



Chapter One: Introduction

1.1 Introduction

Since the first democratic elections in 1994, the South African government has attempted to counter a legacy of grossly unequal allocation of resources, wealth and power.¹ One of the latest in a string of legislative attempts to undo the effect of centuries of race-based oppression and marginalisation (including, obviously, Apartheid²) was the Promotion of Equality and Prevention of Unfair Discrimination Act.³ The National Assembly passed the Act on 26 January 2000, the National Council of Provinces approved the Act on 28 January 2000, and the President signed the Act on 2 February 2000.⁴ Sections 1,⁵ 2,⁶ 3,⁷ 4(2),⁸ 5,⁹ 6,¹⁰ 29 (with the exception of ss (2)),¹¹ 32,¹²

¹ In the legislative sphere, the following Acts have been passed, among others: The Restitution of Land Rights Act 22 of 1994, the Land Administration Act 2 of 1995, the Development Facilitation Act 67 of 1995, the Land Reform (Labour Tenants) Act 3 of 1996, the Extension of Security of Tenure Act 62 of 1997, the Housing Act 107 of 1997, the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998, the National Water Act 36 of 1998, the Labour Relations Act 66 of 1995, the Basic Conditions of Employment Act 75 of 1997 and the Employment Equity Act 55 of 1998. The social democratic Reconstruction and Development Programme (RDP) was replaced with the neo-liberal Growth, Employment and Redistribution programme (GEAR) in 1996 and has been heavily criticised from the left of the political spectrum. See Alexander (2002) 49, 57, 145 and Terreblanche (2002) 103, 108-121 among others. In 2005 the “Accelerated and Shared Growth Initiative of South Africa” (ASGISA) was introduced as an accompaniment to GEAR, with the aim of building a staircase between the first (formal) and second (informal) economy – Calland (2006) 53.

² Apartheid is sometimes referred to as an attempt at “social engineering” (eg Davis (1987) *AJ* 235; Fukuyama (1992) 20-21). Fukuyama argues that Apartheid was social engineering in that it attempted to reverse and prevent the urbanisation of black workers. Hughes in Clapham *et al* (eds) (2006) 160 refers to the “social artificiality” of Apartheid. This is not necessarily a correct description. Apartheid did not fall out of the sky in 1948 with the coming to power of the National Party and was not an attempt to force *new* patterns of behaviour onto South Africans. In 1948 South Africa was already a *de facto* segregated state (see eg Deane (2005) 11 *Fundamina* 2; Rayner and Stapley (2006) 392-393; Fukuyama (1992) 111); Picard (2005) 2; MacDonald (2006) 7; 65). From this perspective, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 may be described as (idealistic) social engineering in its attempt to *undo* centuries of racism and oppression.

³ Act 4 of 2000; hereafter “the Act” or “the Equality Act”.

⁴ Gutto (2001) 123 n1.

⁵ The definitions section.

⁶ “Objects of the Act”.

⁷ “Interpretation of the Act”.

⁸ “Guiding principles”. S 4(1), which did not come into effect onto 1 September 2000, deals with the adjudication of disputes in terms of the Act.

⁹ “Application of the Act”.

¹⁰ S 6 contains the general prohibition against unfair discrimination: “Neither the State nor any person may unfairly discriminate against any person”.

¹¹ “Illustrative list of unfair practices in certain sectors”. S 29(2), which did not come into force on 1 September 2000, provides that “the State must, where appropriate, ensure that legislative and other measures are taken to address the practices referred to in subsection (1)”.



33,¹³ and 34(1)¹⁴ commenced on 1 September 2000.¹⁵ As it stood then, the Act's prohibition of state and private discrimination could not be enforced – the Act envisaged the creation of informal, accessible “equality courts” in which discrimination complaints were to be heard, but these courts were not yet operationalised. In terms of the Act, equality court personnel had to be trained before the courts could be created.¹⁶ Training commenced in April 2001. By June 2003, it was deemed that a sufficient number of trained judges, magistrates and clerks existed to allow the establishment of 60 courts.¹⁷ The remainder of the Act, barring the provisions of the Act dealing with the promotion of equality, came into force on 16 June 2003.¹⁸ At 31 October 2007, 220 equality courts at magistrates' court level had been established, with a remaining 146 equality courts to be

¹² S 32 deals with the establishment of the Equality Review Committee (ERC). GN No R874, *Government Gazette* No 21517, 2000-09-01 established the ERC.

¹³ S 33 deals with the powers, functions and terms of office of the ERC.

¹⁴ “In view of the overwhelming evidence of the importance, impact on society and link to systemic disadvantage and discrimination on the grounds of HIV/AIDS status, socio-economic status, nationality, family responsibility and family status— (a) special consideration must be given to the inclusion of these grounds in paragraph (a) of the definition of “prohibited grounds” by the Minister; (b) the Equality Review Committee must, within one year, investigate and make the necessary recommendations to the Minister”.

¹⁵ GN No R54, *Government Gazette* No 21517, 2000-09-01.

¹⁶ The relevant parts of s 31(1) read as follows, before it was amended by the Promotion of Equality and Prevention of Unfair Discrimination Amendment Act 52 of 2002: “(1) Despite section 16(1)(a) and (b), and until the Minister determines by notice in the *Gazette*, no proceedings may be instituted in any court unless — (a) a presiding officer is available who has been designated, by reason of his or her training, experience, expertise and suitability in the field of equality and human rights; and (b) one or more trained clerks are available. (2) For purposes of giving full effect to this Act and making the Act as accessible as possible— (a) and in giving effect to subsection (1), the Minister may designate suitable magistrates, additional magistrates or judges, as the case may be, and clerks referred to in subsection (1) as presiding officers and clerks, respectively, for one or more equality courts ... (3) The Minister must take all reasonable steps within the available resources of the Department to designate at least one presiding officer and ensure that a trained clerk is available for each court in the Republic. (4) The Minister must, after consultation with the Magistrates Commission and the Judicial Service Commission, issue policy directives and develop training courses with a view to— (a) establishing uniform norms, standards and procedures to be observed by presiding officers and clerks in the performance of their functions and duties and in the exercise of their powers; and (b) building a dedicated and experienced pool of trained and specialised presiding officers and clerks”. The amendment came into force on 15 January 2003 (The Presidency, No 95, *Government Gazette* No 24249, 2003-01-15). Since its amendment, the relevant parts of s 31 now read as follows: “(1) Despite section 16 (1) no proceedings may be instituted in any court unless a presiding officer and one or more clerks are available ... (4) The Chief Justice must, in consultation with the Judicial Service Commission and the Magistrates Commission, develop the content of training courses with a view to building a dedicated and experienced pool of trained and specialised presiding officers, for purposes of presiding in court proceedings as contemplated in this Act, by providing- (a) social context training for presiding officers; and (b) uniform norms, standards and procedures to be observed by presiding officers in the performance of their functions and duties and in the exercise of their powers. (5) The Chief Justice must, in consultation with the Judicial Service Commission, the Magistrates Commission and the Minister, implement the training courses contemplated in subsection (4). (6) The Director-General of the Department must develop and implement a training course for clerks of equality courts with the view to building a dedicated and experienced pool of trained and specialised clerks, for purposes of performing their functions and duties as contemplated in this Act, by providing- (a) social context training for clerks; and (b) uniform norms, standards and procedures to be observed by clerks in the performance of their functions and duties”.

¹⁷ GN No 878, *Government Gazette* No 25091, 2003-06-13.

¹⁸ GN No R49, *Government Gazette* No 25065, 2003-06-13.

established by the second quarter of the 2007/8 financial year.¹⁹ At 31 October 2007, the sections of the Act relating to the promotion of equality have not come into effect.

As an example of “anti-discrimination legislation”,²⁰ the Act is ambitious in scope. It outlaws unfair discrimination²¹ in almost every sphere of society:²² labour and employment, education, health care services and benefits, housing, accommodation, land and property, insurance services, pensions, partnerships, professions and professional bodies, provision of goods, services and facilities, and clubs, associations and sport.²³ The Act also aims at preventing and prohibiting harassment²⁴ and hate speech.²⁵

The Act also calls on the state and all persons to promote substantive equality.²⁶ Section 24 of the Act provides that the state “and all persons” have a duty and responsibility to promote equality. Section 7(2) of the Constitution obliges the state to do this in any event. Section 9(4) of the Constitution states that no person may unfairly discriminate against any other person, which implies a passive approach – every person simply needs to make sure that his or her action (or inaction) does not lead to unfair discrimination. Section 24 of the Act goes further and directs all persons to actively pursue and promote equality. Sections 26 and 27 seem to limit this duty and responsibility to individuals who contract directly or indirectly with the state or exercise public power. It also appears that this duty only arises in relationships with other (public) bodies and when dealing with public activities. Section 27(2) of the Act states that the Minister of Justice must develop regulations that will require persons to prepare equality plans, abide by prescribed codes

¹⁹ Paras 3.1 and 3.2 of a “Progress Report on the Implementation of the Provisions of PEPUDA”, drafted by the Department of Justice and Constitutional Development (hand delivered to me on 2007-07-12; report in my possession).

²⁰ Anti-discrimination legislation typically prohibits “private discrimination”, ie discrimination committed by individuals or institutions such as clubs or restaurants, and usually consists of conduct. Currie and De Waal (2005) 267. The Act also prohibits state discrimination.

