



## Chapter Two: Law as tool of effective societal transformation?

“Law is some tricky shit”.

Thelma & Louise (MGM-Pathé) 1991

### 2.1 Introduction

In this chapter I focus in general terms on the relationship between law and society and the (in)ability of law to effect changes in society. In the chapters that follow this one, I then apply the theoretical constructs and debates, which I explored in this chapter, to the Act and I focus specifically on the Act’s ability to effect societal transformation in South Africa. In this chapter I firstly reflect on different conceptions of “law” and “society” as expressed by (among others) Ehrlich, Weber, Aubert and Cotterrell, and the limits of the law in effecting societal change. I then identify the conditions that should be present to enable “law” to be used (instrumentally) to steer or change a given society. Lastly, if one accepts that, under certain conditions, the law may be used successfully to steer society,<sup>1</sup> I ask the question whether the legislature or the courts are better suited to drive such a societal transformation project.

### 2.2 “Law”

A large number of authors have through the ages attempted to provide a lasting or universally applicable definition of “law”. Some have defined “law” in relation to its societal context. Below I set out the views of some influential authors who may broadly be characterised as being interested in the sociological aspects of what “law” entails. Analysing the literature, Cotterrell helpfully identifies four ways of conceptualising law in this context:<sup>2</sup> law as one normative order in a range of normative orders (legal pluralism); law as coercive order; law as dispute processing, and law as doctrine. I elaborate on these concepts directly below, before clarifying the approach followed in the thesis.

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<sup>1</sup> I do not concern myself with the (normative) question whether the law *should* be used to steer society.

<sup>2</sup> Cotterrell (1992) 39-43.



### 2.2.1 Law as one normative order in a range of normative orders (legal pluralism)

In explaining what he has in mind when he refers to “legal pluralism”, Cotterrell refers to some of the pioneers of legal sociology such as Gurvitch, Petrazycki, Timasheff and Renner, and the American Realist Llewellyn.<sup>3</sup> Gurvitch, for example, sees law as the “expression of order or harmony of different forms of ‘sociality’ or collective life”.<sup>4</sup> The character of law differs depending on the kind of sociality and the kinds of social groups it regulates. Thus, law may be organised or unorganised, fixed in advance or fixed in an *ad hoc* manner, or be purely intuitive and may or may not be accompanied by sanctions.<sup>5</sup>

This “range of normative orders”, referred to in the heading, would for example include routine, habit, convention, the institution of marriage, collegueship in an organisation or the practice of promising;<sup>6</sup> “the ‘law’ of the supermarket check-out line to the constitutional interpretation of the federal courts”;<sup>7</sup> and the rules of “socialization, pressure, religion, popular culture, masculinity and femininity, everyday life”.<sup>8</sup> Stout contends that many legal scholars have come to focus on the phenomenon of “social norms” – norms as rules of behaviour that people follow for a reason other than to be (possibly) sanctioned by a court.<sup>9</sup> Macaulay, who “pioneered the study of business practices”,<sup>10</sup> empirically illustrates how businesspeople prefer settling their disputes outside of the formal precepts of contract law and rather relies on norms such as “commitments are to be

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<sup>3</sup> Cotterrell (1992) 39-40.

<sup>4</sup> Cotterrell (1992) 39. Kamenka and Tay in Kamenka and Tay (eds) (1980) 14 refers to law “as maintaining fundamental rules of living together”. Fuller (1981) 212 thought law should be construed broadly to include “law-like” systems such as labour unions, professional associations, clubs, churches and universities.

<sup>5</sup> Cotterrell (1992) 39.

<sup>6</sup> Sarat and Kearns in Sarat and Kearns (eds) (1995) 1; 22.

<sup>7</sup> Engel in Sarat and Kearns (eds) (1995) 125-126.

<sup>8</sup> MacKinnon in Sarat and Kearns (eds) (1995) 112. MacKinnon is concerned with the range of normative orders that all keep women subjugated. In discussing the role of the law in the construction of homosexual identity, De Vos (1996) 12 *SAJHR* 270 refers to a “*nexus of cultural prescriptions* of deviance, normality and illness which have together involved the production of the ‘homosexual personage’. The discursive production of the homosexual person as a deviant man of law – a new subject to be observed, policed and examined – took place *in and across legal, medical and psychological discourses*” (my emphasis).

<sup>9</sup> Stout in Drobak (ed) (2006) 15 and 28 and the list of studies she refers to at 15 n4 and 28 n32. Also of Gutto (1995) 11 *SAJHR* 313: “The reality of what could be regarded as ‘living law’ or ‘law in practice’, as opposed to ‘inactive law’ or ‘law on paper or books’, is that legal systems are complex and dynamic; they manifest co-existence or many layers of laws and social legal practices which are complementary, sometimes ‘co-operatively’ and at other times in contradiction or contestation with each other, that is conflictual”.

<sup>10</sup> <http://www.wisc.edu/faculty/biog.php?ID=350> (accessed 2007-08-16).

honored in almost all situations” and “one ought to produce a good product and stand behind it”.<sup>11</sup> To these authors may be added Tamanaha, a pragmatist social scientist,<sup>12</sup> who refers to the “new legal pluralism” that have shown that state law is only one order that operates in society alongside custom-based norms, rule-making and rule-enforcing institutions such as companies and universities, and smaller social groups such as clubs and perhaps even the family.<sup>13</sup>

Ehrlich, “with and through Roscoe Pound ... among the founders of modern American sociological jurisprudence”,<sup>14</sup> could be seen as one of the first sociologists who identified this pluralist aspect of “law”. Ehrlich talks of *lebendes recht* or “living law”, by which he means the rules actually followed in social life.<sup>15</sup> The purpose of these rules is to avoid disputes. Should disputes arise, these rules aim at settling them without recourse to state courts.<sup>16</sup> Yet a lawyer’s task is also to settle disputes. When would lawyers (and the courts) become involved? Ehrlich states that lawyers deal with the abnormalities of life, not the normalities.<sup>17</sup> He thinks that state law is often irrelevant in securing order and harmony. People generally voluntarily (“instinctively”) perform the tasks arising from social relationships and “as a rule, the thought of compulsion by the courts does not even

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<sup>11</sup> Macaulay (1963) 28 *Am Soc Rev* 63.

<sup>12</sup> Morales (2000) 20 *Int J Soc & Soc P* 76.

<sup>13</sup> Tamanaha (2001) 117.

<sup>14</sup> Rheinstein (1938) 48 *Int J Ethics* 232.

<sup>15</sup> Ehrlich (1936) 21; Cotterrell (1992) 29. Macaulay (2005) *Wis L Rev* 368 describes Ehrlich’s concept of the “living law” as follows: “The living law is that law which is not imprisoned in rules of law, but which dominates life itself. The sources of its knowledge are above all the modern documents, and also immediate study of life itself, of commerce, of customs and usage, and of all sorts of organizations, including those which are recognized by the law, and, indeed, those which are disapproved by the law”.

<sup>16</sup> Ehrlich (1936) 21; Cotterrell (1992) 29.

<sup>17</sup> Ehrlich (1936) 21; Cotterrell (1992) 29. Macaulay (1963) 28 *Am Soc Rev* 55 shows how the majority of “business deals” are struck without relying on the doctrines of contract law. Only when relationships break down, ie when an “abnormality” occurs, would one expect court cases to ensue, as Macaulay’s study also indicates. Hartog in Sarat and Kearns (eds) (1995) 63-108 describes the journey of Abigail Bailey, a deeply submissive 18<sup>th</sup> century American wife, who discovers that her violent and abusive husband sexually abused one of their daughters, and eventually divorces him after 25 years of marriage. Hartog attempts to show that Abigail’s “thoughts, prayers, and arguments are filled with law; legal facts, remedies, strategies, and institutions were constantly present”. I read her story differently. Abigail’s memoirs deal with her childhood in one paragraph, the first 21 years of marriage in 13 pages, and the next four years in 110 pages. She discovers the sexual assaults after 21 years of marriage. The next four years are understandably filled with the law – this is when her long relationship with her husband breaks down and she has to decide how to deal with the situation. Up to that point her religious faith convinced her to remain true and submissive to this violent man she loved. While the relationship with her husband held, the law played no role in her daily existence. When the “abnormality” intrudes, the law intrudes as well.

enter the minds of men”.<sup>18</sup> People are creatures of habit or they do not want to be seen as deviant and therefore they conform to these extra-state rules.<sup>19</sup>

Ehrlich seems to suggest that scholars employing sociology of law should study “the whole of law in its social relations” and by “law” he means not only “state law”, in other words court cases, legislation and the common law, but the entire “Social Order” made up of institutions such as marriage, family, possession, contract and succession and the rules governing such institutions.<sup>20</sup> (What I would term “state law” he defines as “Legal Provisions”; “instruction[s] framed in words addressed to courts as to how to decide legal cases or a similar instruction addressed to administrative officials as to how to deal with particular cases”.<sup>21</sup>) Such an expansive study is an impossible task to perform in a single doctoral thesis.<sup>22</sup>

From the perspective of legal pluralism, state law plays a small role in the maintenance of the social order, and therefore also will have a marginal effect in changing or steering society.<sup>23</sup> For example, consider Ehrlich’s rather strong view that “one might reasonably maintain that society would not go to pieces even if the state should exercise no coercion whatever”.<sup>24</sup> Ehrlich probably

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<sup>18</sup> Ehrlich (1936) 21. In similar vein Kamenka and Tay in Kamenka and Tay (eds) (1980) 4 argue that violent self-help is not the only alternative to a state-sanctioned legal system and hold that societies have rules without having a sovereign, courts and police.

<sup>19</sup> Cotterrell (1992) 32 refers to a study by Macaulay of business practices in Wisconsin. Cotterrell describes it as follows: “[Macaulay] discovered that business agreements were frequently made without knowledge of the relevant rules of contract law and that, in many cases, they would be invalid according to those rules if challenged in courts. He also found that businessmen actively sought to avoid the use of law and lawyers in their affairs”. See Macaulay (1963) 28 *Am Soc Rev* 55. Compare what a businessman said in testimony in *Glofinco v ABSA Bank Ltd t/a United Bank* 2002 (6) SA 470 (SCA) par 38: “It is not our practice to finalise our deals in a court of law, that certainly doesn’t appeal to us at all”.

<sup>20</sup> Ehrlich (1922) 36 *Harv L Rev* 130-145.

<sup>21</sup> Ehrlich (1922) 36 *Harv L Rev* 132.

<sup>22</sup> Ehrlich (1922) 36 *Harv L Rev* 144 acknowledges this: “Such a task is far beyond the powers of the individual”. Also see Engel in Sarat and Kearns (eds) (1995) 124: “Law academics generally prefer to pitch their tents in the shadow of the Supreme Court rather than on Main Street or in urban or suburban neighborhoods ... The specialized discourse and rituals of lawyers and legislators invite study in a way that day-to-day reliance on common sense by ordinary people does not”.

<sup>23</sup> Cf North in Drobak (ed) (2006) 55: “[T]hree factors determine the institutional framework of a society: formal rules, informal norms of behavior, conventions, and codes of conduct; and their enforcement characteristics. If all we can change are the formal rules, and not the other factors that also shape the performance characteristics, then we are going to get unforeseen and undesirable results”.

<sup>24</sup> Ehrlich (1936) 71. Sumner (1959) 3-4 is of the view that the primary method of control of/in a society is its “folkways”. These folkways are not consciously created but are similar to products of natural forces that are unconsciously set in operation or instinctively developed out of experience. Lévy-Bruhl (1961) 50 as translated from the original French and interpreted by Cotterrell (1992) 29 is less optimistic about the strength of customs. He

overstates the position. The sociologist Aubert, a pioneer within Norwegian social science,<sup>25</sup> provides a plausible explanation for Ehrlich's view. Aubert theorises that Ehrlich lived in a state where the legislature was in distance far removed from local customs and norms and where the state's legitimacy was not secure.<sup>26</sup> Large geographical distances separated the commands of the legislature from local customs and suppressed national minorities resisted and resented central government policies.<sup>27</sup> A number of theories where law as phenomenon is located in the attitudes and behaviour of people had their origin in Tsarist Russia and the failing Austro-Hungarian Empire.<sup>28</sup>

## 2.2.2 Law as coercive order

A number of authors distinguish law from other methods of social control using the criterion of the sanctions that law utilises. In this context Cotterrell refers to Weber and Hoebel.<sup>29</sup> Weber states that "an order will be called law if it is externally guaranteed by the probability that coercion

compares customary rules with "official" law and holds that customs in modern societies in powerful states are fragile and lacks the *solidité* (strength; firmness) of official law. Likewise Ferguson (1980) *Br J Law & Soc* 155 does not believe that dispute settlement mechanisms would be effective in the absence of an ultimate legal sanction. Sarat and Kearns in Sarat and Kearns (eds) (1995) 45-47 argue that most disputes are settled amicably, without recourse to courts, precisely because of the comforting thought that if things "got ugly" the formal legal system would be available, with clear limits to what each of the parties could gain or lose. The authors seem to imply, in other words, that if the *possibility* to approach a state court does not exist, society may well fall to pieces. Also see De Vos (2001) 12 *Stell LR* 343: "[Many conservative and progressive South African lawyers and judges] ... would probably also agree that the law is an important tool in preventing anarchy in a society. In times of radical change and upheaval – like the past ten years in South Africa – the law might well be the most important force for stability and predictability in a society".

<sup>25</sup> Minde (1992) 1.

<sup>26</sup> Aubert (1983) 23. At 28 Aubert maintains that a number of sources must be considered that does not form part of the positive law, such as bills that never become Acts, proposals by judges in chambers directed at achieving a settlement, police methods that have no basis in law, advice offered by attorneys to their clients, but he deems it neither necessary nor useful to present a sociological definition of law. Aubert then also follows a "legal pluralism" approach, but does not express the same degree of skepticism as Ehrlich relating to the power of state law to keep a given society intact.

<sup>27</sup> Aubert (1983) 23. In a context of investigating state dysfunctionality in Africa, Herbst and Mills in Clapham *et al* (eds) (2006) 2 argue that some big African states have "big hinterlands, which are hard to police and govern". Populations in these hinterlands would presumably also feel far removed from the central state's legal commands – see Herbst and Mills at 9 ("[S]cattered populations in a large state automatically present a physical challenge to the extension of state authority over a large percentage of the population"), 10 ("[M]any Africans in big states are not automatically oriented towards the capital"), and 11 ("In [big African states] the capital can be hundreds of kilometres from many of the people ... the administrative backbone may not be present in significant numbers in parts of large states, giving the impression to the populace that the state is uninterested in them".) In the same book Clapham at 298 reaches the same conclusion: "[T]hese states encompass different large population groups with distinct territories of their own, which often have a very slight physical or emotional connection with a national centre ..." (my emphasis).

<sup>28</sup> Aubert (1983) 23. Also see Cotterrell (1992) 26: "Ehrlich taught in a province of the Austro-Hungarian Empire which, after the First World War, became part of Romania. The central authority of the state in Vienna and Budapest must have seen highly remote from the lives of the numerous diverse ethnic groups of the area in which he lived".

<sup>29</sup> Cotterrell (1992) 40.

(physical or psychological<sup>30</sup>) to bring about conformity or avenge violation, will be applied by a staff of people holding themselves specially ready for that purpose”.<sup>31</sup> Hoebel thought that “a social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognised privilege of so acting”.<sup>32</sup> Aubert also notes that a large number of conceptions of law include coercion or force as a central element.<sup>33</sup> Neumann believes that definitions of law that do not refer to its coercive character, fail.<sup>34</sup> He believes that for a norm to have juridical validity, the state must potentially be able to coerce.<sup>35</sup> To be sociologically valid the state’s power must actually be carried out.<sup>36</sup> If a legal norm is not adhered to because the state’s enforcement apparatus is too weak or because no one takes it seriously, then that norm is not sociologically valid.<sup>37</sup>

### 2.2.3 Law as dispute processing

Especially American authors have emphasised the use of courts as dispute-settlement institutions.<sup>38</sup> Cotterrell explains that many contemporary authors assume that dispute resolution is a major function of courts and that it is typical of Anglo-American common law thinking to have a court-centered approach.<sup>39</sup> Cotterrell criticises this approach. He argues that law is much more

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<sup>30</sup> Kidder (1983) 24 points out that by including psychological coercion, Weber expands law to include the activities of a number of groups in society. The threat of physical violence is not necessary to ensure compliance because societal life is full of incentives that may be used (Kidder uses the word “manipulated”) to ensure compliance with these rules.

<sup>31</sup> As quoted by Cotterrell (1992) 40. In Weber (1968) 317 the definition of “legal order” reads a little differently: “A ‘legal order’ shall be said to exist wherever coercive means, of a physical or psychological kind, are available; i.e. wherever they are at the disposal of one or more persons who hold themselves ready to use them for this purpose in the case of certain events; in other words, wherever we find a consociation specifically dedicated to the purpose of ‘legal coercion’”.

<sup>32</sup> Hoebel (1967) 28.

<sup>33</sup> Aubert (1983) 8 quotes Marsilius of Padua: “In one way or the other, insofar as it only shows what is just or unjust, beneficial or harmful, and as such it is called the science or doctrine of right. In another way it may be considered according to whether observance to it is sanctioned by a command and is distributed in the present world; and considered in this way it most properly is called, and is, law”. Aubert (1983) 9-10 also refers to John Austin who saw law as commands backed by force; and von Ihering and Jellinek who also defined law by referring to the force of the state. Jeffrey in Brantingham and Kress (eds) (1979) 31 criticises Austin’s proposition. He considers the so-called command “thou shalt not kill” and the behaviour of people triggered by the discovery of a corpse: police, prosecutor, defence counsel, trial judge, appellate judges and states that these role players are not “obeying a command”, they are “coping with a situation”.

<sup>34</sup> Neumann (1986) 11.

<sup>35</sup> Neumann (1986) 12.

<sup>36</sup> Neumann (1986) 12.

<sup>37</sup> Neumann (1986) 12.

<sup>38</sup> Cf Kamenka and Tay in Kamenka and Tay (eds) (1980) 14 that see law playing three roles; one being setting out “principles for conflict resolution”.

<sup>39</sup> Cotterrell (1992) 41.

than the processing of disputes and that a focus on dispute resolution as such cannot answer the question as to how central or marginal dispute resolution is as an aspect of contemporary Western law.<sup>40</sup>

## 2.2.4 Law as doctrine

This approach sees “law” as a system of rules, which implies the limitation of arbitrariness and a degree of control of official discretion.<sup>41</sup>

Cotterrell distinguishes between law as “a mechanism of regulation of social life through distinct institutions and practices” and as “a body of doctrine or ideas which can be logically or dogmatically interpreted and developed”.<sup>42</sup> He highlights another aspect of its two-faced nature: Law consists of “ought propositions” or prescriptions that sets out how people are supposed to behave, but at the same time law is a social phenomenon, which can only be studied if these prescriptions have a measurable effect on the way people behave.<sup>43</sup> As I understand Cotterrell’s typology, “law as doctrine” would then consist of “ought” propositions.

## 2.2.5 The approach adopted in the thesis

In the thesis I will limit myself mainly to a consideration of law in its “technical” sense;<sup>44</sup> that is, law as a “coercive order” (I would see this as legislation) or as a “dispute-resolution mechanism” (I

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<sup>40</sup> Cotterrell (1992) 41.

<sup>41</sup> Cotterrell (1992) 41.

<sup>42</sup> Cotterrell (1992) vii.

<sup>43</sup> Cotterrell (1992) 8. Aubert (1983) 1 also sees a “profound dualism” in law: It is a coercive force and a refuge from oppression and injustice; it is a technique that is guarded by a professional corps and it is the expression of human needs and interests. He notes that a person’s conception of “law” will differ according to one’s conception of being human: are we good or bad, egoistic and competitive or sociable and cooperative, aggressive or loving and charitable? (Hobbes saw “man” as wicked, sinful and aggressive, yet rational; Rousseau thought “man” capable of living together in harmony – Aubert (1983) 6; 17. Machiavelli (2003) 54 thought men to be “ungrateful, fickle, liars, and deceivers” and at 57 “wretched creatures”. Ehrlich (1936) 23 thought that “the order of human society is based upon the fact that, in general, *legal duties are being performed*”; ie that humans generally live peacefully. Stout in Drobak (ed) (2006) 17-21 may be read to argue that humans act selfishly about half the time and act in an “other-regarding” manner about half the time. Stout refers to a number of social science experiments known as dilemma games, ultimatum games and dictator games. These experiments force subjects to choose between strategies that will maximise their own payoffs, and strategies that help or harm the other subjects. Generally speaking cooperation rates between subjects average at about 50%.)

<sup>44</sup> Black (1976) 2 conceives of law in a similar narrow sense when he defines it as “governmental social control”. (Selznick as referred to by Kidder (1983) 25 says that this definition does not distinguish between legal and illegal acts. Selznick considers justice to be at the center of a satisfactory definition of “law”.) Black has in mind legislation,

would see this as courts' decisions) and not as normative "doctrine".<sup>45</sup> (In chapter four I tangentially concern myself with law as "legal pluralism" when I consider the training of equality court personnel – I impliedly argue that (South African) "discrimination law" should be seen as also encompassing poorly trained personnel and poorly resourced enforcement mechanisms.)

The way in which I perceive the nature of my investigation forces me to adopt this rather narrow concept of law: Parliament has adopted a law to facilitate large-scale societal transformation and decided to utilise equality courts as the main vehicle to do so. I perceive this as an attempt by Parliament to treat the Act and the courts as a tool or instrument to achieve a particular purpose.<sup>46</sup> I will consider whether the Act in its present form can achieve this purpose. I am not primarily interested in asking the normative question whether the goal of societal transformation is a worthy one - I believe the goal to be a worthy one and I leave it to scholars skeptical of the state's transformation programmes to criticise the Act's stated goals. Had I believed the Act's goal to be misguided, it would have become overridingly important to adopt a normative stance as opposed to a technical stance towards the Act. To perhaps provide an unnecessary example: Had I adopted this narrow, instrumental approach towards Apartheid legislation, it would have been immoral.<sup>47</sup>

### 2.3 "Society"

Various authors describe different kinds and different aspects of "society". Depending on one's understanding of what "society" entails, the relationship with "law" will differ and the potential to change that society using (or abusing) law will differ as well. Broadly speaking, and at danger to oversimplify the viewpoints, two main approaches may be identified: firstly, a structural or

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litigation and adjudication. He explicitly excludes social control in everyday life but accepts that law is only one kind of social control. At 126 he argues that all societies, no matter how modern, have residues of "tribal life": Equality, intimacy, sameness and permanence, and in these settings "law" plays no role.

<sup>45</sup> Also see chapter 1.8.3.

<sup>46</sup> Kamenka and Tay in Kamenka and Tay (eds) (1980) 3 argue that a trend exists to "de-intellectualise" law; to compare "law in the books" with life. They state that law stands within society and does not make its own history. They believe that if law is seen as a neutral, flexible and characterless instrument simply needed to serve certain goals and needs, the trend has gone too far.

<sup>47</sup> Perhaps I stretch the analogy Kennedy uses in Sarat and Kearns (eds) (1995) 192 too far if I suggest that to an instrumentalist a critical scholar's approach seems like that of an activist whose "faith seems foolish"; and to a critical scholar the instrumentalist approach seems like that of a bureaucrat whose "complacency is immoral". I argue that I can afford to be "complacent" because I wrote the thesis when South Africa had become a constitutional democracy and because particular values, such as the achievement of substantive equality, had become constitutionally entrenched as part of our legal order.



consensus approach, and secondly, a conflict or critical or dissensus approach. I briefly sketch the two approaches below, whereafter I set out the approach adopted in the thesis.

### 2.3.1 A structural or consensus approach

A structural concept of society sees society as a machine with a large number of interdependent and interrelated parts. If one part does not achieve its goal, that part must be repaired or another part must step into the breach.<sup>48</sup>

Durkheim, the “great French sociologist [and one of] the major figures of sociology”,<sup>49</sup> states that a society is viable only when mechanisms are put in place to ensure that people cooperate.<sup>50</sup> In ancient societies, people share living space and perform identical tasks – they hunt, fish, gather roots and berries.<sup>51</sup> By living and working together, by absorbing the ways of ordinary life, each member of this society gets to know the rules and customs, or “law”, of that society.<sup>52</sup> Should a norm be breached, all the other members of the society would step in and avenge the breach.<sup>53</sup> Law was simple because the structure of society was simple.<sup>54</sup> Revenge is the primary purpose of primitive law and law is the “sacred” order of the group.<sup>55</sup> However population growth creates a crisis of solidarity; resources become scarce and people need to specialise to reduce strenuous competition and to produce goods and services more efficiently.<sup>56</sup>

Specialisation changes the structure of the society in which it operates.<sup>57</sup> Members of this society do not share the same experiences anymore.<sup>58</sup> A basket maker and a barber in the same society have vastly different daily life experiences which leads to different beliefs, values, interests and therefore norms.<sup>59</sup> Because norms differ, consensus disappears and norms are justified as being

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<sup>48</sup> Kidder (1983) 59.

<sup>49</sup> Freeman (2001) 666.

<sup>50</sup> Durkheim (1984) 219, 221; Kidder (1983) 59-61.

<sup>51</sup> Kidder (1983) 59.

<sup>52</sup> Kidder (1983) 60.

<sup>53</sup> Kidder (1983) 60.

<sup>54</sup> Kidder (1983) 60.

<sup>55</sup> Durkheim (1984) 36; Kidder (1983) 60.

<sup>56</sup> Durkheim (1984) 228; Kidder (1983) 60.

<sup>57</sup> Kidder (1983) 60.

<sup>58</sup> Kidder (1983) 60.

<sup>59</sup> Kidder (1983) 60-61.

“practical” rather than sacred or righteous.<sup>60</sup> Law’s function changes: A need for coordination and management now exists.<sup>61</sup> As society’s complexity increases, similarly complex legal institutions come into play to maintain efficient maintenance of organic hamony.<sup>62</sup>

Structuralists also use the concepts of simplex and multiplex relationships. A simplex relationship exists when people have contact with one another for a very specific, limited purpose: ordering a meal across a fast food counter; buying a movie ticket.<sup>63</sup> A multiplex relationship exists when people’s lives connect in various spheres of their daily activities: A is B’s friend. A is also B’s financial advisor; partner in a business venture and the family doctor.<sup>64</sup> Structuralists hold that a decline in the frequency of multiplex relationships increases the necessity of using law for social control.<sup>65</sup> People involved in multiplex relationships are more likely to remind each other of the mutual benefits of their different relationships.<sup>66</sup> People involved in simplex relationships have nowhere to turn but the law should a dispute arise.<sup>67</sup> Where a society is dominated by simplex relationships, law would be expected to play a large role.<sup>68</sup> However, people do not necessarily turn to the law if they feel wronged. It may simply be too expensive or too costly in emotional terms to pursue a court action to finality; and therefore they literally walk away from the potential claim and the wrongdoer.<sup>69</sup> People involved in multiplex relationships cannot however afford to literally walk away and disputes are likely to be settled.<sup>70</sup> For example, Fukuyama explains that a distinct group of Jews emigrated from Baghdad to North Africa which came to be known as “Maghribi traders” by the 11<sup>th</sup> century.<sup>71</sup> These traders socialised each other into a particular cultural way of solving disputes in an area of the world where at that time no overall political authority existed to

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<sup>60</sup> Kidder (1983) 61.

