimination and equality and non-discrimination duties**

The teleological approach to treaty interpretation is also advantageous to the extent that it provides a basis for distilling the concept of discrimination under the African human rights system. Furthermore, the teleological approach is imperative for determining the human rights duties that flow from the guarantee not to be discriminated against based on one's fortune. The following section first discusses the concept of discrimination and thereafter furthers the concept, considering the duties it imposes on relevant stakeholders.

Drawing from other international human rights standards, the African Commission held that 'discrimination can be defined as applying any distinction, exclusion, restriction or preference which is based on any ground'.<sup>167</sup> The African Commission also acknowledges that discrimination can manifest through 'any conduct or omission'.<sup>168</sup> Furthermore, any discriminatory conduct or omission must have the 'purpose or effect of nullifying or impairing the equal access to and enjoyment of economic, social and cultural rights'<sup>169</sup> or the 'purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by

166 African Commission Resolution on Indigenous Populations/Communities in Africa (2016) ACHPR/Res. 334 (EXT.OS/XIX) (Resolution on Indigenous Populations); African Commission Resolution on the Human Rights issues affecting the African Youth (2016) ACHPR/Res. 347(LVIII); African Commission Resolution on the Need to Develop Principles on the Declassification and Decriminalization of Petty Offences in Africa (2017) ACHPR/Res. 366 (EXT.OS/XX1); African Commission Resolution on Women's Right to Land and Productive Resources (2013) ACHPR/Res.262 (LIV); African Commission Resolution on the Situation of Women and Children in Africa (2021) ACHPR /Res.66 (XXXV).

167 *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) (*Zimbabwe Human Rights Forum*) para 169.

168 Principles and Guidelines (n 167) para 19.

169 As above.

all persons, on equal footing, of all rights and freedoms'.<sup>170</sup> Furthermore, direct and indirect discrimination is recognised, and there is, therefore, no need to show that the duty-bearer of the right had the intention to discriminate.<sup>171</sup> Indirect discrimination 'includes situations in which a law or a neutral or an apparently non-discriminatory measure produces the effects of an unjustified distinction'.<sup>172</sup> Recognising that discrimination based on fortune can manifest indirectly is imperative as various everyday laws, practices, and omissions reinforce the disadvantages of impoverished people, although they appear neutral.

These elements of discrimination suggest that the non-discrimination guarantee under the African Charter not only intends to combat differential treatment but also cast the net wider to challenge structural manifestations of discrimination relating to material disadvantage and political erasure. Although these elements give greater clarity to the determination of discrimination based on fortune, the specific duties that the non-discrimination guarantee places on states parties further expand on the substantive equality object and purpose of the ground of discrimination.

Article 2 of the African Charter places a combination of positive and negative duties on states parties. As a start, equality and freedom from discrimination are central features of international human rights law that bind all states parties and ensure that no discriminatory derogations on the basis of fortune are permitted.<sup>173</sup> The Preamble of the African codifies these commitments by expressing that states parties are:

Firmly convinced of their duty to promote and protect human and peoples' rights and freedoms and taking into account the importance traditionally attached to these rights and freedoms in Africa.<sup>174</sup>

The African Commission has subsequently adopted the well-established international human rights quartet of duties to protect, respect, promote and fulfil human rights.<sup>175</sup> In terms of non-discrimination, the African Commission called on states parties 'to strictly observe the provisions of the African Charter, in particular, Article 2 on the principles of non-

170 *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa v Zimbabwe* (2009) AHRLR 268 (ACHPR 2009) (*Zimbabwe Lawyers for Human Rights*) para 91.

171 See the discriminatory manifestations elaborated in the introduction in sec 1.

172 *Open Society Justice Initiative* (n 111) para 144.