²¹ S 6 read with ss 13 and 14 and the definitions of “discrimination” and “prohibited grounds”.

²² Lane (2005) 28 (internet version) seems to argue that the Act applies to “privately owned yet publicly used spaces” but not to private homes. The Act does not contain any explicit exclusions, but will probably not be utilised to combat instances of “intimate discrimination” – male friends’ bridge club, for example.

²³ See the Schedule to the Act that contains an “Illustrative list of unfair practices in certain sectors”. The Schedule to the Act “is intended to illustrate and emphasise some practices which are or may be unfair, that are widespread and that need to be addressed” (read with s 29(1)).

²⁴ S 11 read with the definition of “harassment” in s 1(xiii).

²⁵ S 10.

²⁶ S 24 read with the definition of “equality” in s 1(1)(ix).

of practice or report to a body on measures to promote equality. In this regard, regulations have been published for comment,²⁷ but have not been given legal effect yet.

1.2 Aim of the study

Broadly speaking, my aim is to ascertain the (potential) effectiveness of the Act. To do so, I consider to what extent the Act will reach its stated goals.

Anti-discrimination legislation could have a number of purposes:

- (a) Parliament may wish to send a strong moral message that it views discrimination as an evil. Nothing more necessarily flows from the enactment of the law; the legislature may feel that its symbolic commitment to combating discrimination is sufficient.²⁸
- (b) The goal of an anti-discrimination Act could be to establish forums where discrimination complaints may be aired and resolved.²⁹ This goal need not move much beyond a symbolic commitment: Such tribunals may not be properly resourced, or little publicity may be given to its existence, or to favourable outcomes for plaintiffs.³⁰ At its most idealistic, the legislature may envisage that these forums will hear a large number of (individual) discrimination complaints and will resolve the complaints in favour of the plaintiffs.³¹
- (c) The goal could be to achieve a thorough-going readjustment in income distribution and unemployment rates of various disadvantaged groups, identified by, for example, race,

²⁷ GN No 563, *Government Gazette* No 26316, 2004-04-30.

²⁸ Lustgarten (1986) 49 *Mod L Rev* 84-85; Lacey (1987) 14 *J Law & Soc* 419-420; McCrudden in Loenen and Rodrigues (eds) (1999) 297. Also cf AIDS Law Project (ALP) Submission on the Act to the Joint Monitoring Committee on the Improvement of the Quality of Life and Status of Women and Joint Monitoring Committee on the Improvement of Quality of Life and the Status of Children, Youth and Persons with Disabilities, 22 September 2006, <http://www.pmg.org.za/viewminute.php?id=8349> (accessed 2007-05-15), p 12 of the internet version: "Explicit protection [of HIV/AIDS status] ... would also carry *symbolic importance*. It would give *public and legislative recognition* to the fact that such discrimination is a social ill that affects a large – albeit vulnerable – section of our population". De Vos (1996) 11 *SAPL* 357 states that "some lesbian and gay men ... base their arguments [relating to the right to marry someone of the same sex] on the need for *public legitimation* of their relationships" (my emphasis). De Vos (1996) 12 *SAJHR* 290 argues that "especially for the historically disempowered, the 'conferring' of rights is symbolic of all the denied aspects of their humanity". At the same page he quotes a black drag queen at the 1994 gay pride march in Johannesburg: "Darling, it means sweet motherfuck-all. You can rape me, rob me – what am I going to do when you attack me? Wave the Constitution in your face? I'm just a nobody black queen ... But you know what? *Ever since I heard about the Constitution, I feel free inside*" (my emphasis).

²⁹ Cf Joachim (1999) 13 *Can J ALP* 52; Chemerinsky in Devins and Douglas (eds) (1998) 193.

³⁰ Bailey and Devereux in Kinley (ed) (1998) 303.

³¹ Lustgarten in Hepple and Szyszczak (eds) (1992) 455-457 describes this goal as the "just treatment of individuals".

- sex/gender, sexual orientation and HIV status, so that these figures become proportionately equivalent to the most privileged group (usually white, heterosexual males.³²)
- (d) At its most ambitious and idealistic, the legislature may wish to reach into the hearts, minds and homes of its subjects, and affect fundamental changes in basic social relationships.³³

I would argue that the Act aims to achieve all these goals,³⁴ but that the Act is primarily aimed at *transforming* South African society. I discuss my understanding of what “transformative law” entails immediately below, whereafter I return to the goals of anti-discrimination legislation and the stated goals of the Act.

As to what a *transformative law* entails, the literature is not clear.³⁵ Authors who offer definitions, do so in rather general or even vague terms. Friedman and Ladinsky defines “social change” (I take “social change” and “transformation” as synonyms, perhaps mistakenly) as “any nonrepetitive alteration in the established modes of behaviour in society”.³⁶ If patterns of social relations and established social norms and social roles change, “social change” occurred.³⁷ Grossman and Grossman prefer a wider definition of “social change” and identify varying levels or orders of change.³⁸ They identify (a) an alteration in individual patterns of behaviour; (b) an alteration in group norms or relational patterns between individuals and groups and between groups; (c) an alteration in patterns of relationships between individuals or groups to the political, economic or

³² Lustgarten in Hepple and Szyszczak (eds) (1992) 455-457.

³³ Gutto (2001) 7.

³⁴ Albertyn *et al* (eds) (2001) 3 seem to argue that the Act aims at providing a legal mechanism with which to address and remedy discrimination, and to address structural or systemic discrimination. These authors do not seem to read the fourth possible purpose of anti-discrimination legislation into the Act. Gutto (2001) 7 defines “social legislation” as “laws directed at (a) normalising the abnormalities of the past and/or (b) extending the boundaries of policies, law and practices in line with the national agenda of building a progressive and caring society where social inequalities are redressed to a minimum *and democratic values permeate all social relations*” (my emphasis). At 8 he refers to the Act as “one of the most important pieces of social legislation in the new democratic South Africa”. Gutto clearly reads the fourth possible purpose of anti-discrimination legislation into the Act.

³⁵ Cotterrell (1992) 47 puts it thus: “It is clearly essential to try to pinpoint what is meant by social change in the relevant literature but this is not easy since the concept is often used in extremely loose fashion in discussions of law as though it were self-explanatory”.

³⁶ Friedman and Ladinsky (1967) 50.

³⁷ Cotterrell (1992) 47.

³⁸ Grossman and Grossman (1971) 4.

social system; and (d) an alteration in a given society's "basic values".³⁹ Chemerinsky simply states that "social change connotes an overall noticeable effect on society".⁴⁰ Morison's definition is more explicit. He defines social change as "a fundamental alteration in the way an aspect of society is structured, in the way that people relate to one another or in the way that an issue is perceived and acted upon".⁴¹

More recent commentaries on what "transformation" entails, specifically in the South African context, are more helpful. In the context of transformative constitutionalism, Klare sees a highly egalitarian, caring, multicultural community,⁴² while Albertyn and Goldblatt talks of a complete restructuring of the state and society, including a redistribution of power and resources along egalitarian lines, the eradication of systemic forms of domination and material disadvantage and the development of opportunities which allow people to realize their full human potential within positive social relationships.⁴³ Pieterse understands the concept as "mandating the achievement of substantive equality and social justice, the infiltration of human rights norms into private relationships and the fostering of a 'culture of justification' for every exercise of public power".⁴⁴ At the risk of oversimplifying these authors' views, it seems as if "transformative" laws, specifically in the context of present day South Africa, may be seen as laws that attempt to do one or both of the following:

(a) Transformative laws aim to create a more egalitarian society where socio-economic disparities between different communities are eradicated or at least softened. In the shorter term such laws would aim at the proportional representation across income, wealth and resource categories of the

³⁹ Grossman and Grossman (1971) 6.

⁴⁰ Chemerinsky in Devins and Douglas (eds) (1998) 198. At the same page he states that clear criteria for assessing or measuring social change do not exist.

⁴¹ Morison in Livingstone and Morison (eds) (1990) 7.

⁴² Klare (1998) 14 *SAJHR* 150.

⁴³ Albertyn and Goldblatt (1998) 14 *SAJHR* 249.