<sup>61</sup> Kidder (1983) 61.

<sup>62</sup> Durkheim (1984) 83. Structuralists add a qualification: “If people can organize their collective activities in alternate ways, they may be able to avoid the disorganizing effects of population growth without resorting to law”. Kidder (1983) 65.

<sup>63</sup> Kidder (1983) 70.

<sup>64</sup> Kidder (1983) 71.

<sup>65</sup> Kidder (1983) 71.

<sup>66</sup> Kidder (1983) 71.

<sup>67</sup> Kidder (1983) 72.

<sup>68</sup> Kidder (1983) 72.

<sup>69</sup> Kidder (1983) 72; Macaulay (2005) *Wis L Rev* 383.

<sup>70</sup> Cf Macaulay (1963) 28 *Am Soc Rev* 65 who shows that an ongoing business relationship between a supplier and merchandiser is likely to terminate if one of the parties sues the other.

<sup>71</sup> Fukuyama (2005) 45.

provide enforcement of what we would now call “contract law”.<sup>72</sup> These traders relied on multilateral coalitions to enforce agreements and did not rely on any state courts to solve disputes.<sup>73</sup> Where simplex relationships dominate, people have a choice: resort to litigation, or walk away. Conciliation is not a “natural” option.<sup>74</sup>

To Ehrlich, *gesellschaftlichen Verbänden* (associations) is central to the reason why state-driven coercion is (almost) unnecessary.<sup>75</sup> He has in mind groupings such as trade unions, business corporations, partnerships, clubs, occupational groups, ethnic groups, political parties, religious affiliations and the family.<sup>76</sup> Humans do not want to be excluded from these groupings and therefore they conform as the sanction of non-compliance is exclusion.<sup>77</sup>

In 1887 Tönnies first coined the terms *Gemeinschaft* (usually translated as “community”) and *Gesellschaft* (usually translated as “society”) to distinguish between different models of human interaction.<sup>78</sup> The *Gemeinschaft* is a society that formed in a spontaneous and organic manner;<sup>79</sup> the *Gesellschaft* is external, public, mechanical and formal.<sup>80</sup> The *Gemeinschaft* lies in bonds such as a household, friendship, a neighbourhood.<sup>81</sup> The *Gesellschaft* lies in bonds such as commerce and contract, commercial exchange, the city, the factory, commodity production for exchange.<sup>82</sup> The *Gemeinschaft* is based on relationships; the *Gesellschaft* on rights.<sup>83</sup> These concepts are mental constructs; no actual society fits completely within either of these views of human associations.<sup>84</sup>

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<sup>72</sup> Fukuyama (2005) 45-46.

<sup>73</sup> Fukuyama (2005) 45.

<sup>74</sup> Kidder (1983) 72.

<sup>75</sup> Ehrlich (1936) 32, 34, 37; Cotterrell (1992) 30-31.

<sup>76</sup> Ehrlich (1936) 26-27.

<sup>77</sup> Cotterrell (1992) 30.

<sup>78</sup> Tönnies (2002); Kamenka and Tay in Kamenka and Tay (eds) (1980) 8-11.

<sup>79</sup> Tönnies (2002) 37-64.

<sup>80</sup> Tönnies (2002) 64-102.

<sup>81</sup> Kamenka and Tay in Kamenka and Tay (eds) (1980) 8.

<sup>82</sup> Kamenka and Tay in Kamenka and Tay (eds) (1980) 8.

<sup>83</sup> Kamenka and Tay in Kamenka and Tay (eds) (1980) 10.

<sup>84</sup> Kamenka and Tay in Kamenka and Tay (eds) (1980) 11. In addition to Tönnies’s formulations, Kamenka and Tay 18-19 adds a third conception of society, that of the bureaucratic-administrative society. In this “society”, humans are subject to regulations that determine their consequent rights and duties. This third dimension must be added, they say, because of the power of the state and its agencies in the twentieth century (and presumably beyond.)

### 2.3.2 A conflict, or critical, or dissensus approach

A critical or conflict or dissensus model of society presents a different picture.<sup>85</sup> This concept of society sees law as being actively used by powerful elites to dominate and maintain their dominance of weaker members.<sup>86</sup> This approach focuses on conflict and power as the most important features involved in the creation of law and focuses on inequalities developed or maintained by the law.<sup>87</sup> By way of explanation of this perspective, Kidder summarises a number of studies that follow the conflict paradigm. He sets out in some detail the historical application of the so-called “Black Acts” and vagrancy laws in England.<sup>88</sup>

#### 2.3.2.1 Black Acts<sup>89</sup>

In the late 17<sup>th</sup> century a number of laws were passed in England that aimed at ensuring that only the owners of private land could hunt game on the land. Up to then, whoever could lay their hands on deer, squirrels, rabbits and wild fowl could keep it but after the passage of laws became “protected” animals – only the nobles were now allowed to hunt. Resistance to the laws developed. Groups known as “Blacks” formed, so called because they blackened their faces as part of their camouflage. The Blacks used various techniques of tracking and killing animals and were remarkably successful despite the best efforts of the noblemen. The Black Acts were passed, aimed at eradicating their activities. Poaching was made punishable by death; also being found with a blackened face. Courts set up to enforce the Black Acts had limited success. Blacks regarded hunting as a God-given right which they felt entitled to continue. The poaching struggle continued for decades. During this time the societal structure in Britain changed and a new middle class came to the fore. The middle class was landless and was also prohibited from hunting but by this time hunting had become associated with prestige and power and the new middle class wanted to share in the spoils. The nature of the hunting struggle changed. During the 19<sup>th</sup> century this new middle class succeeded in reforming the game laws. Everyone could now hunt game, but at the same time other laws introduced new restrictions – hunting licenses; permission from the landowner – that effectively excluded the rural poor from hunting. New farming methods had by

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<sup>85</sup> See in general Kidder (1983) 83-111.

<sup>86</sup> Kidder (1983) 83.

<sup>87</sup> Kidder (1983) 83.

<sup>88</sup> Kidder (1983) 84-87.

<sup>89</sup> This paragraph in the thesis is a summary of Kidder (1983) 84-86.

now eliminated regular jobs for the rural poor, leaving only seasonal work, and the new laws cut off a very important food source. Poaching followed a seasonal pattern – hunting was an ancient custom, and the rural poor had to supplement their meagre diet. The poaching laws and courts were ineffective, even when penalties were severely increased. This situation continued throughout the 19<sup>th</sup> century.

### 2.3.2.2 Vagrancy laws<sup>90</sup>

From a critical or conflict perspective the Black Acts is one example where law does *not* follow existing customs; for the rural poor it became customary to *breach* the law. Kidder refers to a study by Chambliss that illustrates that new laws need not necessarily be drafted to serve the elite's needs. Sometimes "the law" need not change at all, but be used for different purposes. Vagrancy laws can be traced to the aftermath of the Black Death when half of England's population died and a severe labour shortage developed. Vagrancy laws were put in place to secure labour for the aristocracy. The purpose behind the laws was to force labourers to accept low wage employment. The laws prohibited labourers from seeking higher paying jobs and prohibited people from giving alms to able-bodied beggars, presumably to force them to seek work. These laws did not have their intended effect. New social forces developed. The growing industrial sector needed free labour and their interests overrode the interests of the land-owning nobles. Vagrancy laws still punished people who did not have an "honest job" but the focus shifted from "job" to "honest" and full-time criminals were now targeted. Trade routes for safe commerce had to be protected and thieves, highwaymen and vagabonds threatened these routes. The rising merchant class used these laws to secure their newfound power. Likewise, these rules did not develop out of custom but was put in place to preserve the elite's power, whoever that elite may have been.<sup>91</sup>

### 2.3.3 The approach adopted in the thesis

In my view the conflict perspective sometimes seems akin to a conspiracy theory. From this critical perspective the "haves" consciously plot to keep the "haves-not" in their place by utilising the law. However, the question may be asked: From a conflict or dissensus theoretical viewpoint, how would one then explain the enactment of the Act? As expanded on in the next chapter, the Act

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<sup>90</sup> This paragraph in the thesis is a summary of Kidder (1983) 86-87.

<sup>91</sup> Structuralists would argue that these laws protected commerce and therefore protected society by preserving the balance. Kidder (1983) 87.

outlaws unfair discrimination on a wide-ranging number of grounds, including (probably) socio-economic status. All decisions made by the elite that impact negatively on the masses in terms of the prohibited grounds would in principle amount to socio-economic “discrimination” in terms of the Act and it would be up to the elite to justify their decisions to a court. A complainant may approach an equality court without the assistance of an (expensive) lawyer. Any NGO or other public-minded institution may approach an equality court on behalf of a (presumably) poorly-informed and poorly-resourced complainant. Certainly the Act could have been drafted in clearer language, certainly the Act could have come into force much sooner than it did, certainly the training of presiding officers could have commenced sooner and could have been planned and executed much better, but should these delays be attributed to conscious debilitating actions by elite forces opposed to the Act? I believe the delays to have rather been caused by administrative bungling and a poorly-capacitated state, as set out in more detail below in chapter 4, where I discuss the planning and execution of the initial training programmes.

If my argument relating to socio-economic status is not persuasive,<sup>92</sup> consider some of the other grounds protected in the Act. The new Parliamentary elite could not have regarded itself as insulated from discrimination claims based on for example sex, gender, disability and sexual orientation; yet went ahead to put into place a far-reaching piece of legislation, targeting these instances of discrimination.<sup>93</sup> Therefore, not being convinced of the merits of the conflict paradigm *in the context of this Act*, I will, where appropriate, adopt a structural approach to the composition of “society” and its relationship to “law”.

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<sup>92</sup> It could be argued, for instance, that the adoption of the Act also coincided with a “changing of the guard” as it were; one set of (Parliamentary or political) elites moving out and making place for a new elite. This new political elite would not necessarily view themselves as the target of the Act’s prohibition of socio-economic discrimination, as the economic elite had not changed membership. If anything, the economic elite did what it could to soften the Act’s blows by vigorously lobbying Parliament during the drafting process.

<sup>93</sup> Also cf Freeman (2001) 677: “A difficulty with the conflict model is how to explain laws which appear to limit the activities of powerful groups ... Morals legislation also causes problems for it is normally instigated by economically weak, middle-class crusaders”.

## 2.4 *The relationship between “law” and “society” – The (in)ability of law to affect behaviour and attitudes and to steer society*

I discuss below the relationship, or absence of a relationship, between a “society” and the (official state) “law” applicable to that society, with a view to ascertaining to what extent law may be used to steer or change a society in a particular way. I do not have in mind what Dror calls the “indirect” use of law in social change,<sup>94</sup> but will rather focus on the *direct* use of law in transforming society.

Dror quite rightly points out that large-scale bureaucratic societies almost always indirectly rely on laws to bring about changes.<sup>95</sup> For example, a public body may be set up with one of its functions being the bringing about of certain social changes. A law would be passed, setting up that body and establishing its powers. Similarly, education may be used to steer a society in a particular direction, but a law would first have to be passed that sets up educational institutions and creates a duty to attend these institutions.<sup>96</sup> In the context of the thesis, if one would want to utilise the law in combating poverty, creating a legal obligation to attend primary and secondary schools would also amount to the indirect use of “the law” to achieve the desired result, because it is the benefits accruing to a better education that leads to a better chance of being employed.<sup>97</sup> The legal command to attend a school merely facilitates the implementation of state policy in increasing school attendance. To put it differently, the “effective cause” of societal change in this case would have been “education for more people”, not the Act of Parliament obligating school attendance.

(Sustained) court action would usually amount to the *direct* use of the law to bring about a concrete result. Handler lists these (positive) *indirect* effects of litigation: It provides publicity, legitimises values and goals, and may be used as part of broader campaign.<sup>98</sup> He argues that litigation may be used as leverage and that litigation may be used to bring a halt to a particular action and so

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<sup>94</sup> Dror (1958) 33 *Tul L Rev* 798.

<sup>95</sup> Dror (1958) 33 *Tul L Rev* 798.

<sup>96</sup> Dror (1958) 33 *Tul L Rev* 798. To Dror’s examples may be added the following “Grand Schemes” as described by Scott (1998) that could or would have been established “via” law: compulsory *ujamaa* villages in Tanzania, collectivization in Russia, Le Corbusier’s urban planning theory realised in Brasilia, the Great Leap Forward in China and agricultural “modernisation” in the tropics.

<sup>97</sup> Borhat and Kanbur in Borhat and Kanbur (eds) (2006) 8.

<sup>98</sup> Handler (1978) 209-210.

increase the party's bargaining power.<sup>99</sup> Seen from this perspective, the eventual court order is not the end but part of the strategy. Handler states that litigation may generate harmful publicity that may force the discriminator into settlement, which would be some consolation to a claimant that is not able to proceed with the court case to finality because of the duration or costs involved.<sup>100</sup> He seems to argue that litigation may be used as "consciousness raising" and that litigation can contribute to a change in public opinion.<sup>101</sup> I would argue that some of these benefits are easier to assert than to empirically prove,<sup>102</sup> that many of these benefits would only accrue in very specific cases, and that in some instances it would be impossible to clearly link the benefits to the litigation.<sup>103</sup> I therefore do not intend to theorise about the potential or imagined benefits of the indirect use of the law, but will primarily be interested in how the actual outcome of the *direct* use of law may bring about societal change.

When speaking of the direct use of law, Dror has in mind "a revolutionary or intellectual *minority*" that "obtains legislative power and uses it in its efforts to bring about extensive changes in social structure and culture",<sup>104</sup> but the same question could be asked of a previously disenfranchised, marginalised and powerless *majority* that suddenly obtains legislative power: To what degree could "the law" be used effectively in steering society in the desired direction?

Broadly speaking, one group of scholars believes that law has a meaningful role to play in changing (aspects of) society, while others are more skeptical, or critical, or pessimistic. I discuss and analyse the viewpoints of "pessimists" immediately below and I discuss and analyse the "optimists" under the next heading.<sup>105</sup>

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<sup>99</sup> Handler (1978) 212.

<sup>100</sup> Handler (1978) 214.

<sup>101</sup> Handler (1978) 218-219.

<sup>102</sup> How would one measure whether "consciousness raising" occurred? Sen in Drobak (ed) (2006) 254 seems to argue in a similar vein. He suggests that many human rights can serve as important constituents of social norms, and have their influence and effectiveness through "personal reflection" and "public discussion", without their being necessarily diagnosed as pregnant with potential legislation. My argument would again be that this "influence and effectiveness" seem to be theorised or imagined and not susceptible to empirical proof.

<sup>103</sup> Eg, a change in public opinion.

<sup>104</sup> Dror (1958) 33 *Tul L Rev* 799. Dror has in mind "Japan and Turkey, where whole parts of Western law were received with the intention thus to further the Westernization of these countries, and this was also the case in Soviet Russia. To some extent the efforts of the various colonial powers, especially France, to introduce their law into various territories under their rule was also motivated by the desire to shape the social realities of those places", and the enactment of Prohibition in the United States.

<sup>105</sup> That is, chapter 2.5 ("Characteristics of effective law".)



I identified nine overlapping themes in current literature where authors question the (potential) ability of law to change or steer society:<sup>106</sup>

1. It is a complex task to use the law as an agent of change.<sup>107</sup> Compare Morison's view:<sup>108</sup>

We do not have very much by way of a theory *and the sheer number and complexity of the many forces to be understood and deployed* ensures that the theory of the art of statecraft is likely to remain beyond the reach of any modern Machiavelli hoping to educate his Prince.

Chemerinsky argues that change (if it occurs) will probably take place over the long term and the more far-reaching the intended change the longer it will take and the more variables will probably play into the process.<sup>109</sup> Tamanaha notes that the relationship between law and society is too complex to address in a single formula and that one has to drastically simplify the relationship to begin an analysis.<sup>110</sup> An obvious question is why one should bother to study such a "drastic simplification" – Such a simplified model would not be accurate because it is not true to reality. Kamenka and Tay note that only revolutions have simple programmes and that only simple programmes have a high probability of being successful – the more complex the operation the more things can go wrong.<sup>111</sup> They put it bluntly – quick, pervasive or fundamental changes will not be achieved via the law.<sup>112</sup>

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<sup>106</sup> Some authors describe law as a "blunt" or "limited" tool but do not provide particular reasons. Cf Gardner in Hepple and Szyszczak (eds) (1992) 168-169; Loenen (1997) 13 *SAJHR* 427 (she doubts whether any other legal concept could reach the more fundamental levels of gender and race relations and views law, by its nature, as a limited instrument in changing social reality); Burns in Reasons and Rich (1978) 361 (he believes that law is a valuable tool but should not be seen as the only tool; law is only "a component in a much larger change process").

<sup>107</sup> Morison in Livingstone and Morison (eds) (1990) 11: "Law is better seen as a Heath Robinson contraption, a ramshackle device where creaking pulleys operate to overbalance buckets of water that trigger off other forces which in turn activate other processes with the final result that (possibly) an egg is boiled or a banana skinned. Change through law is difficult to plan, complex to execute and often uncertain in its consequences"; Livingstone in Livingstone and Morison (eds) (1990) 64: "Using law to alter a society is a complex and difficult task"; Gardner in Hepple and Szyszczak (eds) (1992) 168-169 thinks that law is a blunt tool "which destroys more readily than it creates" and that no quick fixes exist. Also cf Koopmans (2003) 252 and Marcus in Sarat and Kearns (eds) (1995) 255 ("[R]eality is complex, almost unbearably complex ...").

<sup>108</sup> Morison in Morison and Livingstone (1990) 13; my emphasis.

<sup>109</sup> Chemerinsky in Devins and Douglas (eds) (1998) 192-193.

<sup>110</sup> Tamanaha (2001) 1.

<sup>111</sup> Kamenka and Tay in Kamenka and Tay (eds) (1980) 115.

<sup>112</sup> Kamenka and Tay in Kamenka and Tay (eds) (1980) 115.

2. Linked to the first theme, changes in law in one field may have unforeseen (and perhaps unwanted) consequences in other fields.<sup>113</sup> Authors offer the following examples: Scott tells how a door-and-window tax was established in France under the Directory.<sup>114</sup> The idea behind the policy was that the number of doors and windows in a dwelling would be proportional to its size; the more doors and windows the higher the tax then. A tax collector would then not have to measure the house but merely count the doors and windows. However, peasants then developed their dwellings so as to have as few openings as possible and the health of the rural population in France suffered from more than a century.<sup>115</sup> Kidder explains how income ceilings, intended by the legislature to act as an incentive to *leave* public housing and move into private housing, actually provided a strong incentive to *remain* in public housing and to turn down better-paying employment – “if a moderate increase in family income forced a family out of public housing, their net gain might turn into a net loss because of the pricing effects of a private-housing shortage”.<sup>116</sup>
  
3. More specifically, changes in the law may have unintended consequences because any given society consists of various individuals faced with various choices and the impact of law on these individuals will be varied and almost impossible to control or predict.<sup>117</sup>

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<sup>113</sup> Cf Livingstone in Livingstone and Morison (eds) (1990) 64: “[C]hanges in one area, such as constitutional reform, may be undermined by problems in the application of law elsewhere, such as the security field ... However careful planning of a legal strategy and the likely resistances it will meet will not avoid every problem and legal changes will often have unexpected effects”. Schäffer (2001) 22 *Statute LR* 141 admits defeat in the following terms: “Certainly, any enactment is a ‘shot in the dark’, because we know very little about the way law operates and the *interconnection* of the effects of legislation” (my emphasis).

<sup>114</sup> Scott (1998) 47.

<sup>115</sup> Scott (1998) 48.

<sup>116</sup> Kidder (1983) 137-138.

<sup>117</sup> Engel in Sarat and Kearns (eds) (1995) 136; Friedman (1975) 86; 119. Aubert (1983) 172 simply states: “Individual choices aggregate in unforeseen patterns”. Jeffrey in Brantingham and Kress (eds) (1979) 33 refers to William James’s description of life as a “big buzzing blooming confusion”. Luhmann (1985) 249 is to the point: If the theory behind changing society is based simply on the concepts of “expectation and fulfilment” and “command and obedience”, it will fail to explain practice. The interdependencies in society are probably too high; everything depends on everything; and it is therefore not possible “to cause specific effects by specific interventions”. Cf Rousseau (1968) 89: “Peoples differ; one is amenable to discipline from the beginning; another is not, even after ten centuries” and Machiavelli (2003) 80: “It can be observed that men use various methods in pursuing their own personal objectives ... One man proceeds with circumspection, another impetuously; one uses violence, another strategem; one man goes about things patiently, another does the opposite; and yet everyone, for all this diversity of method, can reach his objective. It can also be observed that with two circumspect men, one will achieve his end, the other not; and likewise two men succeed equally well with different methods, one of them being circumspect and the other impetuous. This results from nothing else except the extent to which their methods are or are not suited to the nature of the times”. Fukuyama (1992) 47 argues that “the more one knows about a particular country, the more one is aware of the ‘maelstrom of external contingency’ that differentiated that country from its neighbors, and the seemingly fortuitous circumstances that led to a democratic

Kidder argues that complex decision-making networks of law enforcers exist and that laws are filtered through these networks.<sup>118</sup> He points out that people are not isolated individuals that make isolated decisions but that they function within a complicated network of family life and employment and that it is not easy to predict law's effects on these individual decisions.<sup>119</sup> He presents an example illustrating the varying effect of a change in the law: In 1948 the United States Supreme Court ruled that religious teaching could not take place in public schools.<sup>120</sup> How did public schools react to this ruling? In all kinds of ways: Some immediately stopped religious teaching; others camouflaged the fact that they were carrying on as they have always did; others carried on without making any adjustments.<sup>121</sup>

Kamenka and Tay state that the relationship between law and "society" is further complicated by the fact that within "society" various "societies" co-exist.<sup>122</sup> These different societies are held together or strain to get apart from one another; sometimes they would agree with each other and sometimes they would display bitter or violent conflict or both.<sup>123</sup> Even within one individual within a given society, different motives and feelings compete or agree, only to agree or compete on another issue the very next moment. These complex inter-relationships between individuals and different societies cannot be reduced to a "fixed and finite pattern".<sup>124</sup> Luhmann uses somewhat obtuse language to reach the same conclusion.<sup>125</sup> He argues that the "enforcement of the legislative will" is filtered through various variables: the socio-economic system, "deviant" legal subcultures (each with its own normative attitudes), and personality structures.<sup>126</sup> These different variables lead to one legal text obtaining very different meanings; or various legal texts pointing to the same

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outcome" (he then refers to Portugal, Spain, Russia and Eastern Europe.) Similarly, Hughes in Clapham *et al* (eds) (2006) 162 argues that "unique and conjunctural forces, including the global failure of state socialism and the stroke suffered by PW Botha in January 1989" created the space for "pragmatic and prescient leaders on both sides" to start negotiations, thus leading to a democratic South Africa.

<sup>118</sup> Kidder (1983) 127.

<sup>119</sup> Kidder (1983) 137.

<sup>120</sup> Kidder (1983) 117.

<sup>121</sup> Kidder (1983) 117.

<sup>122</sup> Kamenka and Tay in Kamenka and Tay (eds) (1980) 106.

<sup>123</sup> Kamenka and Tay in Kamenka and Tay (eds) (1980) 106.

<sup>124</sup> Kamenka and Tay in Kamenka and Tay (eds) (1980) 106.

<sup>125</sup> Luhmann (1985) 235-239.

<sup>126</sup> Luhmann (1985) 236.

situation.<sup>127</sup> All of these systems operate separately yet interdependently and all together forms “social reality”.<sup>128</sup> Every change in the law causes immeasurable effects; some positive, some negative, some short-term, some long-term – but each of these consequences are uncertain in the different systems and in relation to different functions.<sup>129</sup> Unifunctionality is an illusion only used as an analytical tool.<sup>130</sup> Luhmann presents the relationship between law and social structure as “cause and effect simultaneously”; sometimes societal changes take place while the law remains unchanged (although what happens with the legal rules may change), and sometimes new laws appear that do not change society.<sup>131</sup> The more complex a society becomes, the scope of this “relative invariance” will probably increase.<sup>132</sup>

Tamanaha refers to the work of what he calls “new legal pluralism” that have shown that state law is only one order that operates in society alongside custom-based norms, rule-making and rule-enforcing institutions such as companies and universities, and smaller social groups such as clubs and perhaps even the family.<sup>133</sup> From this perspective, and I am echoing Ehrlich here,<sup>134</sup> state law plays a very small role in the maintenance of social order, and therefore also will have a marginal effect in changing or steering society.

4. Problem-solvers considering the use of law to solve a particular problem may not adequately grasp the problem. Most authors who take this line argue that some (or most) social ills cannot be adequately addressed via the law and at least implicitly argue that overambitious legislatures have contributed to the phenomenon of unenforced law.<sup>135</sup>

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<sup>127</sup> Luhmann (1985) 236.

<sup>128</sup> Luhmann (1985) 236.

<sup>129</sup> Luhmann (1985) 238.

<sup>130</sup> Luhmann (1985) 239.

<sup>131</sup> Luhmann (1985) 227.

<sup>132</sup> Luhmann (1985) 227.

<sup>133</sup> Tamanaha (2001) 117.

<sup>134</sup> See pp 36-38 of the thesis where I discuss Ehrlich’s views on this point.