173 De Schutter (n 76) 655.

174 African Charter Preamble, para 10.

175 Principles and Guidelines (n 156); *Ogoniland* (n 46) paras 44-47.

discrimination and *take all necessary measures* to end all discriminatory practices'.<sup>176</sup>

Notably, the matrix of duties entails more than a traditional negative legal duty of non-interference. A substantive conception of equality also requires positive and redistributive duties to inform the duties to respect, fulfil, promote and protect.<sup>177</sup> The African Commission had implicitly denied a formal understanding of equality duties when it indicated that article 2 of the Charter does not require people in similar situations to be treated the same but that some circumstances will permit differential or favourable treatment to comply with human rights duties.<sup>178</sup> In subsequent human rights treaties and documents, 'positive measures' are also required to not only address the deprivation marginalised groups face but also to transform the structural inequalities that enable marginalisation and discrimination.<sup>179</sup> Importantly, the African conception of personhood, where people have inherent moral worth that is furthered through collective solidarity, would not mark redistributive efforts as a counter to African egalitarian efforts.<sup>180</sup> Rather, redistributive efforts would be considered indispensable for creating the necessary conditions where rights and freedoms can be exercised on an equal footing. Moreover, in instances where states parties ignore, neglect, or fail to prioritise impoverished people in redistributive measures to promote and protect their fundamental rights, it will constitute discrimination by omission.

Importantly, states parties must also show that they have harnessed their duties of international cooperation and assistance to fulfil impoverished people's rights to equality and non-discrimination.<sup>181</sup> Furthermore, the rights to equality and non-discrimination bind not only states parties but

176 African Commission Resolution on the General Human Rights Situation in Africa (2011) ACHPR/Res.207 para 8. (emphasis added).

177 S Fredman *Human rights transformed* (2008) 313-318.

178 *Dabakorivhuwa Patriotic Front v Republic of South Africa* [2013] ACHPR 115 (23 April 2013) (*Dabakorivhuwa*) para 117.

179 Art 1(f) definition of discrimination in the Maputo Protocol read with art 2(1) detailing substantive equality entailing positive duties such as 'corrective and positive action' and art 26 requiring the provision of budgetary and other resources to effectively implement and monitor the Protocol. Also see the case of the High Court in Kenya at Nairobi *John Kabui Mwai v Kenya National Examination Council* Petition 15 of 2011 paras 5-11 where redistributive economic measures were held to be part of equality.

180 See sec 3.2 above; TW Bennett 'Ubuntu: An African equity' (2011) 14 *Potchefstroom Electronic Law Journal* 30 at 49-51.

181 African Charter Preamble, para 4; O de Schutter 'The rights-based welfare state: Public budgets and economic and social rights' (2018) *Friedrich Ebert Stiftung* 39.

also non-state actors.<sup>182</sup> The direct obligations of non-state actors need more development in the context of fortune-based discrimination.<sup>183</sup> However, at the very least, there is a duty placed on states parties to exercise 'due diligence' in regulating the affairs of non-state actors to ensure that discrimination based on fortune is not present.<sup>184</sup>

Given the description above that discrimination must have the effect of impairing any rights and freedoms under the Charter, a specific focus on the expressed standards of non-discrimination and impoverished people's rights will assist in further interpreting the matrix of duties emanating from the rights to equality and non-discrimination.

#### 4.1.4 *The rights to equality and non-discrimination and other rights*

The African Commission has taken a cue from the stipulation in article 2 of the Charter that every individual shall be entitled to the enjoyment of the rights and freedoms that are entrenched in the African Charter in holding that article 2 does not establish a 'general ban' on discrimination, but rather 'only prohibits discrimination where it affects the enjoyment of a right or freedom guaranteed by the Charter'.<sup>185</sup> This means that article 2 does not necessarily confer a stand-alone right, but complainants will have to show that their enjoyment of a right or rights in the African Charter is 'hindered in a discriminatory way'.<sup>186</sup> Murray indicates that jurisprudence suggests that article 2 of the African Charter is mostly leveraged to show that there is discrimination against an identifiable group by excluding them from or impairing their enjoyment of a right.<sup>187</sup> This interrelationship between fortune discrimination and other rights is reinforced by a teleological approach to interpretation that recognises the treaty as a whole.<sup>188</sup> This indicates that where impoverished people encounter discriminatory barriers to fully enjoying their rights due to misfortune, it can be challenged in law.

182 Expressed through 'everyone' in the African Charter Preamble, para 7.

183 For some elaboration of non-state actors' influence in enabling global poverty and inequality with some proposals for legal intervention, see L Williams 'Beyond the state: Holding international institutions and private entities accountable for poverty alleviation' in Davis, Kjaerum & Lyons (n 5) 550-565.

184 *Zimbabwe Human Rights Forum* (n 178) para 158; African Commission Resolution on States' obligation to regulate private actors involved in the provision of health and education services (2019) ACHPR/Res.421 (LXIV).