⁴⁴ Pieterse (2005) 20 *SAPL* 155-156. He expands on what he has in mind at 159: "[T]he dismantling of the formal structures of apartheid, the explicit targeting and ultimate eradication of the (public and private) social structures that cause and reinforce inequality, the redistribution of social capital along egalitarian lines, an explicit engagement with social vulnerability in all legislative, executive and judicial action and the empowerment of the poor and otherwise historically marginalised sectors of society through pro-active and context-sensitive measures that affirm human dignity". At 160 he argues that substantive equality will only be achieved if the material consequences of social and economic vulnerability are addressed. The alleviation of concrete hardship, the socio-economic upliftment of the majority of South Africans and the achievement of social justice are therefore integral components of constitutional transformation in his view.

various social groupings, and in the longer term would aim at a society where all residents will lead dignified lives, free from hunger and want.⁴⁵

(b) Such laws aim to change the “hearts and minds” of the broader South African community so that racism, sexism, homophobia, xenophobia and the like become anathema.⁴⁶

⁴⁵ Albertyn and Goldblatt (1998) 14 *SAJHR* 249 seem to use the concept “transformation” in this sense: “[A] complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines”. Pieterse (2005) 20 *SAPL* 159 also seems to think of “transformation” in this sense: “[C]onstitutional transformation in South Africa includes the dismantling of the formal structures of apartheid, the explicit targeting and ultimate eradication of the (public and private) social structures that cause and reinforce inequality, the redistribution of social capital along egalitarian lines, an explicit engagement with social vulnerability in all legislative, executive and judicial action and the empowerment of the poor and otherwise historically marginalised sectors of society...” Also see Moseneke (2002) 18 *SAJHR* 316 (“Central to [that] transformation is the achievement of equality. An egalitarian society would not be possible unless there is a total reconstruction of the power relations in society...”) and 318 ([T]ransformative adjudication must be put to the task of achieving... social redistributive justice. The primary purpose of the Constitution is to intervene in unjust, uneven and impermissible power and resource distributions...”); Lane (2005) 8 (internet version) (She describes the achievement of greater parity as one of the goals of the new constitutional order); Liebenberg (2000) 2 *ESR Review* 2 (internet version) (She argues that the Act is “committed to ensuring equal outcomes for disadvantaged groups) and Bohler-Muller and Tait (2000) 21 *Obiter* 407 (“The Preamble to the Equality Act makes it clear that the eradication of systemic social and economic inequalities and unfair discrimination underlies the establishment of a constitutional democracy ...”). The chairperson of the ad hoc committee who redrafted the Bill certainly had this sense of discrimination in mind when he spoke at the consideration of the Bill in the National Council of Provinces, 28 January 2000 (reproduced in Gutto (2001) 74 and further): “This Bill was about equality. This Bill was about transformation. This Bill was about changing the very fabric of our society so that we redress the disadvantages of a systemic nature that we have suffered as South Africans for so long...” Also of the “Memorandum on the Objects of the Promotion of Equality and Prevention of Unfair Discrimination Bill” that accompanied Bill B57B-99 (ISBN 0 621 29135 8): “This Bill is drafted to give effect to the letter and spirit of the Constitution, especially the founding values of achieving equality and human dignity. The Bill does this by eradicating systemic forms of discrimination and disadvantage ...” (my emphasis).

⁴⁶ Cf Brand (2000) *Woord & Daad* 13; Moseneke (2002) 18 *SAJHR* 319 (“[T]he overarching constitutional enterprise of transforming our society into a democratic, non-racial, non-discriminating, egalitarian, socially just and caring society (my emphasis); Hocking (1995) 15 *Proctor* 21 (who identifies the barriers to a truly non-discriminatory society as “personal attitudes, subtle perceptions and entrenched male focused value systems”); Dror (1958) 33 *Tul L Rev* 788 (who states that “social change” refers to changes in social structure or culture); Klare (1998) 14 *SAJHR* 150 (He talks of a multicultural, caring society); and Lane (2005) 29 (internet version) (who wants to see the equality court presiding officers providing remedies that challenge the attitudes of offenders.) This kind of transformation would for example include issues such as the eradication of “unjust joking” as referred to by Verwoerd and Verwoerd (1994) 23 *Agenda* 67. The (then) Deputy Minister of Justice and Constitutional Development seemed to have both “types” of discrimination in mind when she spoke during the consideration of the Bill in the National Council of Provinces, 28 January 2000 (reproduced in Gutto (2001) 71 and further.) The Deputy Minister said that the “express goal with this legislation is the creation of a society based on respect for the dignity and equal worth of all human beings. The underlying tenet of the Bill is the belief ... that we can eliminate systemic forms of unfair discrimination inherited from a past fraught with prejudice and bigotry and ... that we can prevent and prohibit any new forms of disadvantage that may arise”. Also of the “Memorandum on the Objects of the Promotion of Equality and Prevention of Unfair Discrimination Bill” that accompanied Bill B57B-99 (ISBN 0 621 29135 8): “This Bill is drafted to give effect to the letter and spirit of the Constitution, especially the founding values of achieving equality and human dignity” (my emphasis). The Supreme Court of Appeal offers a similar (oblique) interpretation of the aim of the Act in *Minister of Environmental Affairs and Tourism v George* 2007 (3) SA 62 (SCA) at para 3: “The statute’s objects are to give effect to the letter and spirit of the Constitution’s equality promise ...”

There is a clear overlap between the goals of transformative legislation, and some of the suggested goals of anti-discrimination legislation as referred to above.⁴⁷

I would suggest that both these “types” of transformation may be identified from various provisions in the Act.

As to the achievement of a thorough-going readjustment in income distribution and unemployment rates, the Preamble of the Act speaks of the “eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy”, as well as “systemic inequalities and unfair discrimination” that “remain deeply embedded in social structures [and] practices”. This, in turn, “implies the advancement, by special legal and other measures, of historically disadvantaged individuals, communities and social groups who were dispossessed of their land and resources”. Section 2(g) contains as one of the objects of the Act, “to set out measures to advance persons disadvantaged by unfair discrimination”. When applying the Act, it must be done in such a manner as to give effect to “the Constitution, the provisions of which include the promotion of equality through legislative and other measures designed to protect or *advance persons disadvantaged by past and present unfair discrimination*”.⁴⁸ Section 4(2) of the Act contains the following directive (my emphasis):

In the application of this Act the following should be recognised and taken into account:

(a) *The existence of systemic discrimination and inequalities*, particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy; and

(b) the need to take measures at all levels *to eliminate such discrimination and inequalities*.

Sections 7, 8 and 9 of the Act contain examples of the kinds of discrimination the legislature had in mind when the Act was put in place. Some of these examples very clearly have a socio-economic transformation in mind, notably sections 7(d),⁴⁹ 7(e),⁵⁰ 8(c),⁵¹ 8(e),⁵² 8(g),⁵³ 8(h),⁵⁴ 8(i),⁵⁵ and 9(c).⁵⁶

⁴⁷ Also cf Gutto (2001) 7 where he refers to “social legislation”.

⁴⁸ S 3(1)(a); my emphasis.

⁴⁹ “[T]he provision or continued provision of inferior services to any racial group, compared to those of another racial group”.

It is clear from an analysis of a number of provisions in the Act that the legislature also aimed to bring about changes in the “hearts and minds” of South Africans with the enactment of this Act. The Preamble implicitly expresses the wish that the Act will remove the “pain and suffering” brought “to the great majority of our people”, as well as the “systemic inequalities and unfair discrimination” that “remain deeply embedded in social structures, practices and *attitudes*”,⁵⁷ and that the Act will restore people’s lost dignity. The Preamble explicitly notes that “this Act endeavours to facilitate the transition to a democratic society, united in its diversity, *marked by human relations that are caring and compassionate*”.⁵⁸ A number of the examples listed in sections 7 and 8 at least implicitly addresses attitudinal discrimination.⁵⁹ The sections in the Act dealing with the promotion of equality also, at least implicitly, engage anticipated attitudinal changes.⁶⁰

The Act also clearly has as one its goals the establishment of forums where discrimination disputes may be raised and resolved. A number of provisions in section 2 of the Act (which contains the objects of the Act) may be read to create this aim. Section 2(b)(i) states that the Act aims at giving effect to the letter and spirit of the Constitution, in particular “the equal enjoyment of all rights and freedoms *by every person*”.⁶¹ This subsection anticipates a procedure whereby individual claimants will be able to ensure the enjoyment of their human rights. Section 2(b)(iv) contains another object of the Act: “the prevention of unfair discrimination and protection of human dignity

⁵⁰ “[T]he denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons”.

⁵¹ “[T]he system of preventing women from inheriting family property”.

⁵² “[A]ny policy or conduct that unfairly limits access of women to land rights, finance, and other resources”.

⁵³ “[L]imiting women’s access to social services or benefits, such as health, education and social security”.

⁵⁴ “[T]he denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons”.

⁵⁵ “[S]ystemic inequality of access to opportunities by women as a result of the sexual division of labour”.

⁵⁶ “[F]ailing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons”.

⁵⁷ My emphasis.

⁵⁸ My emphasis.

⁵⁹ Consider ss 7(a) (“the dissemination of any propaganda or idea, which propounds the *racial superiority or inferiority of any person*, including incitement to, or participation in, any form of racial violence”); 8(a) (“gender-based violence”); 8(b) (“female genital mutilation”); and 8(d) (“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” (my emphasis)).

⁶⁰ Ss 2(b)(ii); 2(e); 3(1)(a); and 24-28.

⁶¹ My emphasis.

as contemplated in sections 9 and 10 of the Constitution”. This subsection, read with sections 2(d),⁶² 2(f),⁶³ 4(1)(b),⁶⁴ 16 and the regulations to the Act,⁶⁵ make it clear that the Act aims at the creation of of inexpensive, accessible, informal dispute resolution mechanisms (equality courts). In chapters 3.3.4; 4 and 5.5 I (implicitly) consider to what extent the Act achieved its goal of establishing accessible enforcement mechanisms for the resolution of discrimination complaints.