<sup>135</sup> Livingstone in Livingstone and Morison (eds) (1990) 64: “[P]roblems have arisen through a failure on the part of those designing and applying the law to properly analyse the nature of the problem they are dealing with or to carry through the implications of their actions. However careful planning of a legal strategy and the likely resistances it will meet will not avoid every problem and legal changes will often have unexpected effects”. Ehrlich (1936) 375 simply states “we shall have to get used to the thought that certain things simply cannot be done by means of a statute”. Allott (1980) 287 lists an overambitious legislature, inadequate preliminary surveys, and inadequate enforcement mechanisms as the reasons for the inability of law to effect social change. Gardner in Hepple and Szyszczak (eds)

5. Law must be grounded in existing customs. Put differently, changes in law must or should follow changes in society, or it will not be effective. This argument also implies that laws that stray too far from existing customs will not be followed, in other words, will not be effective.<sup>136</sup>

Morison points out that earlier writing on the relationship between law and society saw law as mirroring the population's views and that legislation would only succeed if it more or less conformed to what society wanted.<sup>137</sup> On this view, law has almost no role to play in effecting social change; society changes and then law adapts to those changes. Morison quotes Sumner's "stateways cannot change folkways"<sup>138</sup> as a prime example of this approach to law and societal change.<sup>139</sup> Morison states that towards the 1960s and 1970s this view changed somewhat in that writers now attempted to identify the circumstances under which laws could be used to steer society, and when not, and that writers in the field of sociology and law moved away from "grand theories".<sup>140</sup>

Probably the best known example of a disastrous attempt at changing people's attitudes is American Prohibition.<sup>141</sup> Despite a relatively high number of convictions and draconian penalties, alcohol consumption did not decrease significantly.<sup>142</sup> Cotterrell lists a number of factors why this experiment failed: half-hearted enforcement by police, enforcement agencies lacked coordination and proper resources to prevail over organised crime, neither

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(1992) 168-169 thinks that law is a blunt tool "which destroys more readily than it creates". He states that no quick fixes exist; social forms develop delicately over time; law may be able to nudge direction-insensitive relationships and that may in turn cause a gradual adjustment, but that rapid transformations will not take place. Fuller (1981) 233 believes that it is primarily in the field of criminal law and specifically so-called victimless crimes (for example, laws that prohibit the use of cannabis, gambling or homosexual practices) where law has failed most spectacularly.

<sup>136</sup> An often-quoted source in this regard is Sumner (1959) 55. He is of the view that legislation must be grounded in existing customs and to be viable must be consistent with these folkways. Folkways only change as life's conditions change. Aubert (1983) 23 sees Sumner as a defender of the *status quo*, in contrast to Marxist scholars who would have been sceptical about using legislation to change society and would instead choose revolution to do so. Also see point 2 below ("the values (implicitly) underpinning a given new law should not run too far ahead of society's contemporaneous *mores*") at pp 77-81 of the thesis.

<sup>137</sup> Morison in Livingstone and Morison (eds) (1990) 5.

<sup>138</sup> Sumner (1959).

<sup>139</sup> Morison in Livingstone and Morison (eds) (1990) 6.

<sup>140</sup> Morison in Livingstone and Morison (eds) (1990) 6-7.

<sup>141</sup> Cotterrell (1992) 55.

<sup>142</sup> Cotterrell (1992) 55.

the federal government nor the states set up proper enforcement machinery.<sup>143</sup> The most important factor, however, was the “social forces” set up against the attempt to outlaw alcohol.<sup>144</sup> Perhaps providing evidence of a contrary conclusion, anecdotal evidence tends to suggest that South Africa’s smoking legislation is quite effective, even without being enforced. One reason may be that the vast majority of South Africans have come to accept that smoking is harmful, and do not smoke,<sup>145</sup> whether a law prohibits smoking in public or not.

Heyns sees the law as at best an instrument that expresses and summarises a society’s deeper held values.<sup>146</sup> Civil society and a culture of volunteerism hold a society together and steers it. Education about human rights values is more important than courts enforcing these values.<sup>147</sup> Internalised values steer society; values that are coerced at best creates a temporary distortion.<sup>148</sup>

Tyler notes that laws are set up to restrain self-interested individuals from actions that are destructive to society and to coordinate individual behaviour (traffic laws are a good example.<sup>149</sup>) Laws can only be effective if they are obeyed and authorities must therefore be able to secure compliance. Tyler believes that a democracy depends on voluntary compliance of laws because the legal system has a limited ability to coerce or compel people into obeying laws. He refers to studies relating to drug use and drunken driving in the United States.<sup>150</sup> Increased penalties for drug use and large numbers of drug-related

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<sup>143</sup> Cotterrell (1992) 55-56. Richards in Swain (ed) (2006) 109 quotes Einstein as having said of the American experience relating to prohibition: “nothing is more destructive of respect for the government and the law of the land than passing laws which cannot be enforced”.

<sup>144</sup> Cotterrell (1992) 56. Koopmans (2003) 256 argues that Prohibition failed because the population was unwilling or indifferent to the enforcement of the prohibition of “intoxicating liquors”.

<sup>145</sup> Griffiths in Loenen and Rodrigues (eds) (1999) 322 notes that anti-smoking legislation is characterised by an almost complete absence of formal law enforcement, yet the legislation is obeyed. Griffiths states that the “social civility” norms have already changed to incorporate a strong anti-smoking sentiment and that highly effective non-official enforcement is taking place. Desmond and Boyce in Pillay *et al* (eds) (2006) 203 report that a 2003 HSRC survey on social attitudes indicated that 76% of South Africans never smokes.

<sup>146</sup> Heyns (1998) 26 *Aambeeld* 17.

<sup>147</sup> Heyns (1998) 26 *Aambeeld* 17.

<sup>148</sup> Heyns (1998) 26 *Aambeeld* 17.

<sup>149</sup> This paragraph is a summary of Tyler (2000) 25 *Law & Soc Inq* 983-985; 988 and 1000.

<sup>150</sup> He cites MacCoun RJ “Drugs and the Law: A Psychological Analysis of Drug Prohibition” (1993) 113 *Psychological Bulletin* 497; Nagin DS and Paternoster R “The Preventive Effects of the Perceived Risk of Arrest: Testing an

prisoners have not lessened drug use while the level of police enforcement needed to increase the risk of being caught to such a level to ensure compliance is prohibitively high. Tyler highlights morality and legitimacy as two factors that will likely lead to voluntary obedience. He refers to studies that have shown that people voluntarily defer to authorities who make decisions that they regard as fair. If judges are perceived as neutral, honest, concerned about citizens and respectful of citizens and their rights, most people will feel satisfied with court decisions and will be likely to obey them.

6. Law is autonomous and self-referential.<sup>151</sup> This implies that (official, state) law is separate from society and relatively “immune” to society’s impulses.<sup>152</sup>

Autopoiesis theory regards law as a self-referential system of communication. Legal communication understands the world in terms of a binary output: legal/illegal or right/wrong or yes/no.<sup>153</sup> Luhmann, one of the exponents of this view of law, regards law as cognitively open but normatively closed.<sup>154</sup> Cotterrell interprets this statement as meaning that law is able to respond to economic, scientific and political events but it interprets these events in its own terms (legal/illegal; yes/no; right/wrong) and uses its own normative criteria that is not dependent on the surrounding environment in which it operates.<sup>155</sup> Autopoiesis theory then seems to suggest that law cannot be used to steer society at all.<sup>156</sup>

Cotterrell comments on law’s *isolation* in Western societies and its *separateness* from other aspects of life.<sup>157</sup> He mentions a number of examples: ordinary people do their best

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Expanded Conception of Deterrence” (1991) 29 *Criminology* 561; Paternoster R “Decisions to Participate in and Desist from Four Types of Common Delinquency” (1989) 23 *Law and Society Review* 7; Tyler TR *Why People Obey the Law* (1990) Yale University Press New Haven; and Ross HL *Deterring the Drinking Driver: Legal Policy and Social Control* (1982) DC Heath Lexington.

<sup>151</sup> Eg Hepple in Hepple and Szyszczak (eds) (1992) 29.

<sup>152</sup> Cf Engel in Sarat and Kearns (eds) (1995) 168: Although the impetus for new law may come from local-level movements and organizations, the norms, procedures and sanctions of law are generally *extrinsic* to particular social domains” (my emphasis).

<sup>153</sup> Cotterrell (1992) 67.

<sup>154</sup> Luhmann (1985) 283; Luhmann in Teubner (ed) (1986) 113-114; Cotterrell (1992) 65-70.

<sup>155</sup> Cotterrell (1992) 67.

<sup>156</sup> Luhmann (1985) 283; Luhmann in Teubner (ed) (1986) 113-114; Cotterrell (1992) 65-70.

<sup>157</sup> Cotterrell (1992) 16. However, Neumann (1986) 17 is also correct: “a legal order for its own sake is unthinkable”.

to avoid courts or litigation; it is mainly lawyers that concern themselves with legal texts such as reported court decisions;<sup>158</sup> lawyers are professionally autonomous which means that lawyers' typical conceptions of law are very resistant to contrary views of the nature and function of the law and law is intellectually isolated in that it can be analysed without reference to the actual conditions in which it is supposed to operate.<sup>159</sup> Elsewhere he comments that many Acts are not understood by most individuals, or are not even aware of most Acts.<sup>160</sup>

Bestbier notes the alienation of individuals from legal processes due to ignorance and an accompanying feeling of incompetence and even impotence.<sup>161</sup> She advocates utilising the primary and secondary school system as a "nationally inclusive socialising agent".<sup>162</sup>

Watson presents a compelling argument.<sup>163</sup> In his view law is largely autonomous and not shaped by societal needs.<sup>164</sup> He uses two propositions to justify his view: (a) legal development has largely been constituted by legal transplantation;<sup>165</sup> and (b) the legal culture itself determines and controls legal development.<sup>166</sup> Lawmakers across societies share the same legal culture: lawyers are creatures of habit, they see laws as ends in themselves, they see law as a specialised field and this leads to an inclination to borrow from one another.<sup>167</sup> He states:<sup>168</sup>

[T]o a large extent law possesses a life and vitality of its own; that is, no extremely close, natural or inevitable relationship exists between law, legal structures, institutions and rules on the one hand and the needs and

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<sup>158</sup> Cotterrell refers to a study by McBarnet that noted that "case law, originating in the everyday business of the courts, has 'a surprisingly low profile in public affairs' owing, no doubt, to its complexity and detail and the 'convoluted and archaic style in which it is presented'." Cotterrell (1992) 175.

<sup>159</sup> An example from a lecture hall would be my own experience in Property Law during my second year as a law student (1991): Not a word was said about the Land Act of 1913 or the racially skewed land distribution in South Africa.

<sup>160</sup> Cotterrell (1992) 45.

<sup>161</sup> Bestbier (1994) 15 *Obiter* 107.

<sup>162</sup> Bestbier (1994) 15 *Obiter* 108.

<sup>163</sup> Watson (1978) 37 *Cam LJ* 313; Watson (1982) 131 *U Pa L Rev* 1121; Watson (1987) *BYU L Rev* 353; Tamanaha (2001) 107-109.

<sup>164</sup> Watson (1982) 131 *U Pa L Rev* 1135; 1136.

<sup>165</sup> Watson (1982) 131 *U Pa L Rev* 1125; 1146. Also see Barak-Erez in Bauman and Kahana (eds) (2006) 532: "Learning from other legal systems has always been a *significant technique* for developing law" (my emphasis).

<sup>166</sup> Watson (1982) 131 *U Pa L Rev* 1125; 1136.

<sup>167</sup> Watson (1982) 131 *U Pa L Rev* 1157.

<sup>168</sup> Watson (1978) 37 *Cam LJ* 314-315.



desires and political economy of the ruling elite or of the members of the particular society on the other hand. If there was such a close relationship, legal rules, institutions and structures would transplant only with great difficulty, and their power would be severely limited.

It is therefore possible that no relationship will exist between “law” and “society”. Watson does however admit that society may influence law. The legal elite’s culture may be influenced by social values and the impetus behind new laws may have their origin in social, economic and political factors.<sup>169</sup> Surrounding circumstances will probably influence transplanted laws.<sup>170</sup> However, there is no direct relationship; “the input of the society often bears little relation to the output of the legal elite”.<sup>171</sup>

Several characteristics of the Act bear out Watson’s hypothesis. If a close association exists between a particular society and its laws, one would have expected a strongly “South African” anti-discrimination Act.<sup>172</sup> Although the Act contains several improvements

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<sup>169</sup> Watson (1982) 131 *U Pa L Rev* 1135.

<sup>170</sup> Tamanaha (2001) 109.

<sup>171</sup> Watson (1985) 17 as paraphrased by Tamanaha (2001) 109. (Watson (1989) 42 puts it somewhat differently: “Lawmakers have defects of imagination and restrictions of knowledge. They are part of society and share in the general culture and interests of society. But they develop a specialized attitude to law, arising out of the tradition in which they work. There is a lawyer’s way to approach a problem. *This mode of thinking inoculates them from too much concern with the demands of society.* Lawmaking becomes an art form that can be understood only by its practitioners” – my emphasis). Perhaps the South African experience bears this out. When the final Constitution was drafted, the public was invited to send their submissions to Parliament. To my mind the legal elite to a large degree ignored these submissions. Cf Murray in Andrews and Ellmann (eds) (2001) 110-112: “If the first problem with the statistics is that they do not do justice to the public participation programme, the second is that they conceal the fact that its goals were not always clear and *leave the concrete results of the programme obscure.* In fact, some commentators were openly sceptical, describing the entire programme as an elaborate hoax, *designed to hide the fact that even the final Constitution was to be a negotiated document* and not the democratically-determined one that the ANC claimed it would be. In support of this argument, people pointed to the huge volume of submissions and asked if any politicians could be expected to review all of them. Moreover, these critics may have added, if the politicians had reviewed the submissions they would have found vague wish lists, more often concerned with poverty and the standard of living than with matters more appropriately dealt with in a constitution. The criticism of the process is not entirely unwarranted. Even those who read through the submissions found repetition rather than inspiration and in many painful requests based on deep poverty, they found the legacy of apartheid rather than a design for the future. *But the public participation programme was not intended to provide a list of matters that should be included in the Constitution. Advertising which suggested this ... might be criticised for being misleading ...*” (my emphasis). *Contra* Ramaphosa in Skjelten (2006) 11: “The [Constitution of South Africa] is remarkable not only for its content, but also for the extent to which the views and interests of ordinary South Africans are reflected in its provisions”. Ramaphosa does not indicate which of the provisions in the Constitution he is referring to.

<sup>172</sup> Cf Dr SE Pheko (MP, PAC), speech at the second reading debate of the Act, reproduced in Gutto (2001) 51: “Some elements of the Bill reflect eurocentric arrogance” (in the context of “outlawing” traditional African customs) and “This Bill has aspects which are turning this country into a dustbin of the decaying values of the West...”

on typical or “orthodox” anti-discrimination legislation,<sup>173</sup> the heart of the Act has been borrowed from elsewhere – that is, the definition of “discrimination” and the “fairness/unfairness” enquiry. The definition of “discrimination” in section 1(1)(viii) of the Act<sup>174</sup> bears a strong resemblance to the definition of discrimination as set out in *Andrews v Law Society (British Columbia)*,<sup>175</sup> *Law v Canada*,<sup>176</sup> section 9(1) of the Queensland Anti-Discrimination Act,<sup>177</sup> section 8(1)(b) of the Australian Capital Territories Discrimination Act<sup>178</sup> and section 4 of the Nova Scotia Human Rights Act.<sup>179</sup> Some of the factors listed in section 14 of the Act (the unfairness enquiry) also appear in section 11(2) of the Queensland Anti-Discrimination Act,<sup>180</sup> section 9(2) of the Victoria Equal Opportunity Act,<sup>181</sup> section 8(3) of the Australian Capital Territories Discrimination Act,<sup>182</sup> section 49C of the New South Wales Anti-Discrimination Act<sup>183</sup> and section 58(2) of the Northern Territory Anti-Discrimination Act.<sup>184</sup>

7. It is very hard if not impossible to ascertain the existence or absence of a causal link between changes in law and changes in society. In the natural sciences laboratory conditions may be created to isolate and measure the impact of certain factors,<sup>185</sup> but this cannot be done in a functioning society in the social sciences. Chemerinsky asks how one

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<sup>173</sup> See the discussion in chapter 3.3 below.

<sup>174</sup> “‘Discrimination’ means any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly— (a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds”.

<sup>175</sup> [1989] 1 SCR 143, 56 DLR (4<sup>th</sup>) 1 at 18: “Discrimination is a distinction based on grounds relating to personal characteristics of an individual or group that has the effect of imposing burdens, or limiting access to opportunities”.

<sup>176</sup> (1999) 1 SCR 497, (1999) 60 CRR (2d) 1 at 36: “Does the differential treatment differentiate, by imposing a burden upon or withholding a benefit from the claimant...”

<sup>177</sup> See Annexure E.4 below.

<sup>178</sup> See Annexure E.1 below.

<sup>179</sup> See Annexure C.8 below.

<sup>180</sup> See Annexure E.4 below.

<sup>181</sup> See Annexure E.6 below.

<sup>182</sup> See Annexure E.1 below.

<sup>183</sup> See Annexure E.2 below.

<sup>184</sup> See Annexure E.3 below.

<sup>185</sup> For example, Diamond (2005) hypothesises on the causes of the decline of (mighty) empires and societies. He identifies environmental damage, climate change, hostile neighbours, friendly trade partners and that society’s response to its environmental problems. At 79-119 he considers the lost civilization of the Easter Islands, *inter alia* because of its remoteness: the nearest lands are Chile, 2300 miles to the east and the Pitcairn Islands 1300 miles to the west. By doing so, he can at least exclude the factor “hostile neighbours”. At 329-357 he considers the Dominican Republic and Haiti, two countries on one island, and by doing so he can focus specifically on “that society’s response to environmental problems”. In the social sciences, these kinds of real-world laboratories do not exist. Cf Herbst and Mills in Clapham *et al* (eds) (2006) 9: “[W]e cannot run controlled experiments with countries ...”

measures causality and argues that in modern society a clear causal link between changes in the law and changes in society will be very difficult to prove: Change will probably take place over the long term and the more far-reaching the intended change the longer it will take and the more variables will probably play into the process.<sup>186</sup> If the intended changes do occur, how does one ascertain if courts (or the legislature) or other social factors caused the change?<sup>187</sup> Handler argues along the same line: When the law changes and effects take place, what is the cause?<sup>188</sup> He sees law as a moral persuader or educator or a ratifier of changes that have already taken place.<sup>189</sup> Factors such as public opinion, timing, social and economic conditions influence the possible effect of law, and law sometimes have completely unintended consequences.<sup>190</sup>

8. Authors disagree on the ability of law to control or steer attitudes and beliefs as opposed to observable behaviour.

Optimists include Berger, Kidder and Chemerinsky. These authors believe that laws may be used to influence attitudes. Berger is of the view that in an urban and secular society a high number of social relations exist that fall within law's ability to influence it, and by steering these "external acts", have an influence on the attitudes behind the external acts.<sup>191</sup> Kidder cites studies that showed an improvement in racial attitudes after the United States school desegregation decision.<sup>192</sup> He notes that one way of explaining this improvement is what psychologists call cognitive dissonance - people cannot persistently act in contravention of their conscience, beliefs and values.<sup>193</sup> If law prevents a person from acting in a particular way, people develop new values to fit the actions of what they

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<sup>186</sup> Chemerinsky in Devins and Douglas (eds) (1998) 192-193.

<sup>187</sup> Chemerinsky in Devins and Douglas (eds) (1998) 192-193.

<sup>188</sup> Handler (1978) 37.

<sup>189</sup> Handler (1978) 37.

<sup>190</sup> Handler (1978) 37.

<sup>191</sup> Berger (1952) 172; Cotterrell (1992) 54.

<sup>192</sup> Elsewhere Kidder (1983) 124 points out that the same people's attitudes were not ascertained over time; the studies related to random population selections at three set points in time. He notes that many things happen over time besides people's exposure to legal decisions. A change in attitude does not necessarily translate into a change in behaviour and perhaps the people questioned gave what they thought to be "respectable" answers to the survey questions.

<sup>193</sup> Kidder (1983) 119.

find themselves doing.<sup>194</sup> Chemerinsky argues that if a court changes the law and the change in law affects society, it is irrelevant if attitudes change.<sup>195</sup> He refers to court decisions invalidating Jim Crow statutes:

Ultimately the 'whites only' signs were taken off restrooms and water fountains and parks and beaches. If this occurred without a change in attitude, it still was valuable and important. Perhaps, too, it caused a change in attitudes over time. Either way, there was an effect, and few would deny that it was positive.<sup>196</sup>

Then Chemerinsky retreats: Public opinion is affected by numerous factors and to try to ascertain courts' role in the mix is probably impossible.<sup>197</sup> To charge an undemocratic, insular body (that must interpret an antimajoritarian document) with affecting public opinion is too much to ask.<sup>198</sup>

Cotterrell, Pound, Wilson, Allott, Friedman and Rosenberg are less enthusiastic about law's ability to effect changes in beliefs.<sup>199</sup>

Pound was of the view that law could not be used to control attitudes and beliefs but could only attempt to control observable behaviour.<sup>200</sup> By interpreting works by Pound and Ehrlich, Cotterrell argues that law cannot be used to control attitudes and beliefs but can only attempt to control observable behaviour.<sup>201</sup> Laws must be able to be enforced to influence behaviour.<sup>202</sup> If laws are to be enforced by state agencies, a high degree of

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<sup>194</sup> Kidder (1983) 119.

<sup>195</sup> Chemerinsky in Devins and Douglas (eds) (1998) 195.

<sup>196</sup> Chemerinsky in Devins and Douglas (eds) (1998) 195.

<sup>197</sup> Chemerinsky in Devins and Douglas (eds) (1998) 195.

<sup>198</sup> Chemerinsky in Devins and Douglas (eds) (1998) 195. Kollapen in *Sunday Times* (2005-04-03) 18 vacillates on the issue. He relates his own tale of being denied admission to a hair salon ostensibly because the staff couldn't cut "coloured people's hair". He decided to lodge a claim with the nearest equality court, which awarded R10 000 in damages, to be paid to a charity. At the start of the article he argues that "we succeeded ... in changing the attitudes of a small group of people". However, his conclusion is much more tentative: "I will soon visit [the salon] again. *I certainly hope* that when they welcome me as a client *they will do so not because of the compulsion of a court order* but because the experience they endured has taught them to accept and respect me as a fellow South African ..." (my emphasis).

<sup>199</sup> Sen in Drobak (ed) (2006) 254 may also be added to this list. He states that on matters of attitudinal change, legislation would be difficult and most likely quite ineffective.

<sup>200</sup> Pound (1917) 3 *ABA J* 55; Cotterrell (1992) 51.

<sup>201</sup> Cotterrell (1992) 51.

<sup>202</sup> Cotterrell (1992) 51.

clarity must be sought.<sup>203</sup> He notes that state-enforced sanctions appear to be useless in many areas of social life and tend to disrupt rather than harmonise social relations.<sup>204</sup>

Wilson believes that law has a limited role in causing societal changes. He argues that public opinion changes because dramatic events take place, such as a war or a depression, because of extraordinary leadership or a repeated circulation of ideas in the media.<sup>205</sup> In other words, public opinion does not change because a law prescribes that it should change.

Allot states that people obey laws because they see it as to their advantage to do so, or because they have formed the habit to do so, or because the appropriate authority has put in place an effective compliance-ensuring mechanism.<sup>206</sup> He does not seem to pay much heed to the moral pressure that laws possibly exercise. He refers to the notion of superficial conformism: people who sense that their opinions are in conflict with the official line, will keep their opinions to themselves and outwardly conform to what seems to be the approved version.<sup>207</sup>

Friedman departs from the premise that people are selective; they choose which laws they approve of and choose specific laws to strengthen already-held beliefs about right and wrong.<sup>208</sup>

Rosenberg is very pessimistic about a court's ability to change popular beliefs.<sup>209</sup> He refers to the American Supreme Court *Dred Scott* decision which upheld the constitutionality of slavery on the eve of the outbreak of what would come to be known as

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<sup>203</sup> Cotterrell (1992) 51.

<sup>204</sup> Cotterrell (1992) 52.

<sup>205</sup> As discussed by Handler (1978) 39. Handler (1978) 220 puts it somewhat differently: "Wilson... argue[s] that social change only really comes about by dramatic events, political entrepreneurs, or the gradual change of public opinion". From this perspective, one could argue that it was not the enactment of the interim Constitution that led to greater tolerance between the polarised racial groups in South Africa, but incidents such as President Mandela's appearance in a Springbok jersey at the 1995 Rugby World Cup.

<sup>206</sup> Allott (1980) 40.

<sup>207</sup> Allott (1980) 231-232.

<sup>208</sup> Friedman (1975) 111-124; Handler (1978) 218.

<sup>209</sup> Rosenberg in Devins and Douglas (eds) (1998) 173.



the American Civil War.<sup>210</sup> The court's ostensible purpose was to avoid that war but instead it only "fanned the flames".<sup>211</sup> Rosenberg writes "when emotions run high, as they do over issues of equality, one might think it unlikely that the Court's decisions would change opinions".<sup>212</sup> He makes the common sense assumption that to be able to influence opinions, people must know what courts do.<sup>213</sup> However, most Americans are largely ignorant and care very little about courts, including the Supreme Court. He refers to a few studies: In 1966, 40% of the American public could not identify Earl Warren and in 1989, less than ten percent could name the chief justice.<sup>214</sup> In 1966, 46% of the survey population could not recall anything that the Supreme Court had done in the recent past.<sup>215</sup> The Court also receives very limited press coverage.<sup>216</sup> Studies of newspaper coverage of issues relating to African Americans after *Brown* do not indicate an increase in coverage relating to racial equality; coverage only improved with the massive demonstrations of the 1960s.<sup>217</sup> Surveys in the American South following *Brown* contain no indication that the decision facilitated a change of heart and Rosenberg concludes that people supportive of integration were probably supportive of it before *Brown*.<sup>218</sup> African Americans also did not show enthusiastic support for *Brown*.<sup>219</sup> Rosenberg refers to similar studies relating to abortion,<sup>220</sup> affirmative action,<sup>221</sup> women's rights<sup>222</sup> and sexual orientation<sup>223</sup> and concludes: "The findings are consistent: there is no evidence supporting the power of the Court to increase support for racial or gender equality".<sup>224</sup> He argues that the reason for courts' inability to influence attitudes is as follows:<sup>225</sup>

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<sup>210</sup> Rosenberg in Devins and Douglas (eds) (1998) 173.

<sup>211</sup> Rosenberg in Devins and Douglas (eds) (1998) 173.

<sup>212</sup> Rosenberg in Devins and Douglas (eds) (1998) 173.

<sup>213</sup> Rosenberg in Devins and Douglas (eds) (1998) 174.

<sup>214</sup> Rosenberg in Devins and Douglas (eds) (1998) 174.

<sup>215</sup> Rosenberg in Devins and Douglas (eds) (1998) 174.

<sup>216</sup> Rosenberg in Devins and Douglas (eds) (1998) 174-175.