185 *Antonie Bissangou* (n 107) para 69.

186 As above.

187 Murray (n 108) 48-53.

188 See sec 2.2 above.

In terms of the material disadvantage and the basic need deprivation of impoverishment, the recognised and implied socio-economic rights under the African Charter must be responsive to impoverished people's challenges to realise these rights based on their fortune.<sup>189</sup> In this respect, the Principles and Guidelines indicate that states parties have specific responsibilities to vulnerable groups by virtue of the non-discrimination principle.<sup>190</sup> The African Commission has also stated in the context of access to health and needed medicines that states parties should guarantee 'the full scope of access to needed medicines, including the accessibility of needed medicines to everyone without discrimination'.<sup>191</sup> In particular, states are required to protect access to needed medicines and regulate non-state actors to 'prevent unreasonably high prices for needed medicines in both the public and private sectors, through promotion of equity pricing in which the poor are not required to pay a disproportionate amount of their income for access'.<sup>192</sup> The standards that emerge from these statements suggest that states parties must eliminate the barriers to accessing these fundamental rights based on fortune.<sup>193</sup>

In terms of the various civil and political rights implicated by the condition of poverty, states parties will have to ensure direct participation by poorer communities and individuals to overcome their political exclusion. The right to freedom of expression may place special duties on states parties to promote, for example, community broadcasting, especially to 'broaden access by poor and rural communities to airwaves'.<sup>194</sup> The African Commission has also indicated that to effectively respond to the COVID-19 virus in Africa, special measures must be put in place for

189 Such as property, work, health, education, family, the collective socio-economic rights to freely dispose of wealth and natural resources, development and a general satisfactory environment. The African Commission have implicitly recognised other socio-economic rights is social security, an adequate standard of living including food, water and housing. See arts 14, 17, 18, 21, 22 & 24, and *Ogoniland* (n 46) paras 60-64 and *Sudan Human Rights Organisation v Sudan* (2009) AHRLR 153 (ACHPR 2009) para 209. For a strong argument for the potential of utilising socio-economic rights and the non-discrimination guarantees in the African Charter, see TS Bulto 'The utility of cross-cutting rights in enhancing justiciability of socio-economic rights in the African Charter on Human and Peoples' Rights' (2010) 29 *University of Tasmania Law Review* 142 at 152-154.

190 Principles and Guidelines (n 156) 13.

191 Resolution on access to health and needed medicines in Africa (2021) ACHPR/Res.141(XXXXIV).

192 As above.

193 See sec 4.2 below on the justifications of limited resources.

194 African Commission Resolution on the adoption of the Declaration of principles on freedom of expression in Africa (2002) ACHPR/Res.62 (XXXII).

‘vulnerable groups including the poor’ to ensure their right to access to information on a non-discriminatory basis.<sup>195</sup>

The Commission has also expressed that adequate, strong and substantive legal and institutional frameworks must be put in place to address the increased poverty and social and economic disparities that violate the rights and freedoms of indigenous people.<sup>196</sup> The Commission has stressed that poor and vulnerable youths, prisoners, children, women, and people who are infected or affected by HIV/AIDS should be prioritised, on the basis of non-discrimination, in protection efforts during situations of violence, such as gender-based violence, forced removals and evictions, armed conflicts and terrorist activities, and harmful cultural practices.<sup>197</sup> Significantly, the African Commission has demanded that states parties must continuously monitor and prioritise efforts to address the disproportionate impact on vulnerable groups ‘like the poor’ during financial crises.<sup>198</sup> Furthermore, states parties must strengthen and adopt principles of good governance to enhance transparency and accountability to ensure economic equality and ‘create a conducive environment for the reduction of poverty and underdevelopment’.<sup>199</sup>

Drawing from the above analysis, a teleological interpretation of the rights to equality and non-discrimination establishes a wide range of positive and negative duties on states parties to effectively promote and protect impoverished people’s guarantee not to be discriminated against based on their fortune. However, the interpretation of fortune-based discrimination by monitoring bodies could raise concerns such as it would not allow states parties satisfactory leeway to employ sovereignty over

195 African Commission ‘Press Statement on human rights based effective response to the novel COVID-19 virus in Africa’ 24 May <https://www.ohchr.org/sites/default/files/Documents/Countries/NHRI/RHRM/RHRMs.Covid-19.response.docx> (accessed 20 August 2023) para 5.