However, the main aim of the thesis is to take the drafters of the Act at their word and to assess the Act’s potential to *transform* South African society, mainly in the first sense – socio-economic transformation.⁶⁶ I do not pay as much attention to the question whether the Act has the potential to change *attitudes*.⁶⁷ Nevertheless, socio-legal research that tracks the divergence or convergence over time between popular attitudes and Constitutional and other legal norms such as non-discrimination would be of value.⁶⁸ For example, it is arguable that a stable South African democracy would *inter alia* depend on “buy-in” by the majority of South Africans.⁶⁹ Therefore, popular attitudes in South Africa relating to issues such as racial tolerance; gender discrimination; homophobia, and so on, could be tracked over time as part of the broader societal transformation project.⁷⁰ However, many evaluative research projects face the problem of establishing the cause

⁶² “[T]o provide for procedures for the determination of circumstances under which discrimination is unfair”.

⁶³ [T]o provide remedies for victims of unfair discrimination, hate speech and harassment and persons whose right to equality has been infringed”.

⁶⁴ “In the adjudication of any proceedings which are instituted in terms of or under this Act, the following principles should apply: (b) access to justice to all persons in relevant judicial and other dispute resolution forums”.

⁶⁵ GN No R764, *Government Gazette* No 25065, 2003-06-13; and see pp 142-145 of the thesis.

⁶⁶ Chemerinsky’s main point of criticism against sceptics is their *failure to clearly set out their criteria* for deciding whether court action was successful or not. His view is that a categorical statement that “courts (or the legislature) cannot effect social change” cannot be made and that a contextual analysis must take place – sometimes courts will have far-reaching effects and sometimes no effect whatsoever. (Chemerinsky in Devins and Douglas (eds) (1998) 192).

⁶⁷ In *Palmore v Sidoti* 466 US 429 (1984) 433 (as referred to by De Vos (1996) 59 *THRHR* 306 and De Vos (1994) 11 *SAJHR* 693) the American Supreme Court may well have decided that the law cannot steer popular attitudes: “*The [American] Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect*” (my emphasis).

⁶⁸ Cf Pollitt (2003) 119, albeit in a somewhat different context. Pillay in Pillay *et al* (eds) (2006) 2 is more to the point: “knowledge about citizens’ perceptions ... enables researchers and scholars to make continuous assessments of citizens’ attitudes which constitutes one of the structural conditions for democratic sustainability”. Also see Orkin and Jewell in the same source at 279: “[A] country’s attitudinal profile is as much a part of its social reality as are its demographic make-up, its culture and its distinctive social patterns ... Regular data of this kind also helps a country to measure its progress towards the achievement of certain economic, social and political goals. And such analyses, especially social and political ones, are not complete unless they are based on the measurement of both ‘objective’ and ‘subjective’ realities ...”

⁶⁹ Cf Pillay in Pillay *et al* (eds) (2006) 1.

⁷⁰ Cf Pillay in Pillay *et al* (eds) (2006) 6 as to the value of longitudinal data.

if a “result” is found.⁷¹ Many different actions by many different actors all operate independently or dependently on one another, co-causing or co-destroying the result; or it could be argued that a particular “project” consists of many programmes with many different subparts, and that it is impossible to calculate the relative contribution of each of the subparts to the whole.⁷² Zammuto suggests that the process of evaluation can be reduced to three conditions necessary for an attribution of effectiveness:⁷³

- (1) an effect is desirable;
- (2) that effect is observed or reliably predicted; and
- (3) the desirable effect is perceived as having been produced by the activity being evaluated.

Zammuto states that an effect must be desirable, observed, or predicted, *and be perceived as being produced by the activity being evaluated* before it will be judged effective.⁷⁴ I would argue that it is not possible to establish the attitudinal outcome of a particular case in an equality court,⁷⁵ and an observation of attitudinal change over time cannot be empirically attributed to the Act.⁷⁶ On the other hand, I would suggest that concrete socio-economic outcomes of actual court cases may be measured and evaluated, at the very least in some cases.⁷⁷

As stated above, the main aim of the thesis is to offer a prediction on the Act’s effectiveness and to consider ways in which the Act could be made more effective in reaching its stated goal of achieving thorough-going socio-economic transformation of South African society.

⁷¹ Pollitt (2003) 119.

⁷² Pollitt (2003) 119.

⁷³ Zammuto (1982) 29.

⁷⁴ Zammuto (1982) 29; my emphasis.

⁷⁵ Consider the approach of Sachs J in *Dikoko v Mokhatla* 2006 (6) SA 235 (CC). Sachs J argues that the common law of defamation should be developed so as to place greater emphasis on reconciliation between the parties. At para 121 he suggests that “more flexibility and innovation concerning the relation between apology and money awards” should be built into the law of defamation. The implication of his judgment is that he believes that the law of defamation may be used as a tool to bring the combating parties closer together; that the law may be used to change their attitudes towards one another. I would argue, and Sachs J admits as much at para 120 of his judgment, that there is simply no method of ascertaining whether the apology, if ordered by a court, was heartfelt and sincere, or a cynical attempt to reduce the amount of damages awarded in the judgment.

⁷⁶ See chapter 2.4 below for a more detailed discussion of this debate in the literature (ie, can laws change attitudes.)

⁷⁷ For example, a researcher could track housing delivery after *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), or treatment of HIV+ mothers in state hospitals after *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC).

Ancillary aims of the thesis include the following:

- an analysis of socio-legal theories on the relationship between law and society and the (in)ability of law to steer, change and transform society;⁷⁸
- a thorough, critical and interdisciplinary evaluation of the training of magistrates and judges as required in terms of the Act, and how the inadequacies in this process may have compromised the effectiveness of the Act;⁷⁹
- a comparative survey of the usual defects in anti-discrimination legislation and anti-discrimination enforcement mechanisms with the aim of identifying possible lessons for the amendment, implementation and application of the Act;⁸⁰ and
- an empirical survey to consider the suitability of court-driven societal transformation.⁸¹

1.3 *Research assumptions*

It is my contention that the South African Parliament's attempt to create an egalitarian society and to eradicate racist and other discriminatory behaviour is likely to be less effective than anticipated by the drafters *inter alia* due for the following reasons:

- The South African state as an institution is weak and is not capable of the degree of surveillance and social control necessary to create fundamental changes in society's power relations, views, attitudes and morals.
- In the South African state, law is largely absent or invisible.
- Many South Africans have internalised discrimination and do not perceive discriminatory incidents perpetrated against them as discrimination, but as "the way things are".
- The Act was written in typical lawyer's language, it is inaccessible and targeted at the judiciary instead of the most likely victims of unfair discrimination.
- The Act has been insufficiently "marketed" and there is a lack of awareness among South Africans of the Act and the equality courts.

⁷⁸ See chapter 2.4 and 2.5 in particular.

⁷⁹ See chapter 4 of the thesis.

⁸⁰ See chapter 3.2 and Annexure D of the thesis.

⁸¹ See chapter 5 of the thesis.

- The Act's enforcement mechanisms are not strong enough.
- Strong supporting mechanisms, for example sufficient legal aid for indigent claimants, do not exist.
- The majority of South Africans lack confidence in the courts and the justice system and have inadequate access to courts.

1.4 Importance of the topic

Whenever a social problem arises, a general tendency is to call upon Parliament to legislate to address the situation.⁸² Relatively recent South African examples of such calls on Parliament include a "Bill of Morals",⁸³ safety at sport stadiums,⁸⁴ anti-smoking provisions,⁸⁵ transformation in sport,⁸⁶ trauma caused to animals due to fire works,⁸⁷ pirating of computer software,⁸⁸ road traffic deaths,⁸⁹ maintenance defaulters⁹⁰ and minimum wages for domestic workers.⁹¹ At the same time a number of social commentators have noted an apparent lawlessness, non-application and the ineffectiveness of existing legislation in South Africa.⁹² Newspapers have also reported a number of incidences in the recent past relating to vigilante justice.⁹³ Against a background of societal transformation in post-Apartheid South Africa, the thesis identifies some of the reasons behind this apparent paradox. The negotiators at the multi-party negotiation process preceding the 1994 elections and the drafters of the interim and final Constitution placed enormous faith in the ability of the legal system (including the courts, legislation, the judiciary and the legal profession) to underpin South Africa's transformation from an autocratic, racist, minority-ruled country into an egalitarian

⁸² This is not unique to South Africa. Allott (1980) vii notes that "obsession with law-making seems a twentieth-century phenomenon, product of the prolonged Age of Enlightenment which stretches down from the eighteenth century to the present day, fed by Bentham and Napoleon, watered by the Germans, and now spreading over all, everyone, and everywhere, like a great green mould".

⁸³ *The Star* (2005-05-21) 1; *Sunday Argus* (2005-05-22) 18; *Saturday Weekend Argus* (2005-05-21) 3.

⁸⁴ *Business Day* (2006-05-31) 8.

⁸⁵ *Star* (2007-03-08) 14; *Beeld* (2003-06-05) 4.

⁸⁶ *Beeld* (2003-04-09) 1.

⁸⁷ *Beeld* (2003-01-06) 5; *Citizen* (2003-01-04) 6.

⁸⁸ *Sunday Times Business Times* (2003-01-19) 7.

⁸⁹ *Beeld* (2003-01-31) 4.

⁹⁰ http://www.mg.co.za/articledirect.aspx?area=mg_flat&articleid=10070 (accessed 2007-08-06).

⁹¹ *Beeld* (2002-08-16) 1.

⁹² Eg Du Plessis, Olivier and Pienaar (2002) 17 *SAPL* 440. Also cf Pound (1917) 3 *ABA J* 64: "Complaint of non-enforcement of law is nothing new. It is as old as the law and has been heard in this country from the beginning".