<sup>217</sup> Rosenberg in Devins and Douglas (eds) (1998) 175.

<sup>218</sup> Rosenberg in Devins and Douglas (eds) (1998) 177.

<sup>219</sup> Rosenberg in Devins and Douglas (eds) (1998) 179.

<sup>220</sup> Rosenberg in Devins and Douglas (eds) (1998) 183-184. Rule and Mncwango in Pillay *et al* (eds) (2006) 270 report that American attitudes relating to abortion had not varied significantly in the last decade.

<sup>221</sup> Rosenberg in Devins and Douglas (eds) (1998) 180-181.

<sup>222</sup> Rosenberg in Devins and Douglas (eds) (1998) 185-186.

<sup>223</sup> Rosenberg in Devins and Douglas (eds) (1998) 186-187.

<sup>224</sup> Rosenberg in Devins and Douglas (eds) (1998) 187.

<sup>225</sup> Rosenberg in Devins and Douglas (eds) (1998) 187.

As anyone who has ever debated issues of racial or gender equality can attest, opinions on such issues are often deeply held. It is naïve to expect an institution seen as distant and unfamiliar, shrouded in mystery, and using arcane language and procedures to change people's views.

South African empirical research tends to disprove Davis's view that "the judiciary shapes public opinion".<sup>226</sup> The Human Sciences Research Council conducted a "South African Social Attitudes Survey" in 2003, the results of which was published in 2006.<sup>227</sup> This study indicated that the South African public's attitude relating to issues such as the death penalty, sexual orientation and abortion are "out of sync with government policies".<sup>228</sup> The authors of the study conclude that "South Africans still come across as ... racist, homophobic, sexist, xenophobic and hypocritical",<sup>229</sup> and that "ten years of democracy seem to have done little to moderate what can be described as hard-line, authoritarian attitudes on such politico-social issues as capital punishment and gay sex".<sup>230</sup> A number of Constitutional Court judgments have been handed down where the values of compassion and tolerance have been preached.<sup>231</sup> These judgments have clearly not found their way into the hearts of South Africans.

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<sup>226</sup> Davis (1999) 11.

<sup>227</sup> Pillay *et al* (eds) (2006).

<sup>228</sup> Pillay in Pillay *et al* (eds) (2006) 10. Rule and Mncwango in the same source at 272 argue that "[South Africa's] new Constitution and legal regime are thus at odds with the core beliefs of a large proportion of its electorate" while Orkin and Jowell at 297 note that "despite South Africa's extremely progressive Constitution, the majority of South Africans are still very traditionalist on all these moral issues".

<sup>229</sup> Pillay in Pillay *et al* (eds) (2006) 10; Roger *et al* in the same source at 20.

<sup>230</sup> Daniel *et al* in Pillay *et al* (eds) (2006) 20. At 36 the authors state that, based on the survey, despite the Constitutional Court judgment outlawing the death penalty (*S v Makwanyane* 1995 (2) SACR 1 (CC)), 75% South Africans favour, and 50% strongly favour, the reintroduction of the death penalty for murder. Despite s 12(2)(a) and (b) of the Constitution and *Christian Lawyers Association of South Africa v Minister of Health* 1998 (4) SA 1113 (T), 74% of respondents regard abortion to be wrong in some respect with 56% of respondents disapproving of abortion even where there is a strong chance of the baby suffering a serious defect. Despite a ruling such as *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 78% of respondents thought gay sex was always wrong. (A 1995 HSRC survey of public opinion showed that 54% of respondents were strongly opposed and 10% of respondents somewhat opposed to equal rights for heterosexual and homosexual marriages – Rule and Mncwango in the same source at 255. An empirical study conducted in 2004 showed that more than 50% of the black gay respondents interviewed felt that the broader South African society's attitudes towards homosexuals had not improved since the coming into effect of the new constitutional order – *Beeld* (2007-01-17) 9.) Dawes *et al* in Pillay *et al* (eds) (2006) 239 report that 75% of women in three provinces thought that it was sometimes acceptable for adults to hit each other and more than 50% of girls between 10 and 19 years of age thought that forcing sex on someone you knew was not sexual violence, despite s 12(1)(c) and (e) in the Constitution and cases such as *S v Baloyi (Minister of Justice intervening)* 2000 (2) SA 425 (CC) and more to the point, *S v Njikelana* 2003 (2) SACR 166 (C).

<sup>231</sup> *Prince v President of the Law Society of the Cape of Good Hope* 2002 (1) SACR 431 (CC) paras 57, 79, 147; *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (2) SACR 540 (CC) para 147; *S v Makwanyane* 1995 (2) SACR 1 (CC) paras



9. A ninth approach is to argue (sometimes implicitly) that legal classifications are artificial. People do not function according to legal precepts; legal principles are mental constructs to find a solution “after the fact”. When the incident that forms the background to the ensuing court case occurred, the legal principles were absent. The implication is clear – law plays (virtually) no role in influencing human behaviour; legal rules come into play after the event to “solve” a “problem”. Permit me a longish detour to expand on this strand of thought.

Jeffrey seems to believe that in the majority of cases it is completely wrong to think of legal rules having “governed” behaviour.<sup>232</sup> He points out that in most civil and criminal cases, the so-called “rules” that are supposed to govern human behaviour, only come into play *after* the incident.<sup>233</sup> He uses an example from contract law to explain his view: Suppose two businesspeople draft a shipping contract but for whatever reason fail to include a provision on what should happen if the cargo does not arrive safely or is delayed. Assuming the cargo does not arrive and assuming the parties fail to reach a settlement, the matter proceeds to court where lawyers use whatever methods are available to “cope with the situation”; to talk of the rules of contract law “governing” the parties’ behaviour is fallacious.<sup>234</sup> Similarly, the rules of law of delict cannot be said to have regulated drivers’ behaviour involved in a motor accident (unless they were both attorneys, perhaps).<sup>235</sup>

Boshoff states that

[E]veryday life, and the slices of everyday life that appear before the courts, do not readily fit into the classifications that the law forces upon them. There are, however, always and only situated contexts of

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249, 308, 369, 391; *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 38; *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 102.

<sup>232</sup> Jeffrey in Brantingham and Kress (eds) (1979) 27-40.

<sup>233</sup> Jeffrey in Brantingham and Kress (eds) (1979) 34.

<sup>234</sup> Jeffrey in Brantingham and Kress (eds) (1979) 34-35. Compare what a South African businessman said in testimony in *Glofinco v ABSA Bank Ltd t/a United Bank* 2002 (6) SA 491 (SCA) para 38: “It is not our practice to finalise our deals in a court of law, that certainly doesn’t appeal to us at all”.

<sup>235</sup> Jeffrey in Brantingham and Kress (eds) (1979) 35.



action, with real people in real situations, imbued with all the particularities of history, culture and preconceived value.<sup>236</sup>

In the South African context, a study by Joubert provides a striking example of Jeffrey's hypothesis.<sup>237</sup> The legislature and presumably courts as well, assume that people will take cognisance of the law when "planning" their behaviour - why else shall we bother drafting and applying laws in the first place? However, Joubert's study would suggest that law plays virtually no role in people's daily decisions:

In November 1982, more than a decade before the advent of a democratic South Africa, a coloured school principal had to write an Afrikaans-Dutch examination together with three white students in a small town in the Cape countryside. They were all students at a non-residential university. A minister of the local Reformed Dutch church acted as invigilator and thought it prudent to let the school principal write his examination separate from the three white candidates. The white candidates wrote their examination in the vestry while the principal wrote his examination in the kitchen. The principal approached the media after the incident and for a number of weeks especially *Die Burger*, a mainstream-Afrikaans Cape-based daily newspaper, covered stories, statements and letters from readers on the incident. Joubert analysed the reasons given by various parties either condemning or defending the minister's decision. He divided the various reactions into 12 categories:

The so-called "immediate reactions" all condemned the minister and included judgments such as insulting (*vernederend*), disgusting, irresponsible, unfortunate, cold rage, insensitive (*onsensitief*), shocking (*ontstellend* and *skokkend*), without tact (*taktloos*), sad (*hartseer*) and "a match that should never have been struck" (*'n vuurhoutjie wat nooit getrek moes gewees het nie*). The second-highest number of reactions (84) related to the minister personally. 41 of these reactions condemned him; 43 defended him.<sup>238</sup> Of the

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<sup>236</sup> Boshoff (2002) *TSAR* 758-759.

<sup>237</sup> Joubert (1991) 22 *S Afr J Sociol* 59.

<sup>238</sup> Joubert *inter alia* lists the following examples of statements justifying his behaviour: "minister was scared that he would be setting a precedent" (*hy was bang hy stel 'n presedenť*); "it was the first time that he had invigilated at an

reactions condemning him, only one used a legalistic term: “the minister regards *discrimination as a right*” (*hy beskou diskriminasie as reg*).<sup>239</sup> 19 reactions commented on the room allocated to the principal.<sup>240</sup> Only four reactions mentioned local conditions: “Parishioners would have felt aggrieved had he allowed the principal to write together with the white students” (*gemeentelede sou andersinds beswaard voel*); “the public did not have regard to the minister’s action in his particular circumstances” (*publiek sien nie dominee se optrede teen agtergrond van omstandighede nie*); “the townsfolk’s profile includes very conservative and very liberal/progressive people” (*die dorp wissel van uiters konserwatief tot uiters liberaal*); “minister’s task is difficult in a *Boland* town” (*taak nie so maklik op so ‘n Bolandse dorp nie*). 12 reactions related to organisational regulations.<sup>241</sup> Six reactions related to the minister’s position and role expectation.<sup>242</sup> The highest number of reactions (85) had church and religion as its focus. 78 reactions condemned the

examination” (*dit was sy eerste eksamentoesig*); “he will and had resolved the matter with the principal” (*hy sal en het die saak met die onderwyser uitgepraat*); “he prayed” (*hy het ‘n gebed gedoen*); “it was a judgment error and who does not make mistakes” (*dis ‘n oordeelsfout en wie maak nie foute nie*).

<sup>239</sup> Reactions condemning the minister included the following: “minister’s blaming of the school principal was pathetic and laughable” (*dominee se blamering van die onderwyser is pateties en belaglik*); “he hides behind the church council” (*hy skuil agter die kerkraad*); “how would he have reacted if he had to write the examination in the kitchen” (*hoe sou die dominee reageer as hy in ‘n kombuis moes eksamen skryf*); “he destroys all the good in one moment” (*hy vernietig in een oomblik al die goeie*); “he lives in one way on Monday and in another way on Sunday” (*hy leef Maandae anders as Sondag*); “how did he invigilate in different rooms” (*hoe het hy toesig gehou in verskillende vertrekke*); “he plays into the hands of the enemy” (*hy speel in kaarte van die vyand*).

<sup>240</sup> Reactions defending the minister included: “the kitchen was in the minister’s opinion the best place to write in the circumstances” (*die kombuis was na die dominee se oordeel die beste skryfplek onder omstandighede*); “the principal was satisfied with the room” (*die onderwyser was tevrede met die skryfplek*); “what more is needed than a table, chair, light and air” (*wat meer as tafel, stoel, lig en lug is nodig*); “the kitchen is the quietest area in the church complex” (*dis die stilste vertrek in die kerkkompleks*); “it is to be regretted that the word ‘kitchen’ was used” (*dis jammer dat die woord kombuis gebruik is*). Reactions condemning the minister included: “it is not the place but the separation of the candidates that is the issue” (*dis nie die plek nie maar die skeiding wat saak maak*); “the church complex was built with money given to God in gratitude” (*die kerkkompleks is gebou met dankoffergeld wat God toekom*); “only God’s will is relevant when considering the use of church buildings” (*net die wil van die Koning geld vir die gebruik van kerkgeboue*).

<sup>241</sup> These reactions *inter alia* included the following: “the church council decides on matters relating to church buildings” (*die kerkraad besluit oor sy geboue*); “if the minister acted differently he would have had to answer to the church council” (*ander optrede sou die dominee by die kerkraad in die moeilikheid bring*); “the minister’s actions corresponded with church council decisions that the minister had to adhere to” (*die optrede is in ooreenstemming met kerkraadsbesluite wat die predikant moes gehoorsaam*); “must a minister be more faithful to a church council? (*moet ‘n predikant ‘n kerkraad meer gehoorsaam wees?*)

<sup>242</sup> These reactions were: “is this ‘n man that called himself a Dutch Reformed minister? (*‘n man wat homself ‘n NG predikant noem*); “cannot believe a minister could do such a thing”; “the conduct is unbecoming of a minister” (*die optrede is ‘n leraar onwaardig*); “that a leader could act in this way to a neighbour” (*dat ‘n leier só teenoor ‘n naaste kan optree*); “spiritual leaders must set an example” (*geestelike leiers moet ‘n voorbeeld stel*); “one should remember that a minister said and acted in this way” (*mens moet onthou dit is ‘n predikant wat só sê en doen*).



incident; seven defended it.<sup>243</sup> The category “politics and state policy” included 17 reactions.<sup>244</sup> “Folkways” accommodated 73 reactions; 15 defending the minister and 58 condemning him. Three of these reactions explicitly referred to “discrimination”: “this is a kind of race discrimination, possibly even racism” (*hierdie is ‘n soort rassediskriminasie, moontlik selfs rassisme*); all of us discriminate indirectly” (*ons almal wat onregstreeks diskrimineer*) and “it is almost impossible to negotiate a better future when such daily instances of discrimination occur” (*dis byna bomenslik om ‘n beter bedeling te beding met sulke daaglikse diskriminasie*).<sup>245</sup> 32 reactions related to the media’s role in the controversy.<sup>246</sup> Joubert allocated 13 reactions to the category “values”. All of these

<sup>243</sup> Reactions defending the minister included: “inconsistent Synod decisions exist that confuse ministers” (*daar bestaan teenstrydige Sinodebesluite wat leraars verwar*); “the Synod’s attitude displays arrogance” (*die houding van die Sinode openbaar heelwat arrogansie*); “we are aware of other parishes with open doors” (*ons is bewus van ander gemeentes wie se deure oop is*); “we must forgive and must pray for harmony” (*ons moet vergewe en bid vir harmonie*). Condemnatory reactions included the following: “writing in the kitchen implies that the Coloured is not welcome in a white church” (*kombuisskrywery impliseer dat die Bruinman ook nie in die blanke kerk welkom is nie*); “this indicates that the Dutch Reformed Church is not honest when it talks about openness” (*dis ‘n aanduiding dat die NGK nie oreg is met oopheid nie*); “culmination of a church’s approval of apartheid” (*kulminering van kerk se sanksionering van apartheid*); “confirms criticism against DRC in Ottawa”; “Synod decision passes the buck”; “an embarrassment to church”; “Synod allowed incident by leaving decision to church councils”; “cannot be justified on biblical grounds”; “Synod declared racism sin – kitchen examination is also racism” (*Sinode het rassisme sonde verklaar – kombuiseksamen is ook rassisme*); “woe to us, that closed white tempels testify against us” (*wee ons, dat geslote wit tempels teen ons getuig*).

<sup>244</sup> These reactions included the following: “it appears to be a crime to have a white skin” (*dit lyk asof dit ‘n misdaad is om ‘n wit vel te hê*); “until recently this particular university let its students write separately” (*tot onlangs toe het die betrokke universiteit sy studente apart laat skryf*); “when apartheid becomes a pseudo religion, it is a mistake” (*‘n optrede waar apartheid ‘n pseudo-godsdiens word, is ‘n dwaling*); “apartheid is the sin of the century” (*apartheid is die sonde van die eeu*); “apartheid infringes the dignity of mere mortals” (*apartheid raak die eer van die nietige mens*); “this is apartheid in its naked, ugly form that our country cannot afford anymore” (*dis apartheid in sy naakte, lelike vorm wat ons land nie meer kan bekostig nie*); “the government can forget about its initiatives if this happens so often” (*regering kan vergeet van inisiatiewe as dit so dikwels gebeur*); “if the government had an explicit policy in place relating to the application of or dismantling of apartheid this would not have happened” (*indien die regering ‘n duidelik uitgespelde beleid ten opsigte van die toepassing of afskaffing van apartheid gevolg het, sou die insident nie plaasgevind het nie*); “PW Botha [the then prime minister] must continue – the entire South Africa will follow” (*PW Botha moet voortgaan – hele Suid-Afrika sal volg*).

<sup>245</sup> Other reactions included: “incident did not promote good relations between races”; “we should avoid behaviour which is belittling and degrading”; “good race relations were impaired” (*goeie rasseverhoudings is afgebreek*); “whites acting as the minister did are a minority” (*blankes wat soos die dominee optree in die minderheid*); “coloured citizens must be treated with dignity” (*kleurlingburgers moet menswaardig behandel word*); “this is not an unusual incident – an entire generation had to cope with it” (*dis mos nie ‘n uitsonderlike geval nie – ‘n hele geslag moes hiermee verlies neem*); “this kind of thing has a 300 year history”; “these kind of incidents are unavoidable and will continue for a long time” (*hierdie insidente is onvermydelik en sal nog lank aanhou*); “are we consistent – why are our children still in segregated schools” (*is ons konsekwent – hoekom is ons kinders dan nog in aparte skole*).

<sup>246</sup> These reactions included the following: “it is important that the media continues to act as a watchdog” (*dat die koerante nie skroom om hul wag hondfunksie te vervul nie, stem tot dankbaarheid*); “one should be glad that an uproar followed” (*‘n mens moet seker bly wees oor die ontstellenis*); “reporters wish to tear parish and community apart” (*verslaggewers wil die gemeente en die gemeenskap uitmekaar skeur*); “incident caused no danger to the country – but the momentum created via the media is abused for political gain” (*insident hou geen gevaar vir land in nie – maar*

reactions condemned the incident as “unChristian”. And finally, 14 reactions focused on image.<sup>247</sup>

One could differ about the categories that Joubert chose as it is not always clear why a particular reaction was not classified under another heading and some reactions could plausibly be put under more than one heading. It should also be pointed out that the incident occurred in 1982, some eight years before FW de Klerk’s Rubicon speech and more than a decade prior to the first democratic elections. Perhaps more crucially, in 1983 the ruling National Party introduced a new constitution, whereby so-called “coloureds” and Indians received limited representation in Parliament. The incident was mainly covered in the Afrikaans press (very few of the reactions were recorded in English) and it is at least arguable that *Die Burger*, one of the National Party’s mouthpieces at the time, wished to use the incident to illustrate that the majority of Afrikaners deplored bad treatment of “coloureds”. Had the principal been African, I doubt whether the same proportion of reactions condemning the minister’s behaviour would have been recorded.

That being said, it is still of value to consider to what extent correspondents utilised the law or legal concepts to justify or condemn the minister’s behaviour. Joubert listed more than 370 “reasons” why the minister should or should not have acted in the way that he did. Very few of the offered reasons invoked the law and those that did, only did so very indirectly – only five correspondents used the phrase “discrimination” and only a further 17 respondents referred to Apartheid as state policy directly or implicitly. Had the matter proceeded to court, trained lawyers would not have used any of the offered arguments as they would have been regarded as “irrelevant”. Had the matter proceeded to court in 1982, perhaps some obscure part of Apartheid legislation would have been used to justify

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*die momentum wat deur die kommunikasiemedie daaraan verleen word, is dikwels vir politieke gewin*); “these days there are many newspaper reports relating to non-whites (sic) that were mistreated” (*daar is deesdae altyd berigte oor nie-blankes wat te nā gekom is*); “media reports sets up brother against brother” (*persberigte sweep blankes teen mekaar op*).

<sup>247</sup> These reactions included the following: “the church council regrets the incident and the publicity” (*die kerkraad is jammer oor die voorval en publiseit*); “the incident created a bad example” (*die voorval stel ’n slegte voorbeeld*); “the parish and South Africa cannot afford the example” (*die gemeente en Suid-Afrika kan die voorbeeld nie bekostig nie*); “damage to South Africa’s image abroad” (*skade aan Suid-Afrika se beeld in buiteland*); “international embarrassment for country and university” (*internasionale verleentheid vir land en vir universiteit*); “our enemies rejoice about this incident” (*ons vyande is bly*).

the minister's conduct. Had a similar event occurred in post-1994 South Africa, the Constitution or the Act would have been in play and lawyers would have argued about the absence or presence of "discrimination", as defined in the Act, and whether the discrimination, if proven, was "fair" or "unfair".<sup>248</sup> In other words, had any of these correspondents been faced with the minister's situation, and assuming that they would have acted in accordance with their "reasons",<sup>249</sup> "the law" would not have featured large in deciding what to do.<sup>250</sup>

## 2.5 *Characteristics of effective law*

The authors referred to above all share a pessimistic, or at least critical, outlook (at least implicitly) on the ability of law to drive a societal transformation project. More optimistic authors have attempted to identify characteristics of effective laws, which I deal with below.

To consider whether a particular Act has been or will be effective in accomplishing its purpose, that Act's goals or objectives first have to be established.<sup>251</sup> It is not necessarily an easy task to

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<sup>248</sup> Tushnet as set out by Crenshaw (1988) 101 *Harv L Rev* 1353 says that the language of rights "undermines efforts to change things by absorbing real demands, experiences, and concerns into a vacuous and indeterminate discourse". The author provides the following example at 1353 n85: "When I march to oppose United States intervention in Central America, I am 'exercising a right' to be sure, but I am also, and more importantly, being together with friends, affiliating myself with strangers, with some of whom I disagree profoundly, getting cold, feeling alone in a crowd, and so on. It is a form of alienation or reification to characterize this as an instance of 'exercising my rights'. The experiences become desiccated when described in that way". However, who describes a march as "exercising our rights", barring a few pretentious lawyers? Ordinary people will describe their outing in precisely the same terms that Tushnet does: being with friends, getting to know people, getting cold. Law does not intrude. Law does not alienate. Law is simply mostly absent. Should the extraordinary occur and a court case ensues, ordinary people will describe the outing in ordinary words to their lawyers and the court, and the lawyers will use "rights-talk" to argue the case in court. The experience in court may be alienating to a layperson, but this is not unique to law and the legal profession. I complain to my doctor in "ordinary" words and he responds in medical jargon. He scribbles a prescription in illegible handwriting, leaving me bewildered. When my brother, a mechanical engineer, talks about his latest project, I am lost.

<sup>249</sup> It could be argued that verbalisation and internalisation are two separate matters; that the mere fact that "the law" as such is not articulated, is not necessarily indicative of the fact that the law plays no part in the life worlds of individuals.

<sup>250</sup> I acknowledge that there are limits to this argument. The selection of "arguments" is not representative as only views expressed in newspapers were taken into account. I also assume that every commentator would have acted in the way that they expressed themselves; ie if someone had reacted negatively to the minister's behaviour, that they would have let all the candidates write in the same venue. If one collects data on human behaviour; if one wants to know why people acted in a particular way, you either have to *imagine* it, but this is a socially conditioned process, or you have to *ask* them but then one gets "in order to" and "because of" motives; "the response to [the] question is filtered through the same social process: whatever the motivation might have been before the act, what we get is a statement of motivation that makes sense of the act after it has happened". Dingwall (2000) 25 *Law & Soc Inq* 891.

<sup>251</sup> Pollitt (2003) 9; Zammuto (1982) 17; 28-29. Macfarlane in Swain (ed) (2006) 101 considers the "effectiveness" of laws more broadly. He suggests that the following indices of effectiveness exist: whether "rule of law" exists, the degree to which people abide by legal decisions, the degree to which citizens or subjects feel protected by their laws

establish these goals. Allott uses the following example:<sup>252</sup> Suppose the conviction rates of burglaries and murder dramatically increase, are the laws prohibiting burglaries and murder effective or ineffective? (If the aim of these laws is to punish transgressors, they may be seen as effective. The more likely aim is however to prevent burglaries and murders from occurring in the first place, and then high conviction rates may be seen as a symptom of the failure of these laws.) Kidder points out that it must always be considered *why* a particular law was put in place and refers to a stop sign in an absurd position – such a traffic sign was probably put in place to generate income for the local authority and has little, if anything, to do with traffic safety.<sup>253</sup> Similarly, an anti-discrimination law may be put in place merely for its symbolic value and it is feasible that the drafters of such an Act never intended it to have any measurable effect, despite what they may have said in public when the Act was promulgated.

An assessment of a specific Act's effectiveness is also further contingent upon the framing of the goal of that specific Act. For example, Chemerinsky refers to Rabkin who argued that anti-discrimination legislation has not succeeded in the United States because income disparities based on race has continued.<sup>254</sup> Chemerinsky asks why it must be assumed that income is the only measure of success.<sup>255</sup> He argues that anti-discrimination legislation would have succeeded if it resulted in less discrimination and more jobs being available for blacks, even if the black-white wealth gap remains.<sup>256</sup> It is clear that Rabkin and Chemerinsky have radically different goals in mind for anti-discrimination legislation and as a result have different views on the (in)effectiveness of such laws. Once a particular Act's goals have been established, it is possible to consider the Act's weaknesses and its potential in effecting change. Assuming that it is possible to reach agreement on a particular Act's aims, I will use the phrase "effective legislation" in the sense of legislation that broadly speaking seems able to, or have met, its stated goal(s).

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and legal processes, the degree to which the public trusts the law, and whether people feel the law runs with their interests and not against them. I would categorise most of his indices as part of a question into the *legitimacy* of a particular legal order and not primarily as indices of *effectiveness*. Of course it may be argued that to be effective, any legal order also has to be (at least to a degree) legitimate in the eyes of the subjects. See chapter 5 below for the results of an empirical survey in greater Tshwane, 2001, that suggests that South African law is not legitimate in the eyes of the majority of subjects.

<sup>252</sup> Allot (1980) 30.

<sup>253</sup> Kidder (1983) 193.

<sup>254</sup> Chemerinsky in Devins and Douglas (eds) (1998) 193.

<sup>255</sup> Chemerinsky in Devins and Douglas (eds) (1998) 193.

<sup>256</sup> Chemerinsky in Devins and Douglas (eds) (1998) 193.

It is possible to extract the following characteristics of effective legislation from the available literature. It would seem that roughly 18 criteria may be identified according to which a particular Act may be measured to gauge its effectiveness. There may well be some overlap between these criteria.

1. To put it bluntly, the legislature must be realistic.
  - 1.1 The goal of the lawmaker must be realisable through law.<sup>257</sup> This seems to be a somewhat circular requirement because one will only know if the goal is realisable by measuring it against criteria for effective legislation, and if the criterion is simply “the goal must be realisable”, it leaves the legislature stranded. Pound suggests a way out. He argues that the following goals will not be realisable:<sup>258</sup>

Another set of limitations grows out of the intangibility of duties which are morally of great moment but legally defy enforcement ... A third set of limitations grows out of the subtlety of modes of seriously infringing important interests which the law would be glad to secure effectively if it might. Thus grave infringements of individual interests in the domestic relations by talebearing or intrigue are often too intangible to be reached by legal machinery ... A fourth set of limitations grows out of the inapplicability of legal machinery of rule and remedy to many phases of human conduct, to many important human relations and to some serious wrongs. One example may be seen in the duty of husband and wife to live together and the claim of each to the society and affection of the other.