196 Resolution on Indigenous Populations (n 166).

197 African Commission ‘Statement by the Special Rapporteur on Refugees, Asylum Seekers, IDPs and Migrants on the Violence in the Republic of Kenya’ 29 January [http://www.achpr.org/english/Press%20Release/Special%20Rapporteur\\_IDPs\\_Kenya.htm](http://www.achpr.org/english/Press%20Release/Special%20Rapporteur_IDPs_Kenya.htm) (accessed 20 August 2023); African Commission ‘Statement by the Special Rapporteur on the Rights of Women in Africa commemorating the “Global Day of Action for Access to Safe and Legal Abortion”’ 28 September <https://achpr.au.int/en/news/press-releases/2022-09-28/rights-women-africa-global-day-action-access-safe-legal-abortion> (accessed 20 August 2023).

198 African Commission Resolution on the impact of the ongoing global financial crisis on the enjoyment of social and economic rights in Africa (2009) ACHPR/Res.159(XLV1) paras 2-3.

199 As above.

their domestic budgetary and socio-economic policy choices.<sup>200</sup> However, these concerns should not be too readily accepted by interpreters at the expense of their promotional and interpretative mandate of human rights in the African Charter.<sup>201</sup> The following part analyses to what extent a teleological interpretation furthering a substantive conception of equality in law provides a sufficient basis for examining any justifications posed for the impugned discrimination by the duty-bearers of the right.

## 4.2 Justifications and proportionality assessment

Generally, the most robust level of judicial review entails a proportionality assessment.<sup>202</sup> In terms of such an assessment, any discriminatory act or omission could be justifiable if the purposes provided for the differential treatment are proportional to the material 'effect of the limitation' on the identifiable group.<sup>203</sup> The African Commission has developed some benchmarks that can be integrated with the features of a proportionality assessment to ensure that any justifications posed for the limitation of the rights to equality and non-discrimination based on fortune will not blunt the substantive equality aims of the right.

As a start, states must prove that the differentiating act or omission has a legitimate governmental aim or purpose.<sup>204</sup> The African Commission has reiterated that a legitimate purpose requires that the restriction of rights must be established in law.<sup>205</sup> The stated purpose must also not be based on 'vague and unsubstantiated reasons'.<sup>206</sup> Furthermore, the legitimate aim 'cannot be derived solely from popular will' to limit the duties and responsibilities of states parties.<sup>207</sup>

200 On a similar danger in terms of socio-economic rights, see S Liebenberg 'Between sovereignty and accountability: The emerging jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights under the Optional Protocol' (2020) 42 *Human Rights Quarterly* 48-84.

201 See secs 2.1 and 2.2 above.

202 K Möller 'Proportionality: Challenging the critics' (2012) 10 *International Journal of Constitutional Law* 710-712; KG Young 'Proportionality, reasonableness, and economic and social rights' in VC Jackson & M Tushnet (eds) *Proportionality: New frontiers, new challenges* (2017) 250.

203 *Open Society Justice Initiative* (n 111) para 145; *Dabalorivhuma* (n 178) para 115.

204 *Interights* (n 74) para 146.

205 *Centre for the Minority Rights Development v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois*) para 172.

206 *Zimbabwe Lawyers for Human Rights* (n 170) para 59.

207 *Legal Resources Foundation* (n 71) para 70.

The Commission has also stated that the legitimate aim must be 'objective' and 'rational'; any differentiation that is 'arbitrary' or leads to a 'manifest naked preference' would not be legitimate.<sup>208</sup> In this respect, the Commission has stated that the disregard for human dignity 'cannot serve as the basis for any state action'.<sup>209</sup> Thus, justifications posed for discrimination against impoverished people in the form of prejudice, stigma or violence on the basis of their fortune should not automatically be regarded as a legitimate justification. For example, supervisory organs and states should be alive to the reasons for the criminalisation of poverty that reflects stereotypical assumptions about and against poorer and more vulnerable communities.<sup>210</sup> In circumstances of petty offences and homelessness, the purpose of the criminalisation of such acts is usually to punish, segregate, control and undermine socially and economically vulnerable people.<sup>211</sup> Such a purpose cannot be considered legitimate and, therefore, cannot be considered to be justifiable.