⁹³ *Beeld* (2002-08-29) 10; *Sunday Times* (2002-12-29) 6; *Beeld* (2003-05-20) 4; *Beeld* (2003-05-21) 10; *Beeld* (2003-06-27) 17; *Sunday Times* (2003-06-08) 16; *Financial Mail* (2002-02-01) 28; *Daily Dispatch* (2007-05-09) 1; *The Herald* (2007-04-25) 3; *Witness* (2007-05-10) 3; *Beeld* (2003-06-05) 16.

society.⁹⁴ Since 1994 the new government has passed a large number of Acts, many of which have been aimed specifically at redressing the imbalances of the past.⁹⁵

In the thesis I question this approach and I point out, with specific reference to the Act, the limits of the law in transforming society. I attempt to ascertain if, when and how the Act and the equality courts can be used effectively to bring about social change, with a particular emphasis on the identification of possible pitfalls in the application of the Act in its attempt to eradicate the legacy of Apartheid. The relationship between law and society forms part of this analysis. If and when the limits of the law in effecting social change are better understood, then more effective ways of bringing about societal change in South Africa may be identified.⁹⁶

⁹⁴ Cameron (1997) 114 *SALJ* 504, Andrews and Ellmann in Andrews and Ellmann (eds) (2001) 8. De Klerk and Mandela, two crucial role players, were both lawyers by profession, as well as Roelf Meyer, a key NP negotiator. Mandela described the 1996 Constitution as “a charter for the transformation of our country” in the foreword to Andrews and Ellmann (eds) (2001) vii. Mutua (2002) 126 states that “never has the recreation of a state been so singularly the product of such focused and relentless advocacy of human rights norms” and “the construction of the post-apartheid state represents the first deliberate and calculated effort in history to craft a human rights state – a polity that is primarily animated by human rights norms”. At 128 he continues: “The most important feature of the post-apartheid state is its virtually exclusive reliance on rights discourse as the engine of change”. Also see Jagwanth in Campbell, Ewing and Tomkins (2001) 298: “In relation to content, the South African Constitution is manifestly transformative”.

⁹⁵ See n1 for examples. Approximately 50 of the Acts passed by Parliament since 1994 (excluding amending Acts) could be described as Acts with a “transformative” purpose. *Contra* Seidman and Seidman (1997) 34 *Harv J on Legis* 10 n33 that thinks South Africa has passed few transformatory laws. The article was written in 1996 however, at a time that the new Parliament was presumably still finding its feet. (On my count, approximately 17 transformative Acts were passed from 1994 to 1996, and a further 33 such Acts since then.) Seidman and Seidman highlight perhaps South Africa’s biggest failure relating to legislating change: “New transformatory educational legislation seemed imminent but, in the interim, *most schools remain segregated* and curricula unchanged” (my emphasis). Also see O’Regan J’s comments in *MEC for Education: KwaZulu-Natal and others v Pillay* CCT 51/06: “The absence of racial integration in our schools remains a problem for us all. It deprives young South Africans of the ability to meet, and to learn and play together” (para 124) and “sadly there are still too few schools in South Africa whose learner population is genuinely diverse” (para 185).

⁹⁶ Economically South Africa remains a deeply unequal society. Terreblanche (2002) 33 paints a bleak picture: “The inequality in the distribution of income has solidified over the past eight years into five clearly identifiable classes: a bourgeois elite consisting of 16,6 per cent of the population (of which +- 50 per cent is white and +- 50 per cent black), receiving 72,2 per cent of total income; a petit bourgeois class consisting of 16,6 per cent of the population (of which +- 15 per cent is white), receiving 17,2 per cent of total income; and a lower class consisting of +- 67 per cent of the total population of which 2 per cent is white), receiving only 10,6 per cent of the total income. However, the lower class has to be divided into three subclasses: an upper lower class, consisting of 16,6 per cent of the population and receiving 7,3 per cent of total income; a middle lower class, consisting of +- 25 per cent of the population and receiving 2 per cent of total income; and a lower lower class, consisting of +- 25 per cent of the population, and receiving only 1,3 per cent of total income... Sixty per cent of Africans are poor, compared to one per cent of whites.” Christie in MacEwen (ed) (1997) 177-178 provides the following statistics: “White households earn more than six times black households ... earnings of male-headed white households are more than seven times those of female headed African households. Black equity holdings are very low: black people have between 5% and 10% of total holdings ... Only 3% of managers are African and women form little over 11% of managerial staff ... At the same time there is even more dispiriting evidence of a widening disparity between rich and poor blacks. Large companies seem willing to pay black senior



1.5 Literature review

Relatively little material is available on the Act specifically – the Act has been in force for a relatively short time and very High Court equality court cases have been reported.⁹⁷

As part of the training programme for equality court presiding officers, a bench book for judges and magistrates and a resource manual for clerks and registrars were drafted. These documents are not widely available. Gutto's⁹⁸ *Equality and non-discrimination in South Africa: The political economy of law and law making* touches on the drafting history of the Act and addresses some of the issues that I raise in the thesis, notably the role of the *ad hoc* Parliamentary committee mandated to draft the Act, the role of lobbyists, the training of equality court presiding officers, the role of the legal profession in a democratising South Africa, comparative practices in other jurisdictions and challenges relating to the implementation of the Act. I discuss the training of equality court clerks, magistrates and judges in much greater detail than set out in Gutto's book.

managers up to 50% more than whites for the same position. Whereas a small, visible black elite, has been seen to benefit considerably from affirmation action programmes, sometimes implemented unilaterally by white management and occasionally negotiated with trade unions (particularly in large businesses) there is massive and persistent impoverishment". O'Regan in Loenen and Rodrigues (eds) (1999) 14: "[T]he wealthiest ten percent of households earn nearly 50 percent of all income earned, whereas the poorest 60 percent of households earn less than 20 percent of income. Liebenberg and O'Sullivan (2001) 2: "Nearly 95% of South Africa's poor are African, 5% are Coloured and less than 1% are Indian or White. The unemployment rate among Africans (42,5%) is ten times the unemployment rate of Whites (4,6%)". Calland (2006) xiii states that the "great majority of South Africans remain marginalized from real power and excluded from full participation in society due to chronic unemployment and poverty". Hughes in Clapham *et al* (eds) (2006) 159 states that South Africa has an ongoing shortage of 2.2 million low cost housing units, 5.3 million South African children are severely deprived and frequently hungry and 10.5 million children are poor and suffer from severe deprivation. Bhorat and Kanbur in Bhorat and Kanbur (eds) (2006) 4-5 hold that during the first ten years of democracy income poverty had increased, income inequality had increased, inequality among African households had increased and unemployment had increased. At 6-8 they note that access to social services, however, had markedly improved during the same time period.

⁹⁷ Only three equality court (High Court) decisions have been reported: *George v Minister of Environmental Affairs and Tourism* 2005 (6) SA 297 (EqC) (this judgment has been taken on appeal: *Minister of Environmental Affairs and Tourism v George* 2007 (3) SA 62 (SCA)); *Du Preez v Minister of Justice and Constitutional Development* 2006 (5) SA 592 (EqC); and *Pillay v MEC for Education, KwaZulu-Natal* 2006 (6) SA 363 (EqC). The respondents in *Pillay* appealed to the Constitutional Court and judgment was handed down on 5 October 2007 (*MEC for Education: KwaZulu-Natal and others v Pillay* CCT 51/06). The Act has been referred to (but not applied) in *Hoffmann v SAA* 2001 (1) SA 1 (CC), *Stoman v Minister of Safety and Security* 2002 (3) SA 468 (T); *Botha v Mthiyane* 2002 (1) SA 289 (W); *Bezuidenhout v Bezuidenhout* 2003 (6) SA 691 (CC); *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC); *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) and *Minister of Education and another v Syfrets Trust Ltd NO and another* 2006 (4) SA 205 (C).

⁹⁸ (2001).

Albertyn, Goldblatt and Roederer (eds)⁹⁹ *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* aims to “unlock” the Act and is not primarily concerned with the Act’s ability to realise its goal. Similarly, in three earlier articles I focus on the application of the Act and I do not specifically address the transformative potential of the Act.¹⁰⁰ Bohler-Muller has written a number of articles on the Act’s transformative potential.¹⁰¹

Considerable material has been produced on anti-discrimination law more generally.¹⁰² A number of impact studies on anti-discrimination legislation have been undertaken, of which most conclude that such attempts have largely been ineffective.¹⁰³ A large number of works concerning sociology of law focus on the (in)ability of laws to effect social change,¹⁰⁴ without specific reference to the Act or to South Africa.

1.6 Modus operandi and research methodology

1.6.1 Literature overview

I undertook an initial literature search of mainly sociological literature. Concepts that I explored included the role of law in society, the transformative potential of law and the requirements of effective laws. I focused on impact studies undertaken in other countries, specifically as they relate to anti-discrimination legislation. I consulted the major books and journal articles on the right to equality and non-discrimination as set out in the South African Constitution.

Professors Gutto, Albertyn and Liebenberg provided me with copies of their personal files relating to the drafting of the Act. The files contained various drafts of the Act, which I used in tracking the development of concepts used in the Act, specifically “discrimination”, “equality”, “fairness /

⁹⁹ (2001).