- 1.2 The required change must be able to be implemented and to be strongly enforced.<sup>259</sup>
  - 1.2.1 Rules will be enforced that are highly visible, cost little and do not affect competition.<sup>260</sup> Handler suggests that, based on this criterion, a law obliging warning labels on cigarette

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<sup>257</sup> Morison in Livingstone and Morris (1990) 9.

<sup>258</sup> Pound (1917) 3 *ABA J* 66-67.

<sup>259</sup> Morison in Livingstone and Morris (1990) 9; Ehrlich (1922) 36 *Harv L Rev* 138; Coussey in Hepple and Szyszczak (eds) (1992) 46-47. This is one of the reasons why Apartheid ultimately failed – in the face of increasing and ultimately unpoliceable disobedience, influx control, and with that the notion of separate development, collapsed. Cf MacDonald (2006) 69. Also see Hirsch (2005) 208: “Perhaps the most important reason for the apartheid government’s turnaround on the economic rights of Africans was its recognition that it had lost the war against the urbanisation of Africans”.

<sup>260</sup> Handler (1978) 16-17.

packages would be enforceable.<sup>261</sup> Meat inspection however is of low visibility because consumers cannot easily detect violations and profits are to be made if substandard meat is sold and therefore requires a major effort to ensure compliance.<sup>262</sup> Handler provides additional reasons why enforcing meat inspection laws are difficult: “a large number of inspectors making hundreds of decisions each day ... throughout the country; it is extremely difficult to monitor their actions, let alone change their behaviour”.<sup>263</sup> For the same reason laws targeting the police, welfare agencies, hospitals, mental institutions or prisons would also face serious implementation challenges.<sup>264</sup> Friedman argues that enforcement depends on “ease of detection and enforcement”.<sup>265</sup> He argues that for some laws there are many potential violators who can violate that law in many places, such as a law against “jaywalking”.<sup>266</sup>

A South African example bears this out. Legislation protecting farm workers is not easily enforceable as many farmowners are potential violators of these laws, and it is not in farm owners’ interests to adhere to the formal and drawnout evictions proceedings. In an empirical study completed in 2005 it was shown that from 1994-2004, approximately 930 275 farm labourers and their dependents were illegally evicted from farms.<sup>267</sup> It is not surprising that the study concluded that only about 1% of evictions that occurred after 1997 were performed in terms of the relevant legislation.<sup>268</sup> In six out of seven cases the farm workers had no legal representation when their eviction case was heard in court.<sup>269</sup> On the other hand, coal mine safety laws can only be violated by (a few) coal mines and such laws are more likely to be effective.<sup>270</sup>

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<sup>261</sup> Handler (1978) 16-17.

<sup>262</sup> Handler (1978) 19.

<sup>263</sup> Handler (1978) 19.

<sup>264</sup> Handler (1978) 19.

<sup>265</sup> Friedman (1975) 86-87.

<sup>266</sup> Friedman (1975) 86-87.

<sup>267</sup> *Sake24 (Beeld)* (2007-03-19) 12.

<sup>268</sup> *Sake24 (Beeld)* (2007-03-19) 12.

<sup>269</sup> *Sake24 (Beeld)* (2007-03-19) 12.

<sup>270</sup> Friedman (1975) 86-87.



- 1.2.2 Enforcement agents must be committed to the behaviour required by the law, even if not to the values implicit in it.<sup>271</sup> Members of the police, judiciary and health services are often tasked with the eradication of a targeted practice, and if these officials are not committed to achieve the required change, adequate public support will likely not follow.<sup>272</sup> Evan refers to the Prohibition Amendment in the United States – he argues that one of the major reasons why Prohibition failed was that local police forces were mainly tasked with enforcing the ban on alcohol consumption, and these local police officials were often disrespectful of the ban.<sup>273</sup>
- 1.2.3 If laws are to be enforced by state agencies, “a high degree of clarity is important”,<sup>274</sup> and objectively measurable results should be put in place.<sup>275</sup> A law that does not establish a clear standard or that is ambiguous or too flexible will facilitate avoidance.<sup>276</sup>
- 1.2.4 The source of the new law must be “authoritative and prestigious”.<sup>277</sup> Evan utilises this criterion to argue that legislation is the most effective way of effecting change, when for example compared to court decisions.<sup>278</sup>
- 1.3 The change-inducing law must provide for effective remedies.<sup>279</sup> In Chemerinsky’s opinion, for example, school desegregation efforts failed largely because courts failed to formulate effective remedies for segregated schools.<sup>280</sup> American cities are largely

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<sup>271</sup> Evan in Evan (ed) (1980) 559; Packer (2002) 169.

<sup>272</sup> Packer (2002) 169.

<sup>273</sup> Evan in Evan (ed) (1980) 559.

<sup>274</sup> Cotterrell (1992) 51.

<sup>275</sup> Coussey in Hepple and Szyszczak (eds) (1992) 46-47. In the United States a presumption of unfair discrimination exists when a 20% or more difference in impact on different groups occur - Hepple (1997) 18 *ILJ* 607.

<sup>276</sup> Friedman (1975) 59; Hepple (1997) 18 *ILJ* 606-607.

<sup>277</sup> Evan in Evan (ed) (1980) 557. Also cf Coussey in Hepple and Szyszczak (eds) (1992) 46-47.

<sup>278</sup> Evan in Evan (ed) (1980) 557-558. In a somewhat different context, Stout in Drobak (ed) (2006) 32 argues that “other-regarding norms” are likely to be followed if the targeted population believes that these norms are supported by a respected authority. She states that courts and legislatures can play this role, even without the actual imposition of sanctions.

<sup>279</sup> Evan in Evan (ed) (1980) 560; Chemerinsky in Devins and Douglas (eds) (1998) 199. Hepple (1997) 18 *ILJ* 606-607 states that a vigorous enforcement mechanism must be put in place; people who disregard a particular Act’s standards must face serious economic consequences and those who comply must earn rewards. Allott (1980) 287 lists an overambitious legislature, inadequate preliminary surveys, and *inadequate enforcement mechanisms* as the reasons for the inability of law to effect social change.

<sup>280</sup> Chemerinsky in Devins and Douglas (eds) (1998) 199.

segregated: Blacks live in the inner cities; whites live in the suburbs. To effectively desegregate schools, courts would have had to include suburban white schools in the desegregation interdicts that they issued.<sup>281</sup> However, in *Milliken v Bradley*,<sup>282</sup> the Burger Supreme Court held that an interdistrict interdict would only be granted in the exceptional cases where proof existed of interdistrict constitutional violations.<sup>283</sup> In effect, *Milliken* prevented the desegregation of black inner city schools and white suburban schools.<sup>284</sup> Chemerinsky also refers to *Keyes v Denver*.<sup>285</sup> In this decision the Supreme Court held that proof of school segregation was not sufficient to establish a constitutional violation; proof had to exist that segregation occurred because of intentionally discriminatory policies.<sup>286</sup> Chemerinsky argues that school segregation usually has many interlocking reasons and that by requiring discriminatory intent instead of discriminatory impact, the Supreme Court radically limited courts' ability to order desegregation of *de facto* segregated northern schools.<sup>287</sup>

Also in the context of school desegregation, Evan argues that it is *not* an effective remedy to allow parents of a black child who was prohibited from admission to a white school to appear before a board of education; these parents should have the support of a government-funded agency or an NGO.<sup>288</sup> Heyns and Brand illustrate how the Constitutional Court in the *Grootboom* and *TAC* decisions failed to retain supervisory jurisdiction over the implementation of its orders and how, as a result of this omission, the practical impact of these decisions remain uncertain.<sup>289</sup>

- 1.4 As resistance to a new law increases, positive sanctions are probably as important as negative sanctions.<sup>290</sup> Evan argues that Anglo-American legal systems generally do not award positive sanctions and that the likely instrument for compliance to be utilised by

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<sup>281</sup> Chemerinsky in Devins and Douglas (eds) (1998) 200.

<sup>282</sup> 484 F 2d 215, 245 (6<sup>th</sup> Cir 1973) rev'd 418 US 717 (1974).

<sup>283</sup> Chemerinsky in Devins and Douglas (eds) (1998) 199-200.

<sup>284</sup> Chemerinsky in Devins and Douglas (eds) (1998) 200.

<sup>285</sup> 413 US 189 (1973).

<sup>286</sup> Chemerinsky in Devins and Douglas (eds) (1998) 200.

<sup>287</sup> Chemerinsky in Devins and Douglas (eds) (1998) 200.

<sup>288</sup> Evan in Evan (ed) (1980) 560.

<sup>289</sup> Brand and Heyns in Manganyi (ed) (2004) 36.

<sup>290</sup> Evan in Evan (ed) (1980) 559; Gutto (2001) 221.

courts are fines or imprisonment (“negative sanctions”).<sup>291</sup> However, more severe fines do not necessarily lead to higher compliance.<sup>292</sup> If anything, Evan argues, very severe fines provide violators the chance to neutralise their feelings of guilt with what they feel are justified resentment against the excessive punishment.<sup>293</sup> Evan therefore argues that to assist in the learning of new behaviour and attitude, positive reinforcement is required. In the context of school desegregation, Evan suggests that subsidies for teachers’ salaries and classroom construction and rebates on income tax (“positive sanctions”) could have been provided to desegregated schools, in accordance with the length of time that a particular school had complied with desegregation directives.<sup>294</sup> In similar vein, Hepple argues that respondents (potential violators) must be better off if they voluntarily comply with the particular legislation, by for example offering government contracts, if they formulate plans and undertake positive monitoring and systematic reviews of their practices.<sup>295</sup>

- 1.5 To have any hope of effective enforcement, the state driving social change must be relatively powerful,<sup>296</sup> and must have significant technological surveillance facilities available.<sup>297</sup>
- 1.6 The enforcement mechanism should consist of specialised bodies and the presiding officers of these enforcement mechanisms must receive training to acquire expertise.<sup>298</sup> Mahomed sets out the following reasons why training of judicial officers in general had

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<sup>291</sup> Evan in Evan (ed) (1980) 559.

<sup>292</sup> Evan in Evan (ed) (1980) 559. This was of course one of the reasons why the death penalty was found unconstitutional in *S v Makwanyane* 1995 (3) SA 391 (CC); the state could not provide sufficient proof that the death penalty was a deterrent factor.

<sup>293</sup> Evan in Evan (ed) (1980) 559.

<sup>294</sup> Evan in Evan (ed) (1980) 559.

<sup>295</sup> Hepple (1997) 18 *ILJ* 606-607. Also see Coussey in Hepple and Szyszczak (eds) (1992) 46-47 and Lustgarten in Hepple and Szyszczak (eds) (1992) 468.

<sup>296</sup> Cotterrell (1992) 44. Ehrlich (1936) 372-373: “The effectiveness of the law of the state is in direct ratio to the force which the state provides for its enforcement, and in inverse ratio to the resistance which the state must overcome”.

<sup>297</sup> Bennington and Wein (2000) 21 *Int J Manp* 21; Cotterrell (1992) 44.

<sup>298</sup> Cf Bawa (1999) September *Consultus* 30; Hepple (1997) 18 *ILJ* 606-607; Gutto (2001) 192. S 180 of the Constitution states that national legislation may provide for training programmes for judicial officers. Regulation 3 of the Regulations for Judicial Officers in the Lower Courts 1993 (GR 361 11 March 1994) published in terms of s 16 of the Magistrates Act 90 of 1993 states that no person may be appointed as magistrate unless he/she has successfully completed a requisite course at Justice College.

- become necessary: The immense quantitative and qualitative changes in the law; litigation has become more complex; conflicts have become more complex that may be linked to industrial, social and economic development; the potential areas of jurisdiction of judges have expanded; a proper judicial insight in the lives of the disadvantaged had to be inculcated and a potentially massive expansion in the power of the judiciary had taken place.<sup>299</sup> He points out that training for judges had become commonplace in the United States, Canada, Australia, New Zealand, Malaysia, Pakistan and Sri Lanka, among other countries.<sup>300</sup>
2. The values (implicitly) underpinning a given new law should not run too far ahead of society's contemporaneous *mores*.
    - 2.1 The purpose behind the legislation must at least to a degree be compatible with existing values.<sup>301</sup> Evan states that "the rationale of the new law must clarify its continuity and compatibility with existing institutionalised values".<sup>302</sup> Jeffrey argues that changes in legal rules will only lead to social change to the extent that people believe in, agree with or accept the legal changes and then decide to model their behaviour in accordance with the new rules.<sup>303</sup> Lundstedt states that penalties prescribed by law must "appeal to the moral consciousness of the public" or else it will not be effective, or could undermine public confidence in the legal system.<sup>304</sup> Savigny's concept of *volksgeist* is in a similar vein. He states that law is an expression of the "spirit of the people" and that law "reflects and expresses a whole cultural outlook".<sup>305</sup> Savigny would of course have frowned upon the idea of "changing" society via legislation; a law would only come into existence if it reflected the *volksgeist*. Anecdotal evidence tends to suggest that South Africa's smoking

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<sup>299</sup> Mahomed (1998) 115 *SALJ* 108-109.

<sup>300</sup> Mahomed (1998) 115 *SALJ* 107.

<sup>301</sup> Macfarlane in Swain (ed) (2006) 105; Morison in Livingstone and Morris (1990) 9. In a somewhat different context Fukuyama (1992) 15-16 argues that a (strong) state breaks down if a failure of legitimacy occurs in at least the elites tied to the state itself: the ruling party, the armed forces, the police. At 20-21 he argues that Apartheid's loss of legitimacy among white elites ultimately led to its demise.

<sup>302</sup> Evan in Evan (ed) (1980) 557-560.

<sup>303</sup> Jeffrey in Brantingham and Kress (eds) (1979) 38.

<sup>304</sup> Lundstedt as translated and interpreted by Aubert (1983) 13 (from the original Swedish).

<sup>305</sup> Cotterrell (1992) 21.

- legislation is quite effective, even without being enforced. One reason may be that the vast majority of South Africans have come to accept that smoking is harmful.<sup>306</sup>
- 2.2 Laws set up in opposition to powerful economic values and interests may also (eventually) fail.<sup>307</sup> MacDonald illustrates how the interests of the (white) business class in South Africa were no longer served by Apartheid by the 1980s.<sup>308</sup> Because of a falling birth rate, whites could no longer fill all the middle and upper rungs of employment and businesses had to start looking at the black population to fill previously “white” jobs, bringing their interests in conflict with those of the Apartheid state.<sup>309</sup> Business’s interests ultimately prevailed with the advent of the post-1994 democratic South Africa and the adoption over time of pro-business economic policies.<sup>310</sup>
- 2.3 Laws that facilitate action that people want to take or that encourage voluntary change is likely to be more effective than compulsory change.<sup>311</sup> Allott distinguishes between “model laws” and “programmatic laws”.<sup>312</sup> A model law sets up a model that the population may adopt if they so choose. The legislature encourages the use of the model but it remains voluntarily. Should the model be adopted by society it will radically alter the content of legal relationships. It is a slow, cautious and less assertive way of achieving transformation but in Allott’s view more likely to succeed than programmatic laws.<sup>313</sup> An example of a “model law” would be where the legislature wishes to discourage polygamous

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<sup>306</sup> Griffiths in Loenen and Rodrigues (eds) (1999) 322 notes that anti-smoking legislation is characterised by an almost complete absence of formal law enforcement, yet the legislation is obeyed. Griffiths states that the “social civility” norms have already changed to incorporate a strong anti-smoking sentiment and that highly effective non-official enforcement is taking place. Desmond and Boyce in Pillay *et al* (eds) (2006) 203 report that a 2003 HSRC survey on social attitudes indicated that 76% of South Africans never smokes.

<sup>307</sup> Cf Przeworski (1991) 37: “A stable democracy requires that governments be strong enough to govern effectively but weak enough not to be able to govern against important interests”.

<sup>308</sup> MacDonald (2006) 73.

<sup>309</sup> MacDonald (2006) 73.

<sup>310</sup> MacDonald (2006) 88; 128; 143; 169; 173; 178. *Contra* Saul (2005) 5 who states, without analysis, that Apartheid would not have disappeared of its own accord and that it was the liberation forces’ armed struggle that brought the Apartheid state to its knees. At 177 he states, again without analysis, that “mass action ... was the key factor forcing the apartheid government onto the path of ‘reform’”.

<sup>311</sup> Allott (1980) xii. Griffiths in Loenen and Rodrigues (eds) (1999) 318 believes that rules are best known and obeyed that require the least departure from existing behavioural expectations. In similar vein Hepple (1997) 18 *ILJ* 604 states that laws are more effective when they facilitate action that people want to take, than laws designed to protect socially vulnerable groups.

<sup>312</sup> Allott (1980) xii; 168-236.

<sup>313</sup> See Allott (1980) 168-174 for a detailed discussion of “model laws”.

marriages but instead of an outright ban on such marriages, introduces the option of a monogamous marriage, with the hope that over time there would be a move to the more “progressive” option.<sup>314</sup> In Allott’s terms a “programmatic law” imposes a programme of compulsory change.<sup>315</sup> An example would be (mandatory) anti-discrimination laws, in Allott’s words laws aimed at overriding “the way people live; the social arrangements which they have in their homes; the attitudes and practices of employers at work; the prejudices of the people”.<sup>316</sup>

2.4 Models or reference groups must be used for compliance.<sup>317</sup> Evan provides the following examples of what he has in mind: The United States could have motivated its school desegregation efforts by referring to countries with which the United States identified with politically where desegregation had been in place for years without any negative effects.<sup>318</sup> It could also have referred to successful desegregation in the United States army.<sup>319</sup> What must be aimed at is providing admirable models to overcome resistance by potential recalcitrants.<sup>320</sup>

2.5 Laws are more effective when introduced to change emotionally neutral and instrumental areas of human activity.<sup>321</sup> Morison puts it as follows:<sup>322</sup>

Change through law works best where behaviour is economically rational, as in business activity, and less well in more customary or emotional aspects of life, such as family relationships. Here the law works only very slowly if at all.

Likewise, Luhmann refers to legal-sociological theories which postulate that “areas of life based on emotion” is more difficult to direct via legislation than “emotionally neutralised” areas such as the economy and communications.<sup>323</sup>

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<sup>314</sup> Allott (1980) 171.

<sup>315</sup> See Allott (1980) 174-236 for a detailed discussion of “programmatic laws”.

<sup>316</sup> Allott (1980) 194.

<sup>317</sup> Evan in Evan (ed) (1980) 557-560.

<sup>318</sup> Evan in Evan (ed) (1980) 558.

<sup>319</sup> Evan in Evan (ed) (1980) 558.

<sup>320</sup> Evan in Evan (ed) (1980) 559.

<sup>321</sup> Dror (1958) 33 *Tul L Rev* 800 and 801; Packer (2002) 170.

<sup>322</sup> Morison in Livingstone and Morison (eds) (1990) 8.

Cotterrell refers to research on the transplantation of laws from one country to another.<sup>324</sup> These studies seem to indicate that such “transplants” may be successful where the new laws concern instrumental matters and where a strong incentive to accept change may exist, such as in the commercial arena.<sup>325</sup> Family relations, however, are extremely resistant to change.<sup>326</sup> It is then, for example, not surprising that a legislative attempt in Tanzania to outlaw female genital mutilation, has not been particularly effective. In 1998 the practice was criminalised and made punishable by imprisonment of up to 15 years. However, no one has been found guilty of violating this law yet. Those prosecuted under this law are usually acquitted because the daughters involved have been unwilling to testify against their parents.<sup>327</sup>

- 2.6 Law must make conscious use of the element of time in introducing a new pattern of behaviour.<sup>328</sup> Evan argues that the shorter the transition time between the “old” and the “new” or “expected” pattern of behaviour, the easier the adaptation to the change, because it lessens the chance for the establishment of organised or unorganised resistance to the enacted change.<sup>329</sup> Evan then argues that this will only be true if enforcement agencies are committed to the behaviour required by the new law, and if positive sanctions are introduced when resistance starts to increase.<sup>330</sup> (I have dealt with these last-mentioned requirements above.) Allott takes an opposite view. He argues that transformation using law(s) is possible if the social transformer is willing to be *patient*, is willing to use

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<sup>323</sup> Luhmann (1985) 243. Also cf Rousseau (1968) 88-89: “Once customs are established and prejudices rooted, reform is a dangerous and fruitless enterprise; a people cannot bear to see its evils touched, even if only to be eradicated; it is like a stupid, pusillanimous invalid who trembles at the sight of a physician”.

<sup>324</sup> Cotterrell (1992) 24.

<sup>325</sup> Cotterrell (1992) 24.

<sup>326</sup> Cotterrell (1992) 24. Cf Prof LBG Ndabandaba (MP, IFP), speech at the second reading debate of the Act, reproduced in Gutto (2001) 33 and further: “The IFP is of the view that it is not correct for the patriarchal system to be listed on the same level as apartheid as a mother of all forms of discrimination. Patriarchy, in our view, is a cultural phenomenon, the purpose of which is to maintain order and social control in society ... The definition of harassment is also a little problematic. It is somehow too broad and could effectively apply to any lack of good manners, humour or proper human considerations ... There is no denying that the proper business of legislation is the prohibition of unfair discrimination and the promotion of equality. This noble exercise, however, must not be so overrated (sic) that it affects cultural and religious beliefs”.

<sup>327</sup> <http://www.ippmedia.com/cgi-bin/ipp/print.pl?id=72766> (accessed 2006-08-23).

<sup>328</sup> Evan in Evan (ed) (1980) 559.

<sup>329</sup> Evan in Evan (ed) (1980) 559.

<sup>330</sup> Evan in Evan (ed) (1980) 559.

- persuasion, is responsive to people's feelings and desires and is prepared to accommodate different views.<sup>331</sup> Allott seems to suggest that change-inducing laws are more likely to be effective over the longer term and seems to imply that change should be phased in over time, instead of suddenly confronting the population with a new required way of doing things, as Evan seems to argue.<sup>332</sup>
3. Different groups of people will be influenced in different ways by a new law.
    - 3.1 Large organisations with specialised personnel that is well-equipped to interpret rules will probably be committed to implementing new laws, but small businesses, individual homeowners, small landlords and individuals will probably not have sufficient knowledge and implementation on this level will be very difficult to achieve.<sup>333</sup> Griffiths argues that law only has a measurable effect if people use the law.<sup>334</sup> This means that the specific legal rule must be known and people must understand what it means; they must be aware of the relevant facts; they must have a sufficient motive for using the rule and must consider doing so feasible and appropriate; and they must not have an overriding motive for not using it.<sup>335</sup> Crucially, he believes that people's interpretation of what happened to them depends on their social surroundings, not the law.<sup>336</sup> Knowledge of the content of a legal rule is transmitted by the media, the educational system and social associations.<sup>337</sup> Each of these institutions has limited knowledge and resources.<sup>338</sup> Therefore (well-resourced) large organisations with specialised personnel are more likely to be committed to implementing new laws.<sup>339</sup>

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<sup>331</sup> Allott (1980) 196.

<sup>332</sup> However at 207 he seems to take no position. He argues that "impatience tends to be self-defeating – it is difficult to sustain the original momentum in the years ahead. Gradualism, on the other hand, runs the risk of being so gradual as to be imperceptible".

<sup>333</sup> Griffiths in Loenen and Rodrigues (eds) (1999) 318.

<sup>334</sup> Griffiths in Loenen and Rodrigues (eds) (1999) 315.

<sup>335</sup> Griffiths in Loenen and Rodrigues (eds) (1999) 315.

<sup>336</sup> Griffiths in Loenen and Rodrigues (eds) (1999) 317.

<sup>337</sup> Griffiths in Loenen and Rodrigues (eds) (1999) 317.

<sup>338</sup> Griffiths in Loenen and Rodrigues (eds) (1999) 318-319.

<sup>339</sup> Griffiths in Loenen and Rodrigues (eds) (1999) 315; 317; 318. A recent South African example bears this out. It has been reported that the South African banking industry will be spending approximately R1.5 billion in implementing the National Credit Act 34 of 2005. <http://www.businessday.co.za/PrintFriendly.aspx?ID=BD4A467927> (accessed 2007-05-22).



- 3.2 Laws put in place to assist or protect the economically weak will have limited impact. Laws such as these should be complemented by active and effective non-governmental support.<sup>340</sup> A provision allowing class actions will give private human rights groups the opportunity to initiate and monitor change.<sup>341</sup> Hepple is of the view that laws will likely succeed where the aim is to steer action that people want to take and less effective where rights are created to assist weaker parties; that is people who lack social and economic power.<sup>342</sup> Lustgarten states that the traditional model of single claimants under an Act designed to assist the socially and economically vulnerable will have limited impact and that if much is expected from this model, disappointment will follow.<sup>343</sup> The author argues that it is important to provide a system that people may use when they have been aggrieved, but the entire project should not be discarded simply because we do not trust law, or as Lustgarten puts it, “we don’t deny victims of accidents adequate compensation because we may have different theories about the economic impact of tort law”.<sup>344</sup>
4. To have any hope of legislating effective laws, Parliament should see to it that its laws are popularised.
- 4.1 The use of law will increase if the educational system is used in a well-directed way as a “nationally inclusive socialising agent”.<sup>345</sup> Bestbier accepts that the repeal of discriminatory laws do not automatically lead to similar norm changes in society.<sup>346</sup> She believes that these norm changes must also be accomplished via the law.<sup>347</sup> She notes the alienation of

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<sup>340</sup> Coussey in Hepple and Szyszczak (eds) (1992) 46-47; Gutto (2001) 299.

<sup>341</sup> Hepple (1997) 18 *ILJ* 606-607.

<sup>342</sup> Hepple in Hepple and Szyszczak (eds) (1992) 20. Some of the reasons Hepple advances for this argument are similar to my discussion of the limits of the law in addressing structural discrimination at pp 120-127 of the thesis.

<sup>343</sup> Lustgarten in Hepple and Szyszczak (eds) (1992) 466-467.

<sup>344</sup> Lustgarten in Hepple and Szyszczak (eds) (1992) 466-467.