When impoverished people's discrimination in the form of material disadvantage is implicated in any economic justifications, such as austerity measures with the ostensible legitimate aim for fiscal consolidation,<sup>212</sup> a substantive conception of equality should guide the proportionality assessment. For example, as stated above in *Purohit*, the African Commission stressed that African states face challenging circumstances of structural poverty where immediate access for everyone to basic goods and services will be difficult to achieve.<sup>213</sup> However, the Commission emphasised that states parties must show that they have taken 'concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all of its aspects without discrimination of any kind'.<sup>214</sup> State parties will therefore have to show that they have taken all measures, including legislative and other positive measures, to minimise or eliminate the economic exclusion impoverished people will face based on their fortune.

208 *Dabakorivhuwa* (n 178) para 117.

209 *Shumba v Zimbabwe* Communication No 288/04, African Commission on Human and Peoples' Rights (2017) para 137.

210 As was the case in *Interights* (n 74) paras 146-149.

211 *Principles on Petty Offences* (n 15) 12.

212 S Liebenberg 'Austerity in the midst of a pandemic: Pursuing accountability through the socio-economic rights doctrine of non-retrogression' (2021) 37 *South African Journal on Human Rights* 181-204.

213 *Purohit* (n 64) para 84.

214 As above.

Even if the justification is found to have a legitimate purpose, supervisory organs must also assess whether the proposed goal of the discrimination is suitable to the extent that it is reasonably capable of achieving the said aim.<sup>215</sup> Furthermore, the limitation must be necessary in so far as there are no other less restrictive options that would not unduly curtail impoverished people's guarantee of non-discrimination based on their fortune.<sup>216</sup>

Finally, the African Commission and Court have explained that no rights under the African Charter are absolute to the extent that the enjoyment of one's rights should not violate other human rights under the African Charter.<sup>217</sup> Thus, article 2 is not absolute and, in principle, not subject to the 'clawback' clauses of article 14 and the limitation clause in article 27(2) of the African Charter.<sup>218</sup> However, these clauses have been incorporated in cases concerning violations of article 2 in relation to other rights and have thus been incorporated in a proportionality assessment.<sup>219</sup> Article 14 of the African Charter inaugurates the so-called 'clawback' clause, where states can justify an encroachment on property if they can show that it is in 'the interest of public need or in the general interest of the community'.<sup>220</sup> Article 27(2) states that '[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest'. Article 27(2) has been understood as a form of limitation clause that sets clear standards for assessing the legitimacy of the limitation of rights.<sup>221</sup> In instances where impoverished people's rights are violated based on their fortune, articles 14 and 27(2) may launch an inappropriate 'balancing' exercise where individual interests are set up against broad public interest concerns.<sup>222</sup>

Article 27(2) has therefore enjoyed considerable academic and judicial debate as it is uncertain why duties owed to individuals are seen as conflicting with broader collective interests.<sup>223</sup> Given the pervasive forms of discrimination impoverished people face on the basis of their fortune, it is expected that states parties or wealthier individuals and groups will argue

215 *Endorois* (n 205) paras 213-214.

216 Möller (n 202) 713; *Constitutional Rights Project* (n 61) para 42.

217 *Gareth Anvar Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004) (*Prince*) para 43.

218 See n 115 above.

219 Murray (n 108) 55-58.

220 Murray (n 108) 377-378.

221 Murray (n 108) 579.

222 Möller (n 202) 715-716; M Mutua *Human rights: A political & cultural critique* (2002) 82-84.

223 For a survey of these debates, see Murray (n 108) 581-582.

that positive measures are against their individual rights or broader societal interests. For example, states parties may argue that the exploitation and destitution of a few will have greater benefits to society at large as it will increase their revenue for redistribution to fulfil a larger poor population's socio-economic needs. Supervisory organs and states parties must tread cautiously in such circumstances as these arguments may deepen vulnerable groups' material disadvantage and blunt an African conception of substantive equality characterised by solidarity, mutual social and communal care and support. In this respect, the African Commission and Court have referred to the margin of appreciation doctrine that holds that a state party is often in a better position to determine the specific needs and the 'competing and sometimes conflicting forces that shape its society'.<sup>224</sup> However, the African Court emphasised that even though the margin of appreciation doctrine is acknowledged, the Court retains its supervisory jurisdiction to strike a 'fair balance' between the interests of the individual and society.<sup>225</sup>

Ultimately, any justification posed must be assessed against the effect the discriminatory measure or omission may have in furthering the material disadvantage, political vulnerability, and interpersonal indignity impoverished people face; otherwise, the right not to be discriminated against based on fortune will be rendered 'illusory'.<sup>226</sup> The teleological approach, therefore, also guides the proportionality assessment that stresses an interpretation that will give practical effect to the object and purpose of the African Charter.