¹⁰⁰ (2001) *TSAR* 294, (2002) 18 *SAJHR* 59, (2002) 4 *Judicial Officer* 211.

¹⁰¹ (2000) 63 *THRHR* 288, (2000) 16 *SAJHR* 623, Bohler-Muller and Tait (2000) 21 *Obiter* 406.

¹⁰² Among others McCrudden (ed) (1991), MacEwen (ed) (1997), Loenen and Rodrigues (eds) (1999).

¹⁰³ Among others Bennington and Wein (2000) 21 *Int J Manp* 21; Freeman (1978) 62 *Minn L Rev* 1049; Crenshaw (1988) 101 *Harv L Rev* 1331; Hocking (1995) 15 *Proctor* 19; Falardeau-Ramsay (1998) 47 *UNB LJ* 165; Lepofsky (1998) 16 *Windsor YB Access to Justice* 155; Hernandez (2002) 87 *Cornell LR* 1093; Astor (1990) 64 *Austr LJ* 113; Beermann (2002) 34 *Conn L Rev* 981; Dickens (1991) 18 *Melb Univ LR* 277; Delgado (2002) 37 *Harv CRCL LR* 369; Morgan (2002) 22 *LS* 259; Buntman (2001) 56 *Univ Miami L Rev* 1; McGoldrick (2001) 50 *Int & Comp LQ* 901; Zalesne (2001) 17 *SAJHR* 503.

¹⁰⁴ Among others Cotterrell (1992), Evan in Evan (ed) (1980), Reasons and Rich (1978), Kamenka and Tay (eds) (1980), Livingstone and Morison (eds) (1990), Kamenka *et al* (eds) (1978), Tamanaha (2001), Handler (1978). See chapter 2 for a detailed analysis of these studies.

unfairness / justification”, as well the approach the drafters followed relating to remedies and enforcement. The files also included copies of the submissions made by the vast array of organisations that lobbied Parliament during the hearings into the Promotion of Equality and Prevention of Unfair Discrimination Bill during November 1999 and January 2000. I reviewed the content of these submissions in order to draw out the implications for equality court-based societal transformation,¹⁰⁵ as many of these organisations could be expected to be involved in equality court litigation, either as complainants or respondents.

I corresponded via email with the Department of Justice and Constitutional Development to obtain statistics on the number of equality cases lodged since 16 June 2003, and progress made with the training of equality court personnel. I corresponded via email with the relevant Justice College trainer to obtain information on the nature and extent of training provided to equality court personnel by Justice College. I made telephonic enquiries to and faxed two letters to Supreme Court of Appeal Judge Farlam relating to the training of judges on the Act. Ms Madonsela, the project manager of the Equality Legislation Training and Education Unit (ELETU), housed within the Department of Justice and Constitutional Development in 2001 and 2002 (and thereafter disbanded), graciously allowed me access to the ELETU offices. She also allowed me to make photocopies of any materials that I could locate in the offices that I deemed relevant to my doctoral research. The ELETU documents mainly related to the planning and implementation of training seminars, arranged during ELETU’s lifespan, and the content of these seminars for equality court judges, magistrates and clerks.¹⁰⁶ I acted as minute secretary to the meetings of the Training Management Team (TMT), later called the Training Management Board (TMB), a committee set up in terms of the business plan relating to the training process. I collated the minutes to each of the 17 meetings. I reviewed the content of all of the abovementioned documents and communications when I wrote chapter 4 of the thesis.

The Internet provided a useful resource, specifically on Canadian equality tribunals’ decisions. Hard copies of the tribunals’ decisions are not readily available and I resorted to the web-based

¹⁰⁵ See Annexure G for a list of the submissions that I relied on in drafting the thesis.

¹⁰⁶ See Annexure G for a list of the documents obtained from the ELETU offices that I relied on in drafting the thesis.

versions.¹⁰⁷ Some of the tribunals' websites contain detailed analyses of decisions, which I studied. I reviewed the information obtained from a search relating to equality court cases as reported in the mass media. I performed a search on "SA Media" (SABINET) during August 2006, using the search key words "equality court", "equality courts", "gelykheidshof" and "gelykheidshowe" for the period 1 June 2003 to 31 July 2006.¹⁰⁸ I reviewed the information obtained from a survey that I undertook of the 60 pilot equality courts during the latter half of 2005. The information obtained from the 60 pilot courts mainly related to the number of complaints lodged with these courts, and a profile of the complainant and respondent in the lodged cases.¹⁰⁹ I also read the reported equality court (High Court) judgments.¹¹⁰ I read these Canadian tribunals' decisions, newspaper reports, results of the equality court survey and reported South African equality court judgments in order to draw conclusions and identify patterns as to the identity of likely equality court complainants and respondents, and to consider the likelihood of the Act achieving its stated goals. I expected the cases brought to the South African equality courts and Canadian tribunals to be of a discrete, insular kind, with very limited, if any, broader societal restructuring disputes being brought to trial. This assumption was largely met.¹¹¹

1.6.2 Field research

Fieldwork research consisted of qualitative and quantitative techniques:

¹⁰⁷ The secretariats of the various Canadian anti-discrimination / equal opportunity commissions referred me to their websites when I approached them for copies of the tribunal decisions. I utilised the following websites: *Alberta Human Rights and Citizenship Commission* at http://www.albertahumanrights.ab.ca/legislation/panel_decisions.asp; *British Columbia Human Rights Tribunal* at <http://www.bchrt.bc.ca/decisions/default.htm>; *Canadian Human Rights Tribunal* at http://www.chrt-tcdp.gc.ca/tribunal/index_e.asp; *Manitoba Human Rights Commission* at <http://www.gov.mb.ca/hrc/english/publicat.html>; *Nova Scotia Human Rights Commission* at <http://www.gov.ns.ca/humanrights/decisions/default.htm>; *Ontario Human Rights Commission* at <http://www.ohrc.on.ca/en/resources/cases>; and *Prince Edward Island Human Rights Commission* at <http://www.gov.pe.ca/humanrights/index.php3?number=72421&lang=E>.

¹⁰⁸ See Annexure F.2.

¹⁰⁹ See Annexure F.1.

¹¹⁰ Only three equality court (High Court) decisions have been reported: *George v Minister of Environmental Affairs and Tourism* 2005 (6) SA 297 (EqC) (this judgment has been taken on appeal: *Minister of Environmental Affairs and Tourism v George* 2007 (3) SA 62 (SCA)); *Du Preez v Minister of Justice and Constitutional Development* 2006 (5) SA 592 (EqC); and *Pillay v MEC for Education, KwaZulu-Natal* 2006 (6) SA 363 (EqC). The respondents in *Pillay* appealed to the Constitutional Court and judgment was handed down on 5 October 2007 (*MEC for Education: KwaZulu-Natal and others v Pillay* CCT 51/06).

¹¹¹ I report on the outcome of this very limited survey in chapter 3.

- Qualitative research consisted of interviews with people involved in the drafting process of the Act. These interviews focused on their role in the drafting of the Act and their expectations of the Act. I interviewed judge Johann van der Westhuizen (then of the Pretoria High Court); Shadrack Gutto, Cathi Albertyn and Shereen Mills from the Centre of Applied Legal Studies, University of Witwatersrand; Deon Rudman, Laurence Basset and Ina Botha from the Department of Justice; Thuli Madonsela, then the project manager relating to training on the Act; Sandra Liebenberg, then from the Community Law Centre, University of the Western Cape; and Michelle O'Sullivan of the Women's Legal Centre, Cape Town.
- Quantitative research consisted of personal interviews in the form of questionnaires with residents of selected suburbs in parts of Tshwane¹¹² (completed by field workers) to ascertain South Africans' awareness of anti-discrimination legislation and what they conceive as "unfair discrimination". Some questions focused on the general public's perception of the courts and the legal profession.¹¹³

1.6.3 Multidisciplinary research

I borrow from the disciplines of sociology and public administration in the thesis.

I criticise the Act mainly from a (positivist) "socio-legal" perspective,¹¹⁴ as opposed to employing a "legal" positivist method.¹¹⁵ I mean by this to enquire into the likely effect of the Act on South African society.¹¹⁶ To quote Pound, I do not "study the form of the rule and the abstract justice of its content".¹¹⁷ My investigation will be different:

¹¹² "White Pretoria" (excluding Centurion), Atteridgeville, Mamelodi, Laudium and Eersterust.

¹¹³ See chapter 5 below.

¹¹⁴ Kuye in Kuye *et al* (2002) 2 describes positivist social science theory as "the development of concepts and ideas, the formulation of hypotheses, the collection of data to confirm or falsify hypotheses, the accumulation of knowledge through exposing findings to critical scrutiny and attempts at integration". The largest part of the thesis follows this approach: the development of concepts in chapters 1 and 2, the formulation of hypotheses in chapters 1 and 2, the collection of data in chapters 4 and 5, and attempts at integration in chapters 2, 4, 5 and 6.

¹¹⁵ In Friedman's words, I "will approach law with methods that come from outside the discipline itself". Friedman (1985) 38 *Stan L Rev* 763. Of course, empiricism, or the way I understand the term, is a positivist discipline: looking for facts to explain the world how it really is (Cf Trubek (1984) 36 *Stan L Rev* 581).