<sup>345</sup> Bestbier (1994) 15 *Obiter* 108. Cf Prof LBG Ndabandaba (MP for IFP), speech at the second reading debate of the Act, reproduced in Gutto (2001) 35: “[O]ne must be engaged in a process of deprogramming and reprogramming according to new values and laws. That is why, in order to be effective, the Bill must be accompanied by a massive educational programme”. Also cf K Moonsamy (MP for ANC), speech at the second reading debate of the Act, reproduced in Gutto (2001) 47: “Concerted efforts will have to be made to educate citizens to change their attitudes and practices regarding the roles of women and men, the disabled, the aged and so forth”.

<sup>346</sup> Bestbier (1994) 15 *Obiter* 107.

<sup>347</sup> Bestbier (1994) 15 *Obiter* 107.



- individuals from legal processes due to ignorance and an accompanying feeling of incompetence and even impotence.<sup>348</sup> She advocates utilising the primary and secondary school system as a “nationally inclusive socialising agent”.<sup>349</sup> Dror argues that law could be used to change social institutions which in turn will influence social change, for example the national education system.<sup>350</sup> Griffiths is less optimistic. He argues that people’s interpretation of what happened to them depends on their social surroundings, not the law.<sup>351</sup> Knowledge of the content of a legal rule is transmitted by the media, the educational system and social associations and each of these institutions has limited knowledge and resources.<sup>352</sup>
- 4.2 The required change must be communicated to the large majority of the population.<sup>353</sup> Public awareness must be maintained over the long term.<sup>354</sup> The mass media (soap operas, advertising, music, news) should ideally become involved in popularising the required change.<sup>355</sup> Packer argues that the mass media, forming part of popular culture, is capable of competing with traditional beliefs.<sup>356</sup> Evan sees this criterion as part of providing effective remedies; potential beneficiaries of a change-inducing law will only be able to utilise such a law if they are aware of its existence.<sup>357</sup>
- 4.3 Laws that include incentives to encourage lawyers to use the new law and to inform clients of the existence of the new law, are more likely to be effective.<sup>358</sup>
- 4.4 The state driving social change must be able to rely on vast mass media communication.<sup>359</sup>

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<sup>348</sup> Bestbier (1994) 15 *Obiter* 107.

<sup>349</sup> Bestbier (1994) 15 *Obiter* 108.

<sup>350</sup> Dror (1959) 33 *Tul L Rev* 797.

<sup>351</sup> Griffiths in Loenen and Rodrigues (eds) (1999) 316.

<sup>352</sup> Griffiths in Loenen and Rodrigues (eds) (1999) 316.

<sup>353</sup> Morison in Livingstone and Morison (eds) (1990) 9; Ehrlich (1922) 36 *Harv L Rev* 138.

<sup>354</sup> Packer (2002) 173.

<sup>355</sup> Packer (2002) 189.

<sup>356</sup> Packer (2002) 189.

<sup>357</sup> Evan in Evan (ed) (1980) 560.

<sup>358</sup> Macaulay (1979) 14 *Law & Soc Rev* 161, 163, 164; Cotterrell (1992) 33.

<sup>359</sup> Cotterrell (1992) 44.

I return to these criteria in chapter 3.4 below, where I compare them to the Act and assess the Act's (potential) effectiveness as a tool with which to transform South African society.

## 2.6 *A court-driven or legislature-driven social transformation?*

If one accepts that “law” may or should be used to effect societal transformation, even if it is a limited instrument, which legal institution should be co-opted to facilitate such a project: Parliament or the courts? Below I set out a debate between authors who tend to favour either legislation-driven or court-driven programmes. I then argue that pragmatically one has to accept that, for the time being at least, a court-facilitated programme of societal change will not achieve the results one would hope for. (Depressingly, this does not necessarily mean that a programme of societal change driven or facilitated by the legislature would succeed either.<sup>360</sup>)

Klare takes for granted that judicial adjudication is a site of law-making: Judges are never completely constrained by the legal texts and it is unlikely that a system of total constraint (consistent with a democracy) will ever be developed.<sup>361</sup> He refers to the tendency of common law academics to overemphasise court decisions at the expense of legislation, executive action, administration, police procedure and extra-legal dispute resolution.<sup>362</sup> He argues that for ordinary South Africans these other processes matter more, but still believes that court decisions are important to study: South Africa has a justiciable bill of rights which supposedly introduced a culture of justification.<sup>363</sup> Compared to other law-making, adjudication is “the most reflective and self-conscious, the most grounded in reasoned argument and justification, and the most constrained

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<sup>360</sup> Eg cf Chemerinsky in Devins and Douglas (eds) (1998) 192: “The failure to improve economic circumstances for African Americans obviously reflects inadequacies not just of courts but also, and perhaps even more significantly, of legislatures”. Komesar (2001) argues that courts are most needed when alternative decision-making bodies such as the political process work least well. Courts, political processes, markets and informal communities all function well when the number of people affected are small and the decision to be made is not complex. However, when numbers and complexity increases, all these institutions’ abilities decrease. Also see Koopmans (2003) 262: “If many citizens want society changed ... the judiciary can help them as little as the political institutions, possibly less so”.

<sup>361</sup> Klare (1998) 14 *SAJHR* 146-147.

<sup>362</sup> Klare (1998) 14 *SAJHR* 147.

<sup>363</sup> Klare (1998) 14 *SAJHR* 147.

and structured by text, rule and principle”.<sup>364</sup> Adjudication is therefore ideally suited to illustrating what a culture of justification entails.<sup>365</sup>

Klare then attempts to identify a way in which courts can develop a politically and morally engaged method of adjudication without turning it into “illicit judicial legislation”.<sup>366</sup> He terms this possibility “transformative constitutionalism” by which he means “a long-term project of constitutional enactment, interpretation, and enforcement committed ... to transforming a country’s political and social institutions and power relationships in a democratic, participatory and egalitarian direction”; an “enterprise of inducing large-scale social change through nonviolent political processes grounded in law”.<sup>367</sup>

He makes an argument that South Africa has a post-liberal Constitution committed to large-scale, egalitarian social transformation; that judges and advocates can be committed to social transformation and be faithful to their professional role; that constitutional adjudication must acknowledge its political role more frankly; and that South Africa’s legal culture and legal education must be transformed as he identifies a disconnect between the constitution’s possibilities and South Africa’s conservative legal culture.<sup>368</sup>

He argues that one can read the Constitution as a post-liberal document because it is social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural and self-conscious about its historical setting, role and mission.<sup>369</sup> As to lawyers’ role in giving life to this promise, Klare accepts that national constitutions and “foundational legislation” enacted under a constitution (the Act could qualify as an example of foundational legislation) may uncontroversially have a transformational purpose because it is “the act of the people through their elected

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<sup>364</sup> Klare (1998) 14 *SAJHR* 147.

<sup>365</sup> Davis (2000) 117 *SALJ* 704 argues in a similar vein: “[T]here is a modest but significant role for law in promoting a culture of justification” and at 708: “[A]s much as judges should be compelled to enhance a culture of justification by insisting that law complies with the twin principles of participation and accountability, so are judges beholden to justifying their own decisions and being accountable therefor. In this way the citizenry can examine the justification for law, participate in the debate surrounding such law and thereby become not only the addressee but also the author of such law”.

<sup>366</sup> Klare (1998) 14 *SAJHR* 150.

<sup>367</sup> Klare (1998) 14 *SAJHR* 150.

<sup>368</sup> Klare (1998) 14 *SAJHR* 151.

<sup>369</sup> Klare (1998) 14 *SAJHR* 153-156.

representatives”.<sup>370</sup> However, the idea of transformative adjudication *is* controversial, as this seems to be an invitation to judges to work towards the achievement of political projects whereas judges are supposed to be appointed in a neutral fashion to enforce laws made by others, not to become involved in politics.<sup>371</sup> How is this “dilemma” to be resolved? Klare believes that legal texts must be interpreted; they do not self-generate their meaning.<sup>372</sup> Texts have gaps, conflict with other texts and are ambiguous.<sup>373</sup> A judge has to work with a medium that *is* constraining but that is also “far more plastic than is commonly acknowledged (although not infinitely plastic)”.<sup>374</sup> Lawyers should be more honest with themselves and with the larger community and should accept responsibility for constructing a social order through adjudication.<sup>375</sup>

Van der Walt (André) is skeptical about the “orthodox” common law method of reasoning to achieve transformation. His view is that the common law tradition is an institutionally sanctified and entrenched version of what is regarded as “normal” and this tradition resists change because courts fail to recognise opportunities for transformation.<sup>376</sup> In similar vein, van der Walt (Johan) states:<sup>377</sup>

I believe a significant part of the failure of the judicial development of the law to address the ills of modern society can be traced to conservative political attitudes bent on the preservation of an existing *status quo* and vested interests. Such political attitudes are bound to turn open-ended legal principles such as reasonableness, good faith and the *boni mores* of society into rule-like maxims that entrench rather than challenge existing power relations.

The implication seems to be that social transformation in present-day South Africa will have to be mainly legislation-driven and that open-ended principles (such as the test for “fairness”/“unfairness”

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<sup>370</sup> Klare (1998) 14 *SAJHR* 157.

<sup>371</sup> Klare (1998) 14 *SAJHR* 157.

<sup>372</sup> Klare (1998) 14 *SAJHR* 157.

<sup>373</sup> Klare (1998) 14 *SAJHR* 157.

<sup>374</sup> Klare (1998) 14 *SAJHR* 160.

<sup>375</sup> Klare (1998) 14 *SAJHR* 164.

<sup>376</sup> Van der Walt (2002) 17 *SAPL* 259.

<sup>377</sup> Van der Walt (2001) 17 *SAJHR* 361.

set out in section 14 of the Act<sup>378</sup>) should be avoided, lest a (conservative) judiciary grab the opportunity to scuttle the transformative project.<sup>379</sup>

From another perspective, Watson explains why legislation is a better “instrument” in developing the law than the judiciary:<sup>380</sup>

When law develops from precedent, the law must always wait upon events, and, at that, on litigated events; it will always be retrospective. The scope for development of legal principles – especially in the short term – is very restricted, and there can be no organised systematic development ... Legislation operates very differently. It can and generally does provide primarily for the future. It can be very systematic, general in its purposes, and removed from individual particular cases. It can make drastic speedy reforms. Development by legislation can have a very satisfactory explicit or implicit theoretical base and can thus point the way to further reform.

I would (pragmatically) argue that courts in present day South Africa are quite limited in what they can achieve. Although some authors view a court-driven process positively,<sup>381</sup> in a South African context it is clear that courts will not achieve much:<sup>382</sup>

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<sup>378</sup> See the discussion relating to the application of this open-ended test in chapter 3 (3.3.5) below.

<sup>379</sup> Courts can play an obstructionist role, consciously or subconsciously. Beermann (2002) 34 *Conn L Rev* 984-5 notes how the American Supreme Court’s creation of the “state action” principle in interpreting the Fourteenth Amendment made it very difficult for Congress to act to attack private discrimination. (In terms of this doctrine, the American Constitution applies only to “state action”. *Civil Rights Cases* 109 US 3, 3 S Ct 18 (1883). State action consists of (a) statutes or regulations enacted by national, state and local bodies and (b) the official actions of all government officers. State action also includes the actions of private individuals or groups if the private actor is performing a government and if the private actor is sufficiently involved with or encouraged by the state. See Woolman “Application” in Chaskalson *et al* (1999) 10-23). Congress passed civil rights legislation in 1866, 1870, 1871 and 1875. The Supreme Court either read these statutes very narrowly or invalidated them on the basis of unconstitutionality. At 986 Beermann notes that the “state action” doctrine still constitutes a fundamental limitation on the Fourteenth Amendment. He analyses the Supreme Court’s decisions on civil rights and at 1034 concludes that “[T]he degree of anti-civil rights judicial activism at the Supreme Court is still much too high. By and large, the Court has obstructed Congress and stood against efforts to legislatively redistribute power from the advantaged to the disadvantaged”.

<sup>380</sup> Watson (1978) 37 *Cam LJ* 323 and 324.

<sup>381</sup> Tay in Kamenka *et al* (eds) (1978) 7 holds that the common law system allows for the detailed consideration of particular people in particular circumstances; that previous cases are seen as historical events that arose in a specific and actual social, psychological and historical setting. Only in common law reports do the parties “come alive”; do they have names and histories and personal quirks. Cotterrell (1992) 17 points out that common law countries still regard judicial decisions as the “heart of the legal system”. Handler (1978) 209-210 lists the positive indirect effects of litigation: it provides publicity; legitimises values and goals, and may be used as part of broader campaign. At 212 he argues that litigation may be used as leverage and that litigation may be used to bring a halt to a particular action and so increase the party’s bargaining power; seen from this perspective the eventual court order is not the end but part of the strategy. At 214 he argues that litigation may generate harmful publicity that may force the discriminator into settlement, that would be some consolation to a claimant that is not able to proceed with the court case to finality because of the duration or costs involved. At 218-9 he seems to argue that litigation may be used as “consciousness

1. Based on the results of empirical surveys,<sup>383</sup> it is not at all clear that South African courts are seen as legitimate in the eyes of the majority. It is perhaps trite that courts need to be held in esteem within the psyche and soul of the nation, or to be reduced to “paper tigers with a ferocious capacity to roar and snarl but no teeth to bite and no sinews to execute what may then become a piece of sterile scholarship”.<sup>384</sup> It is at least arguable that Parliament enjoys more legitimacy than the courts and that Parliament should therefore be the main force behind transformation.
2. Any court system is complaints-driven.
- 2.1 Courts work best when a single plaintiff sues a single defendant and if the dispute between the parties may be reduced to a single issue.<sup>385</sup> The more complicated the dispute, the more strain the system suffers. Social reform groupings use the courts because they are weak politically but they generally bring claims that are complex and that are not easily “solved” in a court;<sup>386</sup> courts are unlikely to produce direct, tangible results.<sup>387</sup>

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raising” and that litigation can contribute to a change in public opinion. McKenna (1992) 21 *Man LJ* 327 believes that a potential advantage of judicial activism is that it may permit legal development in a field where there is typically little political urgency or pressure for legislative action but admits that *ad hoc* judicial law-making introduces a number of dangers. Krishnan (2003) 25 *HRO* 818 argues that in a country where the legislature or the political system is viewed as illegitimate (he uses the words “corrupt and inaccessible”) courts could provide an avenue as a forum where a cause may be advocated. He optimistically asserts that when litigation is “done in a coordinated, structured and repeated fashion”, it “has the potential for creating a culture of rights-consciousness within a society”.

<sup>382</sup> Many of the reasons set out below would apply to any court-driven process, whether South African or elsewhere. Reasons that apply specifically to South Africa are set out in points 1, 4 and 6.

<sup>383</sup> See the results of these surveys in chapter 5 below.

<sup>384</sup> Mahomed (1998) 115 *SALJ* 112. Tyler (2000) 25 *Law & Soc Inq* 983-985; 988; 1000 highlights morality and legitimacy as two factors that will likely lead to voluntary obedience. He refers to studies that have shown that people voluntarily defer to authorities who make decisions that they regard as fair. If judges are perceived as neutral, honest, concerned about citizens and respectful of citizens and their rights, most people will feel satisfied with court decisions and will be likely to obey them.

<sup>385</sup> Cf *S v Williams* 1995 (3) SA 632 (CC) para 8: “[Courts’ role in promoting a human rights culture] ... demands that a court should be particularly sensitive to the impact which the exercise of judicial functions may have on the rights of *individuals who appear before them*” (my emphasis). Allott (1980) 65 is scathing – he believes that a system of self-help still exists and that “might is still right” because a plaintiff must still initiate the complaint. Pound (1917) 3 *ABA J* 68-69 argues that courts generally depend on interested parties *not* professionally involved with the legal system to set it processes in motion. He argues that claimants need incentives to use this system. Hepple in Hepple and Szyszczak (eds) (1992) 20-21 states that law needs specificity, has to be clear and needs an “identifiable culprit”. Also see Chemerinsky in Devins and Douglas (eds) (1988) 193.

<sup>386</sup> The housing crisis in the Western Cape, for example, was not solved when the Constitutional Court ruled in favour of the respondent in *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

In the context of anti-discrimination legislation, a number of authors comment on the inherent weaknesses of a complaints-driven process. Handler<sup>387</sup> notes that the school desegregation cases “simply required too many individual lawsuits in too many places”. Freedman argues that the legislature is better positioned to eradicate disadvantage via a redistribution of resources than courts, as courts “are best suited to deal with *particular wrongs*, rather than with patterns of systemic disadvantage”.<sup>389</sup> Delgado argues that a complaints-driven process assumes that the “perpetrator” is a malevolently motivated individual and assumes that racism is the exception; not an integrated system that elevates one group at the expense of another.<sup>390</sup> Such a complaints-driven mechanism serves as a “valuable, if unstated, homeostatic mechanism for maintaining and replicating social relations”;<sup>391</sup> “if racism is seen as a disease its cure would be medical, educational, psychological treatment – so intrusive that liberals and conservatives might be expected to object”.<sup>392</sup> On a more practical level and in the context of disability discrimination, Astor<sup>393</sup> notes that

[I]f intending litigants must wait over an hour for an adapted taxi to arrive, pay for it out of their pension, and arrive at the lawyer’s office to find that they cannot get in the door, they need to be exceptionally determined not to give up the idea of pursuing their complaint entirely.

2.2 A complaints-driven process will produce very few results where the oppressed or underrepresented do not “feel” the wrongs committed against them;<sup>394</sup> they may

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<sup>387</sup> Handler (1978) 209.

<sup>388</sup> Handler (1978) 117.

<sup>389</sup> Freedman (2000) 63 *THRHR* 320; my emphasis.

<sup>390</sup> Delgado (2001) 89 *Geo LJ* 2295.

<sup>391</sup> Delgado (2001) 89 *Geo LJ* 2295.

<sup>392</sup> Delgado (2001) 89 *Geo LJ* 2295. At 2296 he argues that racism must be looked for in “broad structures that submerge people of color, workers, and immigrants, and replace these structures with ones that can fulfil our unkept promises of democracy, equality, and a decent life” (my emphasis). He does not suggest how this is supposed to be done; if at all via the law.

<sup>393</sup> Astor (1990) 64 *Austr LJ* 114.

<sup>394</sup> Cf *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) at para 14: [South Africa is] a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons”.



experience these wrongs as “life” and the thought of approaching a court may not even enter their minds.<sup>395</sup> A potential claimant perhaps does not realise that a claim exists.<sup>396</sup>

Like other people who have lived under injustice for a long time, many women tend to see themselves through the eyes of their oppressors, having internalised patriarchal views of women’s ‘proper’ roles which justify and legitimate their situation. They often see their situation as the product of ‘natural’ forces which cannot and even should not be changed.

2.3 In a complaints-driven system, the “wrong” claimants may approach the courts. For example, Lahey sets out an empirical survey of American Supreme Court jurisprudence on the Fourteenth Amendment.<sup>397</sup> From 1868 to 1911, the court heard 604 such claims of which only 28 cases concerned black interests and of which blacks lost 22 of these cases.<sup>398</sup> From 1920 to 1937, the Court declared 132 laws unconstitutional but only a few related to black people and more than 67% were linked with property or economic claims.<sup>399</sup> In Canada, equality disputes are mainly brought (and won) by male complainants.<sup>400</sup> Almost all the American Supreme Court sex discrimination cases have been brought by men.<sup>401</sup> The equality jurisprudence produced by the South African Constitutional Court largely had to be developed with the “wrong” kind of claimants and the “wrong” kind of facts:<sup>402</sup> privileged females,<sup>403</sup> white males,<sup>404</sup> a (rich) German fugitive from

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<sup>395</sup> Handler (1978) 223. Cf *Moise v Transitional Local Council of Greater Germiston* 2001 (8) BCLR 765 (CC) para 14: “[M]any potential litigants (arguably the majority) are poor, sometimes illiterate and lack the resources to initiate legal proceedings within a short period of time. *Many are not even aware of their rights* and it takes time for them to obtain legal advice. Some come by such advice only fortuitously” (my emphasis).

<sup>396</sup> Verwoerd and Verwoerd (1994) 23 *Agenda* 70.

<sup>397</sup> Lahey in Martin and Mahoney (eds) (1987) 74.

<sup>398</sup> Lahey in Martin and Mahoney (eds) (1987) 74.

<sup>399</sup> Lahey in Martin and Mahoney (eds) (1987) 74.

<sup>400</sup> Lahey in Martin and Mahoney (eds) (1987) 82.

<sup>401</sup> MacKinnon in Dawson (ed) (1998) 366.

<sup>402</sup> McKenna (1992) 21 *Man LJ* 327 argues that tribunals are constrained by the facts of particular cases and are usually “unable to shape the law with the same measure of reflection, cogency and universality practised by legislatures”. He sees a danger in politicians becoming too comfortable in their own passivity with the result that tribunals may then act as a conservative force, “sufficient to prevent a build up of pressure for political change, but insufficient to keep the law in reasonable harmony with social values and power relations”. To the Constitutional Court’s credit, it has somehow managed to develop a relatively cogent equality jurisprudence despite the “wrong” sets of facts. To my mind, the cases referred to in the footnotes immediately below were brought by privileged or powerful members of society. The equality clause in the Constitution was not primarily drafted to cater for the complaints in these cases. Cf Carpenter (2002) 65 *THRHR* 184: “Among the ironies are the fact that the only allegation of discrimination based on race to have engaged the attention of the Constitutional Court was brought by whites; that so many cases were on unspecified grounds of discrimination; that most of the women who alleged discrimination based on

justice,<sup>405</sup> forestry legislation,<sup>406</sup> while the first “affirmative action” decision to be decided by the Constitutional Court was brought by (privileged) “old order” Parliamentarians.<sup>407</sup> A thorough-going empirical investigation of equality court discrimination complaints would have to be undertaken to establish whether this pattern is also evident for these courts.

- 2.4 It is also possible that the “right” claimants will bring “wrong” claims. In its first year of operation the Canadian Human Rights Commission had to turn away a number of complaints that could not be related to a discriminatory practice.<sup>408</sup> In its 1978 report the Commission provided the following examples:<sup>409</sup>

A mother with three children to support claimed that she could not find a job that would provide her with an adequate income. She was in tears. A discreet exploration of her situation did not indicate any discrimination had occurred. An elderly man wrote that his oil bills were rising faster than his pension indexing. He may well have to sell his house ... A woman whose unemployment benefits were cut off had not found out that she could appeal such a decision until after it was too late. She was not disentitled on the basis of a prohibited ground of discrimination.

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sex and gender were in fact persons from privileged sectors of society; and that two of the most important cases dealing with gender issues were brought by males. Thus the Constitutional Court has not had many opportunities to deal directly with factual situations of the kind that were a characteristic of pre-1994 South Africa”. Also see *Albertyn and Kentridge* (1994) 10 *SAJHR* 168; *Albertyn and Goldblatt* (1998) 14 *SAJHR* 273. A number of more “deserving” cases have since been reported, where the complainants could be described as (historically) vulnerable members of South African society. These complainants were not necessarily successful, however. These cases include *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) (the gay and lesbian community); *National Coalition of Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) (the gay and lesbian community); *Moseneke v The Master* 2001 (2) SA 18 (CC) (administration of deceased black estates); *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) (person living with HIV); *S v Jordan* 2002 (6) SA 642 (CC) (female sex workers); and *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) (permanent residents).

<sup>403</sup> *Brink v Kitshoff* 1996 (4) SA 197 (CC) related to a constitutional challenge to the Insurance Act.

<sup>404</sup> *The President of the Republic of South Africa v Hugo* 1997 (1) SA 1 (CC) case related to a complaint by a male prisoner that (then) President Mandela's proclamation to only grant clemency to certain female prisoners were discriminatory. *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) related to a claim that Pretoria City Council unfairly discriminated by imposing a flat rate on Mamelodi whereas 'white Pretoria' was charged according to actual consumption. *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC) related to s 18(4)(d) of the Child Care Act 74 of 1983 that only requires the mother of an illegitimate child to consent to the child's adoption.

<sup>405</sup> *Harksen v Lane* 1998 (1) SA 300 (CC) related to the alleged unconstitutionality of ss 21, 64 and 65 of the Insolvency Act 24 of 1936.

<sup>406</sup> *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) related to s 84 of the Forest Act 122 of 1984. The complaint was that the Act unfairly put the onus on the defendant in civil disputes.

<sup>407</sup> *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC).

<sup>408</sup> *Falardeau-Ramsay* (1998) 47 *UNB LJ* 168.

<sup>409</sup> *Falardeau-Ramsay* (1998) 47 *UNB LJ* 168.

- 2.5 A number of authors refer to the “one shotter” versus the “repeat player” that is characteristic of a complaint-driven dispute resolution mechanism.<sup>410</sup> In a system where a “wronged” plaintiff sues a “malevolent” defendant, the defendant is more likely to be a well-resourced repeat player while the plaintiff is more likely to be an under-resourced one-shotter. The tactical advantage lies with the defendant – their lawyers are specialists, they can afford long-term litigation based on complex facts, they can afford experts, they can afford to take a long-term view, they can budget for litigations costs and they are familiar with legal jargon and the nature and risks of court proceedings.<sup>411</sup>
3. The institutional nature of courts causes other disadvantages as well. Courts sometimes attempt to “simplify” what could be an immensely complex problem.<sup>412</sup> Most courts have to reach a decision based on partial facts.<sup>413</sup> A decision cannot be indefinitely deferred until all the information is available; the search for “truth” has to be pragmatically balanced against the need to reach a (relatively) speedy decision.<sup>414</sup> Judgments are handed down with

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<sup>410</sup> The most-cited article in this regard is Galanter (1974) 9 *Law & Soc Rev* 95.

<sup>411</sup> Aubert (1983) 142. Neumann (1986) 195 refers to Weber’s “advantage of small numbers” – a large number of potential plaintiffs will likely sue a small number of, for example banks or insurance companies, who may meet and keep deliberations secret and will probably demonstrate greater solidarity. Law cannot overcome this. Also see Ehrlich (1922) 36 *Harv L Rev* 141; Griffiths in Loenen and Rodrigues (eds) (1999) 325, Kidder (1983) 75-76, 136; Handler (1978) 31 and Hunt (2002) 71 *Henn L* 19. Haynie (2005) 21 *SAJHR* 476 fn 22 quotes a large number of empirical studies that have found that those litigants with more resources are more likely to succeed. In the same article at 483 Haynie quotes a Constitutional Court judge who bluntly told her “the one-shotters (ie inexperienced and less expensive counsel presumably hired by a resource-constrained litigant) aren’t very helpful”. Another Constitutional Court judge said that the quality of the oral argument reflected the inexperience of one-shotters as they do not address the broader issues. Most judges interviewed by Haynie thought that a bad oral argument was more likely to lose a case for a client than a good oral argument would win a case for a client. Arguably inexperienced counsel are more likely to produce bad arguments. At 489 Haynie argues that Galanter’s hypothesis may not necessarily apply in South Africa as white, experienced advocates who appear before transforming courts and “ideologically divergent” judges may not necessarily be “sufficiently conversant with new constitutional principles and precedents or new judicial personalities”. The counter-argument is more persuasive: “Conversely, one may find that more experienced may be particularly advantaged before courts whose judges lack the experience of previous appointees. Newly appointed judges who were denied years to develop expertise in a particular area may be compelled to rely on the expertise of veteran advocates”.