## 5 Conclusion

This chapter has sought to demonstrate that 'fortune' as an expressed ground of discrimination under the African Charter is an untapped legal tool to contest the manifestations of discrimination impoverished people encounter. It argued that the purely textual approach to interpretation as the dominant approach followed by supervisory organs to the African Charter is not conducive to interpreting fortune as it will allow for self-generating and restrictive interpretations that may normalise the 'misfortunes' of impoverished people. The chapter argued that a teleological approach to treaty interpretation stressing the determination of the 'object and purpose' of fortune in its context holds the potential to come to terms with

224 *Prince* (n 217) para 51; *Jebra Kambole v Tanzania* (2020) 4 AfCLR 460 (*Jebra Kambole*) para 80.

225 *Jebra Kambole* (n 224) paras 43, 81.

226 *Media Rights Agenda v Nigeria* (2000) AHRLR 200 (ACHPR 1998) paras 68-70.

the normative content of the guarantee not to be discriminated against based on one's fortune as it allows for a holistic interpretation.

Furthermore, the chapter indicated the current interpretative approach to the equality and non-discrimination rights under the Charter is mainly interpreted in terms of a formalistic understanding of equality in law. It illustrated that a formal view of equality is not conducive to driving the interpretation and implementation of the non-discrimination principle as it will entrench the structural discrimination that underlies fortune-based discrimination. Specifically, it illustrated how a teleological interpretation could overcome such formalism and facilitate a more appropriate substantive conception of equality in law as an overarching object and purpose of the Charter. Furthermore, it showed that the teleological interpretation, which looks at the treaty as a whole, helps assert a regionally sensitive account of substantive equality which seeks to use the law as one tool to challenge the political erasure, material disadvantage and the violation of human dignity vulnerable and marginalised groups such as impoverished people on the African continent encounter. It was underscored that a teleological interpretation of fortune enables a historical awareness of the inception to the Charter seeking to eliminate all forms of colonial discrimination, as well as enabling the Charter to be a 'living instrument' to contest the continuing neo-colonial strongholds giving rise to current forms of discrimination.

Drawing from the sub-elements that characterise the teleological approach to treaty interpretation, such as the preparatory documents to the African Charter and other international, regional and domestic human rights instruments and jurisprudence, it was argued that 'fortune' refers to 'economic status' of which poverty forms part. The article further showcased that the African human rights system is weak in its intersectional understanding of disadvantage and therefore argued for an intersectional conception of discrimination. In this respect, the chapter showed how fortune could be utilised to ensure a more sophisticated intersectionality analysis on other expressed grounds relating to, for example, impoverished women, children, the disabled, youths and indigenous communities. Furthermore, it illustrated how the rights to equality and non-discrimination in the African Charter are leveraged to show a discriminatory exclusion or unequal enjoyment of other rights and freedoms in the African Charter. As such, it indicated that the guarantee against discrimination based on fortune is a powerful legal tool to challenge various civil and political, social and economic, environmental, and group rights that impoverished people are denied.

This chapter further developed a concept of discrimination in line with substantive equality that captures a wide range of direct and indirect discriminatory omissions and conduct that will allow responsiveness to structural discrimination. In furthering the substantive equality aims of prohibiting fortune-based discrimination, it established that states parties and non-state actors have a wide range of negative, positive and redistributive duties to effectively realise the guarantee not to be discriminated against. Finally, this chapter considered typical justifications posed for discrimination. It argued that a substantive understanding of equality provides states parties and supervisory organs with a vital framework to assess whether the proposed justifications are proportional to the effect it has on deepening impoverished people's material deprivation, political marginalisation and indignity based on their fortune.

### Table of abbreviations

CESCR	United Nations Committee on Economic, Social and Cultural Rights
SERAC	Social and Economic Rights Action Centre
VCLT	Vienna Convention on the Law of Treaties

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