¹¹⁶ Cf Griffiths in Loenen and Rodrigues (eds) (1999) 313: "In the field of sociology of law probably most attention has been paid to the effectiveness of legislation. However, such studies have usually been undertaken in a paradigm of instrumentalism, which ultimately proved quite sterile: The instrumentalist postulates that the policy-maker addresses a

He must study how far cases under the rule are susceptible of proof. He must study how far by means of his rule he may set up a tangible legal duty capable of enforcement objectively by legal sanctions. He must consider how far infringements of his rule will take on a palpable shape with which the law may deal effectively. He must study how far the legal machinery of rule and remedy is adapted to effect what he desires. Last, and most of all, he must study how to insure that someone will have a motive for invoking the machinery of the law to enforce his rule in the face of opposing interests of others in infringing it.¹¹⁸

That said, the thesis cannot do for the sociology of law or sociological jurisprudence what Weber or Pound achieved. I will not provide grand answers to grand questions. This is not a *magnum opus*. I do not develop a general theory on the relationship between legislative action and societal change, nor is it my intention to build on the “long tradition in the sociology of law”, in Cotterrell’s words, of concerning myself with explaining “theoretically the nature of law as doctrine and behaviour in historical and social context”.¹¹⁹

As to the discipline of public administration, in chapter 4 I describe the inability of the South African state to have devised and implemented an effective training programme for equality court personnel as obliged in terms of the Act. Chapter 4 focuses on the Department of Justice and Constitutional Development’s planning and implementation of training programmes for judicial officers relating to the Act. I provide a detailed topical overview of the planning and training process, mainly sourced from minutes to the meetings of the TMT/TMB. I analyse the training process and point out shortcomings in the planning and training stages. I show that a well-trained cadre of equality court personnel had *not* been established. I argue that this microscopic study may have a secondary purpose, or added benefit. Kuye suggests that one aim of public administration research would be to reform public organisations and agencies and their work, such as service delivery initiatives.¹²⁰ Reform-minded “gap” studies in socio-legal research could have the same purpose in mind – once the “gap” between the suggested ideal in the law books and the

command to those who are supposed to obey it, and if they do not, a sanction will be imposed. However, most instrumentalist literature comes to the depressing (and monotonous) conclusion that people sometimes (or generally) do not obey legislative commands and that sometimes (or usually) nothing happens to them”. I hope to move slightly beyond this conclusion, by offering suggestions on how to improve the odds that the Act will be utilised.

¹¹⁷ Pound (1917) 3 *ABA J* 70.

¹¹⁸ Pound (1917) 3 *ABA J* 70.

¹¹⁹ Cotterrell (1989) 208.

¹²⁰ Kuye in Kuye *et al* (2002) 2.

factual reality have been identified, a further object of these kinds of studies could be to identify ways of *narrowing* the gap. From a socio-legal perspective, I paint this detailed picture because an analysis of the provisions of the Act and reflection on the nature of the Act and the stated purpose of the Act is not sufficient – the social factors surrounding the Act should also be taken into account when assessing the full scope of “living discrimination law” in South Africa.¹²¹

1.6.4 Analytical research

Parts of the thesis, like many “law and society” studies,¹²² proceed in a relatively a-theoretical manner.¹²³ Broadly speaking, however, I follow a pragmatic and instrumentalist approach to “law” in the thesis, that takes the view that we can do no more than “tinker at the edges” or “muddle through”¹²⁴ when considering the (better) use of law in society. I use “pragmatic” in the ordinary-meaning-of-the-word of being concerned about where law “works best”.¹²⁵ Posner suggests that a legal pragmatist “lacks the political commitments of the realists and the crits”¹²⁶ and elsewhere suggests that “those pragmatists who attack the pieties of the Right while exhibiting a wholly uncritical devotion to the pieties of the Left ... are not genuine pragmatists; they are dogmatists in pragmatists’ clothing”.¹²⁷ In Posner’s terms I am a “dogmatic instrumentalist” as I am sympathetic to the goals of social transformation as set out in the Constitution.¹²⁸ When I use the word “law” I

¹²¹ Cf Curzon (1995) 152-153 where he discusses Ehrlich’s concept of the “living law”. As Curzon explains it, the “living law” is an “amalgam of formalities, current social values and perceptions”. Also see pp 36-38 below, where I discuss Ehrlich’s concept of “living law”.

¹²² Cotterrell (1989) 207.

¹²³ Cf Friedman (1985) 38 *Stan L Rev* 766: “[Law and society studies] do not, in general, build or grow; it travels in cycles and circles, round and round” and 779: “There is (it seems) no foundation; some work merely proves the obvious, some is poorly designed; there are no axioms, no ‘laws’ of legal behavior; nothing cumulates. The studies are at times interesting and are sporadically useful. But there is no ‘science’: Nothing adds up. Law and economics offers hard science; CLS offers high culture and the joy of trashing. The law and society movement seems to have nothing to sell but a kind of autumnal skepticism. The central message seems to be: It all depends. Grand theories do appear from time to time, but they have no survival power; they are nibbled to death by case studies. There is no central core”.

¹²⁴ Cf Posner in Patterson (ed) (2003) 189.

¹²⁵ Cf the explanation given by Cameron JA *et* Brand JA in *Minister of Finance v Gore NO 2007 (1) SA 111 (SCA)* at para 33 where he explains the application of the “but for” test in a delictual matter. It approximates my understanding of a “pragmatic” approach: “Application of the ‘but for’ test is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the ordinary person’s mind works against the background of everyday-life experiences”. Harms JA in *Tsogo Sun Holdings (Pty) Ltd v Qing-He Shan 2006 (6) SA 537 (SCA)* at para 10 is to the point: “Courts have to be pragmatic and realistic...”

¹²⁶ Sullivan and Solove (2003) 113 *Yale LJ* 690.

¹²⁷ Posner in Patterson (ed) (2003) 183.

¹²⁸ I agree with what Woolman said at the launch of *Constitutional Law of South Africa* on 28 March 2006 at Constitutional Hill, Braamfontein: “South Africa remains ... the last great modernist project. Our Final Constitution is certainly written as if it is such. It commits us to great ideals and the material transformation of the lives of those who cannot yet enter the public square without still experiencing shame ... Part of our collective responsibility ... is to put

primarily have in mind a potential tool for addressing social ills,¹²⁹ and I focus primarily on adjudication.¹³⁰

The initial aim of the doctoral study was to undertake an *impact study* of the Act and to evaluate the effectiveness of the Act.¹³¹ To achieve my aim I would have traveled through the country, visiting every operational equality court, and would have compiled statistics on the number of cases brought to each court, the profile of the complainants and defendants, the profile of complaints and the outcome of each case. I would also have hoped to interview complainants, defendants, presiding officers and legal representatives with a view to identifying barriers to the effective implementation of the Act. Because of the very long delay between the enactment of the Act and the eventual coming into force of the entire Act, I shifted my focus to a socio-legal *analysis* of the Act; turning what would have been a “making my hands dirty” research project into an office-bound or library-bound one.¹³² The long-term aim to test the research question set out in the thesis with results obtained from a comprehensive compilation of data from the equality courts remains a goal.¹³³ In the last chapter I expand on further avenues of socio-legal research that could be undertaken relating to the Act.

Let me at this point also tone down expectations about the “critical” nature of the thesis. This is not a thesis written from the perspective of the “critical left”.¹³⁴ “Critical” in the thesis corresponds to a

our basic law on as solid a footing as possible, so that other members of the legal fraternity may do what they need to do to realize the great ends of this modernist project”. (Woolman “Launch Talk” <http://www.chr.up.ac.za/closa/Reflections.doc> (accessed 2006-06-23) 2-3 of the internet version; copy of speech in my possession.) Of course, many modernist projects have failed – Scott (1998).

¹²⁹ Lane (2005) 9 (internet version) calls the Act a “pivotal *tool* for facilitating South Africa’s transition” and Liebenberg (2000) 2 *ESR Review* 2 (internet version) argues that the Act “has the potential to be a powerful *tool* to protect disadvantaged groups from unfair discrimination in accessing and enjoying socio-economic rights”.

¹³⁰ As stated in chapter 1.2, this is one of the main reasons why I am interested in the Act’s approach to combating discrimination: I want to question the drafters’ implicit faith in the ability of courts (ie, adjudication) to facilitate societal transformation.

¹³¹ I registered for my doctoral studies in 2001. Indications from the Department of Justice were that the Act would come into force in 2001.

¹³² That is, barring the empirical study I undertook in 2001 in parts of greater Tshwane.

¹³³ Such a project would have to be funded from post-doctoral research funds.