<sup>412</sup> Hannett (2003) 23 *Oxford J LS* 76: “Rather than acknowledging the complex ways in which discrimination operates between and within groups in society, the court retreats into easily compartmentalised, discrete, essentialist understandings of discrimination”. Haynie (2005) 21 *SAJHR* 480 quotes an advocate that suggested that the advocate must “give the judge a hamburger rather than a five-course meal – he wants fast food – simplify, simplify, simplify”.

<sup>413</sup> Cf *Westminster Produce (Pty) Ltd t/a Elgin Orchards v Simons* 2001 (1) SA 1017 (LCC) para 16. Also see *Wagener v Pharmicare Ltd; Cuttings v Pharmicare Ltd* 2003 (4) SA 285 (SCA) para 37: “[S]ingle instances of litigation cannot possibly provide the opportunity for the breadth and depth of investigation, analysis and determination that is necessary to produce [an effective structure to deal with strict liability for manufacturers]”.

<sup>414</sup> Levy-Bruhl as translated and interpreted by Cotterrell (1992) 51; *Pharmaceutical Society of South Africa v Tshabalala-Msimang* 2005 (3) SA 238 (SCA) para 33.

incomplete knowledge of background social circumstances and the likely effect of new rules or principles cannot be readily ascertained.<sup>415</sup> This means that courts do not necessarily solve the “real” problem – suppose, for example, that a poor tenant’s water supply is discontinued. The “problem” that the legal system may perhaps be able to solve is to have the water supply returned; but the underlying, structural disadvantage remains. The tenant has scarce resources and will likely decide not to waste money on a system that cannot effectively address his or her situation.<sup>416</sup> It is therefore not surprising that poor people do not readily access the justice system; the justice system (lawyers; courts) cannot offer them anything meaningful.

Lawyers serve the propertied classes – they, for example, draft contracts and wills and assist in the conveyancing of property. Poor people do not need these services.<sup>417</sup> Law “works” for employed people; for people with resources and who have something to lose. If a potential claimant has already lost everything, or have never had anything, law can do very little. If the economy does not grow and insufficient jobs are available, legal “solutions” such as affirmative action won’t do a thing to resolve the poverty.<sup>418</sup>

On another level, courts do not solve problems as well. Cotterrell argues that the legal system depends on ignorance to be supported and he notes that the more people know about courts the more dissatisfied they are with it; for example the shock of realising that what the client regarded as important was treated as “irrelevant” by the court.<sup>419</sup> In a divorce case, the wronged wife may simply want her day in court, to verbalise her anger and disappointment at her philandering husband; forcing him to listen to her, perhaps for the first time in their lives. However, judges are loath to hear contested divorce cases and the case may be stood down, day after day, in an attempt to force the parties to settle. The wife’s real

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<sup>415</sup> Cotterrell (1992) 91. Allott (1980) 69-70 refers to “poor feedback systems”.

<sup>416</sup> Cf Kidder (1983) 90-91.

<sup>417</sup> Kidder (1983) 74-76.

<sup>418</sup> Nyman (1994) 23 *Agenda* 82.

<sup>419</sup> Cotterrell (1992) 173.

“problem” is not solved.<sup>420</sup> The legal system forces a dispute into an “admit/deny” pattern while the “real” conflict may be about interests.<sup>421</sup>

It is not necessarily true that courts should be preferred to the legislature because the legislature is more open to persuasion when lobbied by powerful players than the courts. During the drafting of the Act the insurance industry persistently lobbied for a complete defence to so-called “mere economic differentiation” and eventually got something from the portfolio committee.<sup>422</sup> Had the lobbying not taken place, section 14(2)(c) would not have formed part of the Act and the fairness/unfairness enquiry would have been more coherent.<sup>423</sup> That is not to say, however, that over time courts could not have crafted an insurance-friendly defence out of the factors listed in the Act, even in the absence of section 14(2)(c). Galanter argues that repeat players in litigation can afford to take a long term view and may play for a change in the rules.<sup>424</sup> The repeat players are likely to be powerful players as well.

4. Representivity is a major concern in the South African context.<sup>425</sup> If the legal profession, the magistracy and judiciary are dominated by a particular gender or race, or if they hold

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<sup>420</sup> This example is based on a similar incident that occurred while I was an articled clerk in Johannesburg. The particular divorce case stood down for four days but the plaintiff wife was adamant that she wished to proceed with the case. When a judge was finally allocated to the case during the late afternoon of the fourth day, the wife was called as the first witness. After she testified the case was postponed to the next day. The case settled that evening – all she wanted to do was to tell her husband that she was angry and hurt – she nursed him back to health after he contracted cancer and he repaid her by having a number of affairs.

<sup>421</sup> Aubert (1983) 63. From another perspective courts as an institution are also likely to have limited power to change things. Ferejohn and Kramer in Drobak (ed) (2006) 161 reminds readers that courts are the least dangerous branch of government, having neither the purse nor the sword to enforce its own judgments. The authors argue because of this political weakness, courts will generally attempt to hand down judgments in such a way as to minimise the risk of a “showdown” with the other branches of government, and so ensure that its judgments are usually enforced. Edwards in Drobak (ed) (2006) 230 agrees: judges’ self-restraint builds up constitutional legitimacy over time, which in turn allows the other branches of government to develop the habit of obedience to judgments and as this practice becomes entrenched, courts achieve real independence. However, to ensure the continued existence of that independence, courts must continue to exercise self-restraint.

<sup>422</sup> See fn 497 (p 106) and pp 324-328 of the thesis below.

<sup>423</sup> See Albertyn *et al* (eds) (2001) 41; 46.

<sup>424</sup> Galanter (1974) 9 *Law & Soc Rev* 100.

<sup>425</sup> Zulman (2002) 76 *Austr LJ* 42 points out that the South African judiciary is not particularly representative. By June 2001 of the 192 permanent judges, 52 or 27% were people of colour: Six of the provincial divisions and the Land Claims Court were headed by people of colour. Millar and Phillips (1983) 11 *Int J Soc Law* 422 note that the legal profession is to a large degree male-dominated. The same is probably true of the South African legal profession. Based on the profile of the 2007 intake of first year law students at the university where I teach, in future the profession may become dominated by women.

stereotypical views about race and gender equality, will they identify possible causes of action and will they grant effective remedies?

Handler points out that the outcome of a dispute depends to a large degree on the lawyer-client relationship.<sup>426</sup> A strong client may dominate his or her attorney; any attorney is likely to dominate a poor, unknowledgeable client. It is not necessarily in lawyers' interests to utilise a particular Act, for example consumer protection laws.<sup>427</sup> Lawyers may for example not wish to utilise the Act to pursue a case of loan discrimination against a bank, as that particular lawyer may wish to receive more work from that particular bank. Clients from a different socio-economic or ethnic background than their lawyers may not be accurately "heard" by their lawyer and may be represented at court in a way that they would not necessarily have hoped for.

5. The remedies that courts are generally inclined to grant cannot always satisfactorily address the disadvantage suffered:<sup>428</sup>

Sometimes courts are explicit about their refusal to grant far-reaching remedies. Buntman considers *Washington v Davis*<sup>429</sup> and *McCleskey v Kemp*<sup>430</sup> and points out that in both cases the black litigants were portrayed as challengers to the "American way" and the "correct" *status quo*.<sup>431</sup> In both cases the Supreme Court rejected the litigants' claim *inter alia* based on the consideration that to have found for them would have been too disruptive to the economic, social and political order.<sup>432</sup> *Davis* related to a complaint by black applicants to the Washington DC police force that the civil service exam was discriminatory as black applicants failed at a grossly disproportionate rate compared to white applicants.<sup>433</sup> The Supreme Court rejected the argument and found that if it had to consider the disproportionate impact, widespread and wholesale economic redistribution and social re-

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<sup>426</sup> Handler (1978) 25.

<sup>427</sup> Cf Kidder (1983) 129-131.

<sup>428</sup> Chemerinsky in Devins and Douglas (eds) (1998) 199.

<sup>429</sup> 426 US 229 (1976).

<sup>430</sup> 481 US 279 (1986).

<sup>431</sup> Buntman (2001) 56 *Univ Miami L Rev* 21.

<sup>432</sup> Buntman (2001) 56 *Univ Miami L Rev* 21.

<sup>433</sup> Buntman (2001) 56 *Univ Miami L Rev* 22.

engineering would perhaps have to take place and would raise questions or even invalidate a whole range of tax, welfare, public service, regulatory and licensing statutes, on the basis that the statutes are more burdensome to the poor than the more affluent white.<sup>434</sup>

Kagan provides striking examples of the limits of traditional legal remedies: Courts can issue orders against overt discrimination, but they cannot increase the tax base of central cities, eliminate economic disparities between the poor and the suburban middle class, create governmental programmes, guarantee jobs, build subsidized houses, or operate halfway houses for the mentally ill.<sup>435</sup>

In the same vein Loenen argues that it is primarily the legislature that must see to it that substantive equality is achieved.<sup>436</sup> She provides the following example to illustrate that the remedy that a court would grant is not ideally suited to achieving the “best” result: The Dutch legislature considered an amendment to its Unemployment Act to make the factor “work history” decisive in ascertaining the period for which a person could claim unemployment benefits – the longer a person had worked, the longer that person would be entitled to benefits. A question was raised in Parliament as to possible indirect sex discrimination: more women than men would have given up their employment to take care of young children and more women would therefore have a shorter “work history”. The legislature’s solution was to allow people taking care of young children to count these years as part of their “work history”. The proviso was couched in sex-neutral terms, therefore also allowing stay-at-home fathers to be included.<sup>437</sup> Had the Act been promulgated in its original form and had a court to decide on the appropriate remedy, it would have faced a dilemma: striking down the “work history” factor would have had much more serious economic consequences than Parliament would have intended when it enacted the Act.<sup>438</sup> Loenen argues that a court would not have been able to introduce the solution the Dutch legislature opted for.<sup>439</sup>

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<sup>434</sup> Buntman (2001) 56 *Univ Miami L Rev* 22.

<sup>435</sup> Kagan (2001) 180.

<sup>436</sup> Loenen (1997) 13 *SAJHR* 428.

<sup>437</sup> Loenen (1997) 13 *SAJHR* 428.

<sup>438</sup> Loenen (1997) 13 *SAJHR* 428.

<sup>439</sup> Loenen (1997) 13 *SAJHR* 428.

Handler argues that courts consider themselves overburdened and would rather get rid of problems.<sup>440</sup> Enforcement of court orders is problematic and courts will generally not set up elaborate structures to enforce judgments.<sup>441</sup> This puts pressure on the plaintiff and requires staying power.<sup>442</sup> Money payments are generally not difficult to monitor, except when small amounts need to be paid out to a large group of people.<sup>443</sup> Courts or court-like structures are probably better equipped to provide short-term or immediate remedies and are loath to order long-term restructuring.<sup>444</sup> For example, Chisholm and Napo refers to two commissions of enquiry that were set up to investigate gender violence at two Soweto schools, one a primary school and the other a high school.<sup>445</sup> The primary school enquiry was set up under the chairpersonship of a woman, the Director of Personnel, Human Resources Development and Organisational Development, educated at a liberal South African university and acutely aware of gender inequality.<sup>446</sup> The high school enquiry was placed under the control of a male advocate and an outsider to the particular community.<sup>447</sup> Both enquiry reports examined the grievances on a case-by-case basis and recommended the transfer of particular students and/or teachers.<sup>448</sup> In the authors' words, such an approach "dissolve but do not resolve" the issues.<sup>449</sup> The long-term effect is to silence and trivialise grievances.<sup>450</sup>

6. It is perhaps trite to mention that the costs of legal proceedings in South Africa are prohibitively high for the vast majority of South Africans.<sup>451</sup> Sarkin states that legal aid in civil matters is almost entirely unavailable to the majority of South Africans.<sup>452</sup> He lists the most important ways in which access to justice is provided in South Africa: Private attorneys and advocates (compensated by the Legal Aid Board (LAB)); LAB-funded candidate attorneys in

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<sup>440</sup> Handler (1978) 24.

<sup>441</sup> Handler (1978) 24.

<sup>442</sup> Handler (1978) 24.

<sup>443</sup> Handler (1978) 22-25.

<sup>444</sup> Handler (1978) 24.

<sup>445</sup> Chisholm and Napo (1999) 41 *Agenda* 35.

<sup>446</sup> Chisholm and Napo (1999) 41 *Agenda* 36.

<sup>447</sup> Chisholm and Napo (1999) 41 *Agenda* 36.

<sup>448</sup> Chisholm and Napo (1999) 41 *Agenda* 36-37.

<sup>449</sup> Chisholm and Napo (1999) 41 *Agenda* 37.

<sup>450</sup> Chisholm and Napo (1999) 41 *Agenda* 37.

<sup>451</sup> Cf Froneman J's remarks in *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 (1) SA 141 (SE) para 27.

<sup>452</sup> Sarkin (2002) 18 *SAJHR* 630. Francis (Liberty conference) 71 confirms that legal aid is provided in criminal matters only and that the Legal Aid Board "has inherited a logistical mess".



rural law firms; LAB-funded law clinics; LAB-funded justice centres; uncompensated private lawyers (*pro bono*; *pro amico*; *in forma pauperis*); public interest law firms; independent university law clinics; advice offices staffed by paralegals; legal insurance schemes; contingency fee arrangements and the small claims courts.<sup>453</sup> Sarkin deplors the fact that more free legal work was done during Apartheid,<sup>454</sup> and advocates the creation of a *pro bono* clearing house.<sup>455</sup> Francis highlights a number of issues that hamper access to justice: the high cost of private attorneys, the uneven geographical distribution of legal services, a lack of information about legal services, the intimidating image of lawyers, limited small claims court jurisdiction and the failure of many lawyers to provide community service.<sup>456</sup> He states that attorneys in rural areas serve primarily wealthy farmers with whom they share linguistic, cultural and political links, which leaves few attorneys to assist the majority of impoverished rural population. He argues that to ordinary people the law remains an area of mystery and attorneys are regarded as shrewd and unscrupulous, which means that ordinary people are loath to use legal services.<sup>457</sup> Francis offers the following suggestions to improve access to justice: the training of paralegals to provide primary legal services; an increase in the jurisdiction of the small claims court and the establishments of these courts throughout South Africa; the removal of barriers to enter the legal profession, mandatory externships; encouraging contingency fee arrangements between attorneys and clients; the setting up of public-interest departments in large law firms; simplifying court procedures; and big business providing funding to NGOs to provide free legal services to the poor.<sup>458</sup> Christie suggests that “enforcement tribunals to determine discrimination complaints and commissions to promote awareness are North American and European devices which may be irrelevant to the overwhelming majority of the really poor”.<sup>459</sup>

7. Some authors argue that the attempt to equalise the social position of disadvantaged groups and the restructuring of the overall benefits in a given society is a political task best left to

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<sup>453</sup> Sarkin (2002) 18 *SAJHR* 631. I assume he has those cases in mind where the client does not have the funds to afford an attorney of own choice.

<sup>454</sup> Sarkin (2002) 18 *SAJHR* 638.

<sup>455</sup> Sarkin (2002) 18 *SAJHR* 641.

<sup>456</sup> Francis “Liberty Conference” (2000) 72-73.

<sup>457</sup> Francis “Liberty Conference” (2000) 73.

<sup>458</sup> Francis “Liberty Conference” (2000) 73-76.

<sup>459</sup> Christie in MacEwen (ed) (1997) 188.



Parliament, as courts are ill equipped and ill trained in this regard.<sup>460</sup> For example, Koopmans argues that judges are inherently conservative as it is their role to maintain the established order; those who wish to change the existing order should turn to politics,<sup>461</sup> while Waldron points out that courts are not set up as representative law-making institutions.<sup>462</sup> Likewise, Nedelsky argues that legislatures in a constitutional state have a duty to deliberate collectively on the common good<sup>463</sup> – again, this is not something courts are set up to do. Parliaments are more accessible than courts; members of Parliament are more accountable and likely to be a more diverse group than judges.<sup>464</sup> In most instances Parliament would have better access to resources, different points of view, and data.<sup>465</sup> It then follows that the legislature is much better placed to effect fundamental redistributions in society.<sup>466</sup>

In the context of combating discrimination, the drafters of the 1996 Constitution seem to have agreed with the argument that societal transformation is a political task best left to a democratically elected legislature. Section 9(4) of the Constitution obliged Parliament to enact anti-discrimination *legislation*. The implication is that the drafters of the Constitution felt that combating discrimination was a *legislative task* and not something to be left to the courts to solve in a piecemeal, case-by-case fashion. However, the drafters of the Act were faced with a dilemma:<sup>467</sup>

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<sup>460</sup> See in general Koopmans (2003) 98-104. As to anti-discrimination legislation, see Freedman (1998) 115 *SALJ* 251; Freedman (2000) 63 *THRHR* 320; Koopmans (2003) 215-216 and Moon (1988) 26 *Osgoode Hall LJ* 673.

<sup>461</sup> Koopmans (2003) 274.

<sup>462</sup> Waldron in Bauman and Kahana (eds) (2006) 22; 25.

<sup>463</sup> Nedelsky in Bauman and Kahana (eds) (2006) 123.

<sup>464</sup> Eskridge and Ferejohn in Bauman and Kahana (eds) (2006) 325-326.

<sup>465</sup> Eskridge and Ferejohn in Bauman and Kahana (eds) (2006) 327.

<sup>466</sup> Eskridge and Ferejohn in Bauman and Kahana (eds) (2006) 350.

<sup>467</sup> Réaume (2002) 40 *Osgoode Hall LJ* 143; my emphasis. Scott (1998) 309 argues in similar vein: “Any large social process or event will inevitably be far more complex than the schemata we can devise, prospectively or retrospectively, to map it”; at 335: “[N]o forms of production or social life can be made to work by formulas alone”; and at 22: “No administrative system is capable of representing any existing social community except through a heroic and greatly schematized process of abstraction and simplification”. One of the drafters of the Napoleonic Code observed that “[A] code may look very complete, but a thousand unexpected questions present themselves to the judges as soon as it is finished: for laws, once drafted, remain as they have been written down, but people never rest” – Koopmans (2003) 224. At 284 Koopmans says that “ultimately, life always defies general schemes”.

The human phenomenon of *discrimination* – of those in relative positions of power denying full human status and opportunity to those in relative positions of disadvantage – *is not capable of being codified in precise terms* of the sort that have characterised past legislative efforts.

The drafters' solution to this dilemma was reasonable: In Reaume's terms, they codified a general theory and left it to the courts to work out the detail.<sup>468</sup> It could be argued that the South African legislature in effect appropriated the law of delict as a tool to bring about social change as the Act creates a quasi-constitutional delict of unfair discrimination. The Act contains a general definition of "discrimination", a test for recognising "prohibited grounds" not listed in the Act, and a general test for "fairness/unfairness". Over time equality courts will have to work out the detail, fleshing out on a case-by-case basis what would be "fair" or "unfair" discrimination in a great variety of contexts and circumstances. The upside is that a more accessible enforcement mechanism was created: Instead of having to approach an expensive magistrate's court or High Court, an equality court may be approached without legal representation. The downside is that all the usual disadvantages of using litigation to solve social ills will follow.<sup>469</sup> I revisit the question whether a court or the legislature is better placed to address discrimination in chapter 6.2.1.3 below, where I raise the possibility of an inter-institutional dialogue between the three branches of state authority and civil society.

## 2.7 Conclusion

As will be expanded on in the next chapter, the drafters of the Act took the typical defects of a court-driven dispute resolution mechanism into account and as a result the Act creates the (currently untapped) potential for wide-ranging court-driven societal transformation.

However, some of the Act's underlying assumptions are unrealistic or false. The Act implicitly assumes that the equality courts will address at least a significant number of incidents of discrimination effectively – how else will real transformation take place?<sup>470</sup> For example, consider

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<sup>468</sup> Réaume (2002) 40 *Osgoode Hall LJ* 142.

<sup>469</sup> Ngcobo J in *National Education Health and Allied Workers Union v UCT* 2003 (3) SA 1 (CC) para 14 is more positive. He sees the courts and Parliament acting in *partnership* to give life to constitutional rights (where legislation has been enacted to give effect to the Constitution.)

<sup>470</sup> This seems to have been the viewpoint of at least one of the drafters of the Act. On p 6 of the "Draft Project Plan" drafted by the Chief Director: Transformation and Equity and the Chief Director: Legislation in the Department of



clause 4(c) of the Schedule to the Act, in terms of which the legislature targets unfair discrimination in the provision of housing bonds, loans or financial assistance on the basis of race, gender or other prohibited grounds. Assume that a bank's lending policy has the effect of disproportionately denying loans to black applicants. If only a few applicants approach the courts, that bank may very well settle each of the few individual cases. A bank will likely only consider changing its policy if a large number of applicants who have been denied a loan approach an equality court. If a particular individual is an avowed racist, the Act will only reach him if a particular defendant approaches a court to complain. His or her behaviour will likely only change once he has been sued and it becomes too expensive to be a racist. (More promisingly, the Act allows claims to be brought as class actions<sup>471</sup> or as public interest actions,<sup>472</sup> but this potential remains untapped, arguably because of the complexities involved in bringing a class action, and the high threshold established for a public interest action by the Constitutional Court.<sup>473</sup>)

Another unrealistic assumption driving the Act is the role that law plays in ordinary South Africans' lives. As I have set out above, law is absent from the vast majority of South Africans' lives. In the context of anti-discrimination laws specifically, consider for a moment the Cronje-Davids rugby controversy that erupted a few weeks prior to the 2003 Rugby World Cup. Cronje, a white player, allegedly refused to share bathroom facilities with Davids, a "coloured" player from another provincial side and a rival for the same position in the final national (Springbok) squad. The incident was widely reported in the media. The same pattern that I have identified from Joubert's study emerges again: Very few commentators, if any, refer to *the law* in criticising or defending Cronje's decision. Comments relating to the incident could broadly speaking be divided into four categories: racism, interaction between rugby players, emotive reactions and comments linking the incident to the broader South African society.<sup>474</sup> The vast majority of reactions linked the incident to racism.<sup>475</sup> The second-largest group of reactions focused on the nature of the interaction

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Justice and Constitutional Development (copy of document in my possession), it was estimated that 1.5 million people would use the dispute resolution mechanisms established in terms of the Act in the first year of operation.

<sup>471</sup> S 20(1)(c).

<sup>472</sup> S 20(1)(d).

<sup>473</sup> *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) read with *Ferreira v Levin NO* 1996 (1) SA 984 (CC) para 234.

<sup>474</sup> I do not suggest that the newspaper clippings that I collected amount to a representative sample.

<sup>475</sup> I *inter alia* collected the following reactions: "there were no racist words" (*daar was geen rassistiese woorde*) (*Beeld* (2003-09-05) 3); "is South African rugby racist? The answer may be yes, depending on your parameters". (*Mail &*

between rugby players and between players from different provincial sides.<sup>476</sup> About seven of the clippings I collected referred to the incident in emotive terms<sup>477</sup> and three reactions tied the incident to the broader South African situation.<sup>478</sup>

I could not locate a single reference to the Act or a debate as to whether Cronje “fairly” or “unfairly” “discriminated” against Davids, which would have been the lawyerly way of “solving” the “problem” – the way such an incident is treated in terms of the Act.<sup>479</sup> If ordinary people do not refer to the law in criticising or justifying similar incidents, why would the law have any influence in their daily

*Guardian* (2003-09-05) 56); “there was not conclusive evidence that this activity was based on racism” (*Mail & Guardian* (2003-09-05) 56); “[Coach] Straeuli and his squad insist racism played no part in the players’ decision to change rooms last week” (*Sunday Times* (2003-09-07) 21); “the controversy now includes full-blown accounts of racism and deceit” (*Sunday Times* (2003-09-07) 21); “racism cover-up” (*Sunday Times* (2003-09-07) 1).

<sup>476</sup> Some of the reactions included: “Dale Santon asked whether he would have been guilty of racism if he asked to share a room with Davids, on of his friends” (*Dale Santon het gevra of hy ook aan rassisme skuldig sou wees as hy gevra het om saam met Davids, een van sy vriende, ‘n kamer te deel*) (*Beeld* (2003-09-05) 1); “as to the alleged incident of racism between Geo Cronjé and Quinton Davids, the Bok Captain said that it often happens that players swap rooms for various reasons. In this case it was wrongly interpreted as racism” (*wat die beweerde voorval van rassisme betref waarin Geo Cronjé en Quinton Davids na bewering betrokke was, het die Bok-kaptein gesê dit gebeur gereeld dat spelers om verskeie redes van kamer verander. ‘In hierdie geval is dit verkeerdlik vertolk as rassisme*) (*Beeld* (2003-09-05) 3); “[I]t was a simple swop as players normally do... team management did not allow it this time and Cronjé went back to rooming with Davids before it blew up as a race issue in the papers” (*Sunday Times* (2003-09-07) 30); “‘Why is it racism when Geo and Quinton swop but not when Victor and AJ do it?’ asked an irate Werner Greeff” (*Sunday Times* (2003-09-07) 30); “You’re dealing with 30 players and not all of them are the best of friends. Without being involved, it’s very difficult to say if it could have been done differently” (*Sunday Times* (2003-09-07) 30); “They are competing for the same position in the World Cup squad. It is understandable that there could have been friction between them (*Hulle ding albei mee om dieselfde plek in die Wêreldbeker-groep. Dis te verstane dat daar wrywing tussen hulle kon gewees het*)” (*Beeld* (2003-08-29) 3).

<sup>477</sup> “Race storm” (*rassedstorm*) (*Beeld* (2003-09-06) 8); “race racket” (*rassieherrie*) (*Beeld* (2003-09-05) 1); “race drama” (*rassedrama*) (*Beeld* (2003-09-05) 3); “Bok crisis” (*Rapport* (2003-09-07) 1); “a scandal” (*‘n skandaal*) (*Rapport* (2003-08-31) 1); “rugby race row” (*Sunday Times* (2003-09-07) 7); “a racism bomb” (*‘n rassisme-bom*) (*Beeld* (2003-08-29) 1).

<sup>478</sup> “In the greater scheme of things South African rugby is absolutely irrelevant. The ideals of the Rainbow Nation are in tatters not because of a few muddied oafs with funny shaped balls, but because a decade of free and fair governance has taught us one important lesson: we actually don’t like each other very much” (*Mail & Guardian* (2003-09-05) 56); “Race is a factor in South African rugby, as it is a factor in all facets of our daily living. What is important is how it is treated. If every racial incident in South Africa leads to the kind of polarisation that we have seen over the past ten days, our days are numbered” (*Ras is ‘n faktor in Suid-Afrikaanse rugby, soos dit ‘n faktor is in al die fasette van ons alledaagse bestaan. Hoe dit hanteer word, is wat tel. As elke voorval in Suid-Afrika met ‘n ras-element lei tot die soort polarisasie wat die afgelope tien dae aanskou is, kan ons maar by voorbaat Ikabod skryf oor die toekoms*) (*Rapport* (2003-09-07) 18); “Madiba has on various occasions said that we must all realise that racism still exists in South Africa. It will not suddenly disappear. People were raised with certain values and it takes time to change those values. He believes it must be eradicated over time and therefore he advised Straeuli and minister [of sport] Balfour to not tolerate it” (*Madiba het al by verskeie geleenthede gesê ons moet almal beseft dat daar nog rassisme in Suid-Afrika bestaan. Dit is nie iets wat oornag kan verdwyn nie. Mense is grootgemaak met sekere denkwyses en dit verg tyd om daardie denkwyses te verander. Hy glo dit moet mettertyd uitgeroei word en daarom het hy vir Straeuli en minister Balfour aangeraai om dit nie te duld nie*) (*Rapport* (2003-09-07) 1).

<sup>479</sup> Griffiths in Loenen and Rodrigues (eds) (1999) 316 states that people’s interpretation of what happened to them depends on their social surroundings, not the law.

decisions? As Marcus puts it, “people ... don’t seem to think legalistically or in terms that are derived from the law”.<sup>480</sup> The entire incident could have played out completely differently. Cronje could have decided to say nothing and could have stayed in the room. Davids could have decided to say nothing. Apparently Davids overslept and that is how the team management discovered that the players swapped rooms. Had he not overslept, nothing may ever have become known. Somehow the media heard about the incident – had that not happened, the incident may well have been covered up. These are only some of the possible outcomes, and “the law” played no part in the outcome of any of these scenarios. “The law” can always step in afterwards, but to do what exactly? The damage has been done; after the fact analysis of what each of the role players said or did or did not say or did not do plays no role in steering or driving anyone’s behaviour. The Austinian concept of law as command assumes that citizens will obey all laws, lest they be subjected to sanctions. The above exposition shows this approach to law as flawed. The underlying assumption to legal rules is that humans are rational beings and that they will direct their behaviour according to legal principles, but at best humans are a-rational.<sup>481</sup>

A number of authors’ views on the role of law in a given society complement each other. Whether one distinguishes between “simplex” and “multiplex” relationships,<sup>482</sup> or propose that “law varies

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<sup>480</sup> Marcus in Sarat and Kearns (eds) (1995) 248.

<sup>481</sup> Fukuyama (2005) 105; Stout in Drobak (ed) (2006) 13. Berger (1991) 22 *S Afr J Sociol* 73-77 highlights four relatively recent events that have occurred since the Second World War that were not foreseen by sociologists: (a) the cultural and political turmoil in Western countries in the late 1960s and early 1970s; (b) the rapid economic growth of newly industrialised countries in the East in the 1970s and onwards; (c) the Iranian revolution and (d) the quick collapse of the Eastern European communist regimes. He laments the fact that sociologists generally fall into two camps; what he calls “ideologists” and “trivialisers”. The ideologists imagine a “bigger picture” that simply does not exist; the trivialisers see the minute parts but does not realise that it is part of something bigger. He says that the social sciences are children of the Enlightenment and that they are based on a *basic erroneous assumption about the rationality of human action* (my emphasis). Aubert (1983) 141 puts it thus: “Underlying our presentation of reasons for preferring an alternative conflict-solving device, there is the *assumption of rationality* on the part of the actors. It is rational to act in accordance with the mini-max principle, to save time and money, to shun publicity. However, *this assumption of rationality is not always realistic*; nor is it always correct to look upon the individual actor as a separate entity, free from ties to other actors” and at 142: “Rationality is a difficult concept. Unusual steps may appear irrational because they are unsuited to furthering the welfare of the actor in the conventional sense. *However, an actor may be prompted by a desire to realize unusual values, for the achievement of which these apparently irrational means are suitable*” (my emphasis). Fuller (1978) 92 *Harv L Rev* 360: “[A] more general criticism that may be directed against the whole analysis being presented here, namely that it grossly overstates the role of rational calculation in human affairs. It forgets that men (sic) often act in bland conformity to custom, in passive acquiescence to authority, and – sometimes at least – in response to inarticulate impulses of altruism. But there is no intention here to deny that the springs of human actions are diverse and often obscure”.

<sup>482</sup> Kidder (1983) 70-72.

inversely with other social control”,<sup>483</sup> or distinguishes between a “Gemeinschaft” and “Gesellschaft” conception of society,<sup>484</sup> or talks of a continuum ranging from intimacy to open hostility,<sup>485</sup> the same pattern emerges: The closer a particular society mirrors a close-knit, co-dependent, “happy (or unhappy) family”,<sup>486</sup> the smaller the role that (official state) law will play.<sup>487</sup> To this one could add authors’ observation that neutral and instrumental areas of life may to a degree be controlled by law,<sup>488</sup> but that “areas of emotion” are extremely difficult to direct.<sup>489</sup> This does not bode well for an Act that was *inter alia* put in place to address the intimate spheres of life.<sup>490</sup>

Consider just one example of the Act’s likely impotence. It is at least arguable that a society will only change if the basic relationships in a society change: For example, as long as the division of labour within a household is skewed in favour of men, real substantive equality between the sexes will not be achieved.<sup>491</sup> However, it is precisely in this sphere that the Act will most probably fail most spectacularly. Although the Act may in theory arguably intrude into the home and perhaps

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<sup>483</sup> Black (1976) 6-7.

<sup>484</sup> Tönnies (2002) 37-102; Kamenka and Tay in Kamenka and Tay (eds) (1980) 8-11.

<sup>485</sup> Fuller (1981) 237.

<sup>486</sup> It is then, for example, not surprising that a legislative attempt in Tanzania to outlaw female genital mutilation, has not been particularly effective. In 1998 the practice was criminalised and made punishable by imprisonment of up to 15 years. However, no one has been found guilty of violating this law yet. Those prosecuted under this law are usually acquitted because the daughters involved have been unwilling to testify against their parents. <http://www.ippmedia.com/cgi-bin/ipp/print.pl?id=72766> (accessed 2006-08-23).

<sup>487</sup> Cf Galanter (1974) 9 *Law & Soc Rev* 130. Contra Lane (2005) 29 (internet version) that argues that it is “*highly likely* that equality courts will hear cases in which there will be a *continuing relationship* between colleagues, scholars, neighbours or members of religious groups” (my emphasis). She cites no authority for this proposition. Available sociological literature suggests that these kinds of cases are the *least* likely to reach official state courts.

<sup>488</sup> In Annexure D below I set out reported decisions by the various Canadian anti-discrimination tribunals. Of the reported Canadian Human Rights Tribunal decisions (Annexure D1), 67% relate to employment. The respective percentages for Alberta, British Columbia and Ontario are 51%, 52% and 50%. One way of explaining this high percentage of employment-related complainants would be to argue that the employment relationship is an instrumental area of human life and relatively easily “reachable” by courts, especially where the employment relationship has broken down.

<sup>489</sup> Morison in Livingstone and Morison (eds) (1990) 8; Luhmann (1985) 243; Cotterrell (1992) 24; Packer (2002) 150. I readily admit that this is a conservative conclusion: deeply held customs will not be changed by using laws; a critical mass of individuals need to change their stance and then laws that are passed to confirm the “new” custom may be successful. The prohibition of the Chinese custom of footbinding seems to bear out this conclusion. The custom of footbinding was first prohibited in 1622 but only by 1911 had public support for anti-footbinding campaigns reached such levels that the ban that followed was successful. Packer (2002) 161. The Hindu custom of *sati* (widow burning) and the custom of female circumcision practised in some African countries seem to be still deeply held in some communities and official state prohibitions of these customs have *not* been successful. Packer (2002) 164 and further.

<sup>490</sup> Cf Albertyn *et al* (eds) (2001) 4.

<sup>491</sup> Cf Wollstonecraft as interpreted by Pateman in Boucher and Kelly (eds) (2003) 270-287; and at esp 285: “[T]he interrelationship between marriage, employment, and citizenship is only slowly being acknowledged, and the legacy of old institutions and convictions about women’s proper place lingers on”.

may assist a wife who wishes to sue her husband for failing in his role as a sensitive, caring, burden-sharing companion,<sup>492</sup> it is extremely unlikely to happen. Such a claim faces a number of hurdles. The loving wife will probably not realise that a potential claim lies against her errant husband. The clerk of the equality court may turn the complainant away, perhaps even laugh in her face. The presiding officer may dismiss the claim as frivolous and award a punitive costs order against her. Even if a far-reaching remedy is awarded, an unsympathetic husband will likely laugh off the claim and she will be forced to institute another action, or have him thrown in jail for contempt of court, whereafter divorce could follow (which is perhaps what she should have done in the first place, without first wasting money on a case that may well be dismissed as frivolous.) And if only a few wives should follow the equality court-route, even assuming that their husbands will adhere to far-reaching court orders, other wives' position will remain unchanged.<sup>493</sup>

In a "society" of about 40 million inhabitants consisting of banks and lenders, insurance companies and insureds, farmers and labourers, shopkeepers and customers, restaurants and clients; African chiefs and their subordinates; schools and pupils, universities and students, employers and employees, it is the powerful "repeat players" that will likely come out on top and it is likely that the "one-shotters" will lose more than they win.<sup>494</sup> In dependent (or multiplex) relationships, such as

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<sup>492</sup> My example is not absurd. S 8(d) of the Act outlaws "any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child". Sen in Drobak (ed) (2006) 254 argues that these kinds of obligations should not be legislated: "[I]n a male-dominated traditionalist society ... the social recognition of a wife's 'human right' to be consulted in family decisions may be a very important move. But it does not follow that a human right of this kind should be put into the rule books through legislation – perhaps with the husband being arrested, locked up, or otherwise punished by the state if he were to fail to consult his wife".

<sup>493</sup> Gardner in Hepple and Szyszczak (eds) (1992) 149 puts it more eloquently: if we see "social life" as state-family-market, then law has almost nothing to do, as it a weapon of the "state" sphere only; as "economic and personal activities are generally assumed to be organized so that they can look after themselves". When courts are relatively reluctant to intrude in the market and the family, how does one call into question long-established patterns of domination internal to such activities? In other words, most people cannot be atomistic, rational "authors of their own lives". Fuller (1978) 92 *Harv L Rev* 370-371: "Adjudication is not a proper form of social ordering in those areas where the effectiveness of human association would be destroyed if it were organized about formally defined "rights" and "wrongs". Courts have, for example, rather regularly refused to enforce agreements between husband and wife affecting the internal organization of family life". MacKinnon in Sarat and Kearns (eds) (1995) 111-112: "No law addresses the deepest, simplest, quietest, and most widespread atrocities of women's everyday lives. The law that purports to address them, like the law of sexual assault, does not reflect their realities or is not enforced, like the law of domestic violence. Either the law does not apply, is applied to women's detriment, or is not applied at all. The deepest rules of women's lives are written between the lines, and elsewhere". I would argue that the Act attempts to address these "deepest atrocities" but in an unrealistic way.

<sup>494</sup> In an empirical study completed in 2005 it was shown that from 1994-2004, approximately 930 275 farm labourers and their dependents were illegally evicted from farms. The study concluded that only about 1% of evictions that occurred after 1997 were performed in terms of the relevant legislation. In six out of seven cases the farm workers had



farmer-labourer, it is extremely unlikely that courts will be utilised.<sup>495</sup> And in simplex relationships, it is likely that a potential claimant will decide to walk away from a potential lawsuit, *inter alia* because of the material and emotional costs involved.<sup>496</sup> The Parliamentary hearings process relating to the finalisation of the Act partly bears out this argument. The most vociferous opponents of the Bill were the insurance and banking industry – arguably well-informed, well-resourced “repeat players” that may be expected to be sued often.<sup>497</sup> These organisations are also involved

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no legal representation when their eviction case was heard in court. *Sake24 (Beeld)* (2007-03-19) 12. This finding is not surprising from a socio-legal perspective.

<sup>495</sup> It is at least arguable that vulnerable groups are more likely to be caught up in multiplex (dependent) relationships and therefore more likely *not* to utilise courts. In Annexure D I set out reported decisions by the various Canadian anti-discrimination tribunals. Only 28% of cases were brought by minority groups to the Canadian Human Rights Tribunal. The respective percentages for Alberta, British Columbia and Ontario are 15%, 16% and 29%.

<sup>496</sup> A limited empirical survey that I undertook in 2001 suggests that the South African legal system still suffers from a severe legitimacy crisis, which would be another reason why ordinary people do not easily approach lawyers and courts for assistance. (See chapter 5 for more detail).

<sup>497</sup> See Gutto (2001) 108-109. Gutto made available his files relating to the lobbying process to me. I extracted the submissions from the following bodies from these files. The following bodies argued in favour of an “economic differentiation” defence in the Act: The Banking Council submitted that “the Bill as currently formulated would preclude banks from using appropriate systems and mechanisms to arrive at sound judgments on the provision of banking services and products to appropriate customers, markets and segments, based on objective commercial principles and criteria”. The Banking Council argued that a defence be built into the Act for “credit criteria, products and services that are based and applied solely on commercial principles and criteria”. It suggested the following wording for such a defence: “The application of objective commercial principles and criteria in selling or providing goods, services and facilities in a free market economy”. Business South Africa (BSA) submitted that regarding the insurance, health, banking and other services sectors, a defence must be built into the Act to the following effect: “BSA submits that differentiation based on objective actuarially and commercially based evidence should not be regarded as unfair discrimination, as is the case in other countries”. The Financial Services Board (FSB) noted that it is widely accepted in foreign jurisdictions that “differentiation on sound underwriting principles and actuarial grounds” does not constitute unreasonable discrimination. The Institute of Retirement Funds of Southern Africa argued that “sound financial operation of a retirement fund depends (generally) on differentiations based on actuarial grounds. If funds are constrained from applying these traditional risk management techniques, the result will be a general erosion of the level of member benefits and the hastened demise of defined benefit funds in particular”. It argued that “reasonable and *bona fide* differentiation based on actuarial or statistical data should be excluded from categorisation as ‘unfair discrimination’”. The Life Offices’ Association’s (LOA) submission was in similar vein. The submission contains the following alarmist sentence: “Regard being had to the operation of insurance, any legislation which directly (or indirectly) prohibits non-arbitrary differentiation founded on proper risk assessment *constitutes a threat to the very existence of the Insurance Industry and millions of policyholders*, as it is only through proper risk assessment that an insurer can ensure its solvency and ability to continue to indemnify its policyholders for losses suffered” (my emphasis). LOA further argued that the Bill negated the basic principles of risk insurance. It proposed the following defence: “No insurer may unfairly discriminate against any person in the provision of insurance services on any of the prohibited grounds. It shall not constitute unfair discrimination if an insurer differentiates between persons, and that differentiation (a) is based on actuarial data or statistical data or medical or actuarial opinion upon which it is reasonable to rely; (b) is reasonable having regard to the data or advice or opinion”. The South African Insurance Association (SAIA) proposed the following scheme: “Every person has a right not to be unfairly discriminated against in respect of insurance services on the grounds of race, gender, sex, pregnancy, marital status, ethnic origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Every person having legal capacity has a right to contract on equal terms without unfair discrimination because of race, gender, sex, pregnancy, marital status, ethnic origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. An insurer may discriminate against any person in the provision of insurance on the grounds of gender, sex, pregnancy, marital status, sexual



in “instrumental” or “neutral” areas of life, where law may be expected to play a larger role. The lobbyists for the “one-shotters”, the likely plaintiffs, argued in favour of the removal of barriers to lessen the strategic disadvantage they would face in giving life to the Act.<sup>498</sup>

Even authors who believe that law has a potentially meaningful role to play, provide severe provisos. For example, Evan puts forward seven conditions that would allow law to play an “educational function”.<sup>499</sup> His second condition prescribes that a new law must “clarify its continuity and compatibility with existing institutionalized values”.<sup>500</sup> Read with his fourth condition, “law must make conscious use of the element of time in introducing a new pattern of behaviour”,<sup>501</sup> it seems that at best he suggests that a new law will have (some) effect only over the (very) long term. A radical departure from “institutionalised values” will then probably never be implemented. His final condition, “effective protection must be provided for the rights of those persons who would suffer if the law were evaded or violated”,<sup>502</sup> could be unattainable in a resource-limited country, especially if a large number of agitated defendants exist.<sup>503</sup> Morison’s “advice to Machiavelli’s Prince today

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orientation, age or disability if the discrimination is based on actuarial or statistical data from a source on which it is reasonable for the insurer to rely; and the discrimination is reasonable having regard to the data”.

<sup>498</sup> A number of bodies for example argued for the inclusion of further, explicitly listed, prohibited grounds in the Act. The AIDS Law Project (ALP) regretted that HIV/AIDS was not listed as a prohibited ground and not explicitly defined as a disability for purposes of the Bill. It described this omission as “unfortunate, ill advised and unhelpful”. ALP argued that one could not simply rely on the “natural progression of law” to decide if HIV/AIDS could be deemed to be “any other recognised ground” but that the Bill “must be clear about locating HIV/AIDS in the legislative framework of equality and should do so by listing HIV/AIDS as a prohibited ground”. ALP also argued for the explicit inclusion of the additional prohibited grounds of family status and family responsibility, socio-economic status and nationality. The Commission on Gender Equality argued for the inclusion of family responsibility, family status, HIV/AIDS status and socio-economic status. COSATU submitted that family responsibility, national origin, HIV/AIDS and socio-economic status be added as prohibited grounds. The Equality Alliance requested Parliament to replace the various definitions of (unfair) discrimination with a single definition as the various definitions were inconsistent with one another; it made the Act inaccessible; it could give rise to confusion; and the various definitions do not take cognisance of the intersectionality of discrimination. The Alliance also asked that the Act be amended to make it clear that an action could be brought on more than one ground. It also submitted that the Act should distinguish between individual cases of discrimination and systemic forms of discrimination, to ensure the promotion of protection from structural discrimination. The Alliance argued for the inclusion of HIV/AIDS, nationality, socio-economic status and family status in the list of grounds. The Gender Project, Community Law Centre argued for the inclusion of HIV/AIDS status, family status, family responsibility and socio-economic status in the list of prohibited grounds. The National Coalition for Gay and Lesbian Equality submitted that nationality, HIV/AIDS status, socio-economic status, family status and family responsibility be added to the list of prohibited grounds.

<sup>499</sup> Evan in Evan (ed) (1980) 557-561.

<sup>500</sup> Evan in Evan (ed) (1980) 558.

<sup>501</sup> Evan in Evan (ed) (1980) 559.

<sup>502</sup> Evan in Evan (ed) (1980) 560.

<sup>503</sup> Assume for a moment that a hundred thousand wives sue their hundred thousand husbands, and assume that a hundred thousand equality court judgments order the husbands to share the household burdens equitably.

as to the limits and possibilities of law” leads to the same conclusion.<sup>504</sup> His first condition, “the goal of the lawmaker must be realizable through law”,<sup>505</sup> and his fourth condition, “the required change must be able to be implemented”,<sup>506</sup> leads nowhere as he does not answer the question *when* the lawmaker’s goal will be realisable and *when* the change will be able to be implemented.<sup>507</sup> Morison also insists that the “purpose behind the legislation must be compatible to existing values to a degree”,<sup>508</sup> which also implies that radical change will take a long time to be realised.

At first blush authors such as Chemerinsky and Budlender seem to come to a different conclusion and seem to be much more positive about the potential effect of utilising the law. Chemerinsky ostensibly argues that courts “make a difference” and that changes in the law lead to changes in society.<sup>509</sup> However, a careful reading of his argument reveals that he has a very narrow definition of what would constitute “effective” court action. He seems to argue that an anti-discrimination Act would be effective if it provides redress to injured *individuals*.<sup>510</sup> He uses tort law as an example: Tort law is effective because it compensates innocent victims, although it may not deter dangerous products and practices.<sup>511</sup> He takes solace from *Brown v Board of Education* because it was an “enormously important” statement of equality, although it had little effect.<sup>512</sup> He argues that court cases upholding the (American) Constitution protects key values and therefore have “great social importance” even if no social change flows from the cases.<sup>513</sup> He correctly argues that categorical statements about the (lack of) ability of courts to achieve social change must be avoided,<sup>514</sup> but he does not provide a single example of a court case that has led to social change. If anything, he provides examples where courts have *frustrated* social change.<sup>515</sup> Budlender optimistically refers

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<sup>504</sup> Morison in Livingstone and Morison (eds) (1990) 8.

<sup>505</sup> Morison in Livingstone and Morison (eds) (1990) 9.

<sup>506</sup> Morison in Livingstone and Morison (eds) (1990) 9.

<sup>507</sup> At 9 he rather unhelpfully suggests that world peace or a happy Christmas is beyond the scope of the legislature.

<sup>508</sup> Morison in Livingstone and Morison (eds) (1990) 9.

<sup>509</sup> Chemerinsky in Devins and Douglas (eds) (1998) 191-203.

<sup>510</sup> Chemerinsky in Devins and Douglas (eds) (1998) 193; my emphasis.

<sup>511</sup> Chemerinsky in Devins and Douglas (eds) (1998) 193.

<sup>512</sup> At 198-199 he is quite candid about *Brown*’s failure. A decade after *Brown* only 1.2 % black schoolchildren were attending school with whites and in present day America racial separation is increasing.

<sup>513</sup> Chemerinsky in Devins and Douglas (eds) (1998) 193.

<sup>514</sup> Chemerinsky in Devins and Douglas (eds) (1998) 201.

<sup>515</sup> Chemerinsky in Devins and Douglas (eds) (1998) 201-202.

to *Minister of Health v Treatment Action Campaign (No 2)*<sup>516</sup> as an example where court action successfully lead to changes in government policy and the provision of treatment to (poor) people living with HIV.<sup>517</sup> However, in another decision by the Constitutional Court relating to socio-economic rights, *Government of the Republic of South Africa v Grootboom*,<sup>518</sup> very little happened in its aftermath. Three years passed before the national government put in place an emergency housing programme that had still not been adequately implemented.<sup>519</sup> Budlender argues that to be effective, civil society organisations must pressurise government to comply with court orders and the public media must pursue the particular matter.<sup>520</sup> This translates to enormous organisational ability, energy, effort and money; something most litigants do not have.

Dror is probably correct: Law seems to be the quickest and cheapest way in changing a society and that is why governments too readily turn to the law when it wishes to dispose of a social ill.<sup>521</sup> In this belief governments are probably usually mistaken.<sup>522</sup>

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<sup>516</sup> 2002 (5) SA 721 (CC).

<sup>517</sup> Budlender (2006) 15 *IB* 140.

<sup>518</sup> 2001 (1) SA 46 (CC).

<sup>519</sup> Budlender (2006) 15 *IB* 139.

<sup>520</sup> Budlender (2006) 15 *IB* 139 and 140.

<sup>521</sup> Dror (1958) 33 *Tul L Rev* 802. Also cf Dawes *et al* in Pillay *et al* (eds) (2006) 240 who argue that the solution to combating partner violence in South Africa lies in the effective implementation of domestic violence legislation. The characteristics of effective law set out in this chapter, however, would suggest that law will have an extremely limited impact in such intimate settings.

<sup>522</sup> Dror (1958) 33 *Tul L Rev* 802. And perhaps, naively, legislatures truly believe that people will obey laws that have been enacted – cf *NBS Bank Ltd v Cape Produce Co (Pty) Ltd* 2002 (1) SA 396 (SCA) para 31; the speech by JO Tlhagale (MP, UCDP) at the consideration of the Bill in the National Council of Provinces, 28 January 2000 (reproduced in Gutto (2001) 82): “No longer will any anybody call anyone derogatory names, no longer will anybody discriminate against anyone on the basis that he or she has no struggle credentials and no longer will anybody discriminate against anyone on the basis of race, gender or disability”; and the speech by MP Themba (MP) at the same occasion (Gutto (2001) 87): “There are many more areas in which the implementation of this Bill will have *immediate and positive effect*” (my emphasis). Lustgarten (1986) 49 *Mod L Rev* 84-85 is more cynical: “It is impossible to say whether the preference for a legal approach was based upon an exaggerated faith in the efficacy of law; or the need, for political reasons, to be seen to do something highly visible, such as enacting a statute; or was a conscious alternative to taking on a wider long-term expensive and controversial commitment”. Also cf Unterhalter “Liberty Conference” (2000) 38: “I do think that to some extent we are the *victims of the notion that law cures everything*. We do have this rather imperial view that lawyers and decisions by law-making tribunals of one sort or another *can always rectify every problem* or produce every kind of social good that we want. And sometimes in my view it is better to take a more modest view of what one can achieve, and achieve it better, than to put grand schemes in place” (my emphasis). (At p 34 of the published conference proceedings he notes that there are mainly two approaches of viewing law and the role of the state: “On the one hand, a large and dominant state is welcomed. From this view, what was wrong with apartheid was that it was applied to the wrong object. The opposite view is that liberty and dignity must be seen as the founding values of society and that the state should have a diminished role”. If one accepts Unterhalter’s analysis, a programme of social change being driven via law depends on a dominant, capacitated state. Fukuyama (2005) argues in this vein.

The question should be posed: What would the purpose of the thesis then be, if in the second chapter I already reach the conclusion that the Act is likely to fail in its stated goals? It would have to be a modest and limited purpose: At least some individuals will approach the equality courts some of the time, and courts can and will provide meaningful relief to some of these individuals. However, perhaps more individuals would approach these courts had the Act been drafted in clearer language, had the “fairness” enquiry been set out more coherently, had the training process run more smoothly, and so on. In the remainder of the thesis I attempt to identify barriers to a more effective implementation of the Act, accepting that the Act will probably not have its intended effect, but will assist some claimants some of the time.<sup>523</sup>

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<sup>523</sup> Tamanaha (2001) 132 is to the point: A gap between “law in books” and “real life” is not necessarily problematic. If a gap exists, either abolish the law or find other ways of achieving the result aimed at.