¹³⁴ Cf. Friedman (1985) 38 *Stan L Rev* 776: “The left tends to show great impatience with ‘mere empiricism’, and its program is to expose ideology, not to show how anything actually works”. Trubek (1984) 36 *Stan L Rev* 577-578 explains that the critique of legal order is based on four principles: indeterminacy, antiformalism, contradiction, and marginality. The principle of marginality entails that there is no reason to believe that “the law” is often or even frequently a decisive factor in social behaviour. At 615 he argues that critical scholars have ignored the implications of

skeptical approach to the Act and to what it is supposed to achieve.¹³⁵ Disputes arise in any society at any given time and any society, consequently, has to put some kind of dispute resolution mechanism into place.¹³⁶ I am skeptical (or “critical”) of the use of these dispute-resolution mechanisms to (fundamentally) change or transform society; I am skeptical about the value of “symbolic” victories;¹³⁷ and I am skeptical about the ability of courts and lawyers and academics to provide *tangible* rewards to the poor and vulnerable. On the other hand, I do not wish to “trash” the constitutional project or a rights-based approach. I hope not merely to criticise but to suggest other solutions.¹³⁸

1.6.5 Comparative law research

If comparative law is the “comparison of the different legal *systems* of the world”,¹³⁹ I do not undertake comparative law research in the thesis. Although a very large part of the annexures to the thesis consists of comparative material (court cases and legislation from Australia and Canada), the aim of the thesis is not to analyse these materials exhaustively or to compare these materials point by point to South African Acts or court cases. I do not hope to “resolve the accidental and divisive differences in the laws”¹⁴⁰ of South Africa and other jurisdictions who have grappled with the problem of how to combat discrimination via the law. Parts of the thesis¹⁴¹ could perhaps be described as adopting an approach of microcomparison – concerning myself with “specific legal institutions or problems”¹⁴² (ie, discrimination tribunals and how to address discrimination via the law) and with the “rules used to solve actual problems or particular conflicts

the principle of marginality and have seem relatively indifferent to most “law and society” literature that tries to explore the impact or lack of impact of legal rules, legal doctrines and legal institutions.

¹³⁵ Macaulay (2005) *Wis L Rev* 391 suggests that Critical Legal Studies, Law and Economics and Law and Society scholars are all “skeptical about making life better by creating legal rights”.

¹³⁶ Cf Watson (1982) 131 *U Pa L Rev* 1153: “Law ... is functional and practical. To some extent, it facilitates social and economic life. *At a minimum, it exists to institutionalize dispute situations* and to validate decisions given in the appropriate process which itself has the specific object of inhibiting unregulated conflict” (my emphasis).

¹³⁷ Slabbert (2006) 92, in a somewhat different context, makes the same kind of argument. He suggests that South Africa will measure its success not by eloquent speeches at political meetings, but by the ability of local governments to build a truly new South Africa by efficient service delivery.

¹³⁸ Cf Majury (1987) 3 *Wisconsin WLJ* 374-5: “But taking all of the criticism seriously leaves one without a theory of equality”.

¹³⁹ Zweigert and Kötz (1987) 2; my emphasis. Also see Zweigert and Kötz at 4.

¹⁴⁰ Zweigert and Kötz (1987) 3. At 23 the authors even suggest that the “final function of comparative law ... is its significant role in the preparation of projects for the international unification of law”.

¹⁴¹ See specifically pp 112-127 and chapter 6 of the thesis.

¹⁴² Zweigert and Kötz (1987) 5.

of interests¹⁴³ (ie, discrimination statutes). The comparative elements contained in the thesis aim to illustrate the limits of orthodox anti-discrimination legislation in selected (Western) countries,¹⁴⁴ and to identify proposed amendments to the Act to strengthen the Act's ability to achieve its stated goals.¹⁴⁵

Annexures C, D and E relate to comparative law research. Annexure C contains overviews of each of the Canadian provinces' anti-discrimination Acts, so as to provide a context for the provisions in these Acts that I believe could be usefully appropriated for use in South African equality courts. Likewise, Annexure E contains overviews of each of the Australian states' anti-discrimination Acts, for the same purpose that I included Annexure C in the thesis. (In chapter 6, the conclusion, I draw on relevant provisions from Canadian and Australian anti-discrimination Acts to propose certain amendments to the South African Act.) Annexure D contains my brief summaries of decisions handed down by selected Canadian anti-discrimination tribunals for the period 1996 to 2003. As stated under chapter 1.6.1 above, the purpose of reviewing of these decisions was to to draw conclusions and identify patterns as to the identity of likely equality court complainants and respondents, and to consider the likelihood of the Act achieving its stated goals.

1.7 Limitations of this study

1.7.1 I am who I am

I am a 35-year-old male, white, Afrikaans-speaking¹⁴⁶ South African. I am a third generation South African: My grandfather on my father's side immigrated to South Africa from the Netherlands a few years before the second World War broke out. I lived on farms on the East Rand until I left school in 1989. I was four years old when the Soweto riots broke out in 1976 – I do not remember this event. I was in standard seven when the then State President PW Botha declared the first of a number of states of emergency. I was a matric pupil when PW Botha suffered a stroke and FW de Klerk became his successor. I was a first year BCom (Law) student at the University of Pretoria

¹⁴³ Zweigert and Kötz (1987) 5.

¹⁴⁴ See pp 112-127 of the thesis. I accept that my choice of Australian and Canadian legislation and court cases may be criticised on the basis that South Africa is a racially divided society and much more polarised than these countries.

¹⁴⁵ See chapter 6 of the thesis.

¹⁴⁶ English, then, is my second language. Except for the first chapter, I did not have the thesis proofread or edited professionally. I may well have expressed myself somewhat inelegantly in some places in the thesis.

(then an almost all-white, almost all-Afrikaans tertiary institution) when de Klerk unbanned the ANC, PAC and SACP and released Nelson Mandela. I voted for the first time in 1992 in an all-white referendum on the future that South Africa should hope for.¹⁴⁷ I participated in the 1994 elections as an IEC official at a voting station north of Tshwane and assisted in vote counting at the (then) Pretoria show grounds. I voted for the then Democratic Party in the 1994 and 1999 elections, at that point a supposedly “liberal” political party, and for the Independent Party in the 2004 elections.

I do not have a single black friend.¹⁴⁸ I do not understand any African languages. Growing up on a farm, I did not regard it as unnatural that the black labourers lived in a location on the farm in small houses whereas my family lived in a much bigger house with a very large lawn. I did not regard it as unnatural that I attended an all-white primary and secondary school. I was about six years old when our domestic worker once accompanied us on our yearly holiday to the sea. We went to the circus one evening. She could not sit with us; she had to sit in the seats reserved for Blacks. I did not understand why, but I was not particularly perplexed by the incident. I became somewhat politically aware from about 16 years of age and would sometimes have blazing rows with my father, who, at that point, had rather conservative views. As a matric pupil I became despondent about the future of this country when De Klerk became State President, as I did not believe that he had the vision to do what had to be done. I was surprised by his February 1990 speech.

I did not engage in student politics at university and spent most of my time studying. I did not come into contact with many black people during my studies or during my articles with a large, corporate law firm in Johannesburg. I have not suffered from discrimination in any form.¹⁴⁹ I accept that

¹⁴⁷ The question asked to the white voters was “Do you endorse the continuation of the reform process... which is aimed at a new constitution through negotiation?” Giliomee (2003) 633-634.

¹⁴⁸ Shadrack Mbonani, a former colleague, is the closest I came to forming a friendship with a black person. He committed suicide in 2002. I am convinced I could have done more to prevent it.

¹⁴⁹ Critical Race authors rightly state “those who have experienced racial discrimination all their life may have a perspective or insights on discrimination that those who are part of the majority would not have” (see Bix (1999) 216). I am not part of a “majority” in any sense in present day South Africa, but I am a member of an economically powerful group, and a member of a group that has not historically experienced discrimination. I am also part of a group that historically were the perpetrators of discrimination, consciously and unconsciously. Lacey in Hepple and Szyszczak (eds) (1992) 100 states that “there will be aspects of the issues which I am discussing to which my position as middle-class white woman will have made me insensitive”. Macaulay (2005) *Wis L Rev* 366 states that the American Realists were white males and then proceeds to observe: “[W]e can wonder whether this affected what they looked for and what they saw”.

Apartheid had and has ongoing consequences and that being born white almost automatically leads to a privileged life compared to the majority of South Africans. My own living standard has improved dramatically since 1994. I live a cocooned life,¹⁵⁰ far removed from the desperate conditions of life most South Africans have to face.

I should probably never have studied law. Although I may have achieved good marks, I disliked and was bored by a large number of my law courses. Although I completed my articles at a very good law firm and received excellent training, I disliked large parts of the training and exposure to legal practice. In a way, joining a law faculty at a university, teaching law and writing about law, has been an escape from what I would otherwise have had to do. Perhaps, paradoxically, what I miss about legal practice is the “practical results” – getting a judgment, having it enforced, reporting to a satisfied client. The pleasures and benefits of academic life are subtler.¹⁵¹

These and other personal facts necessarily impact on the conscious and subconscious choices made, patterns identified and conclusions drawn, during the course of writing the thesis.¹⁵²

¹⁵⁰ I am an academic; a senior lecturer in law at the University of Pretoria.

¹⁵¹ Cf Van der Westhuizen (1989) April *DR* 242: “Dit hang saam met ‘n spanning tussen ‘n esoteriese en ‘objektiewe’ akademiese benadering en ‘n hartstogtelike drang tot aksie en verandering”.

¹⁵² We probably “see and understand the world in a way typical of the sort of member of our community that we represent ourselves to be” – Dingwall (2000) 25 *Law & Soc Inq* 892. I also accept Lawrence’s assertion as set out by Delgado (2001) 89 *Geo LJ* 2279: “The source of much racism lies in the unconscious mind. Individuals raised in a racist culture, without knowing it, absorb attitudes and stereotypes that reside deep in their psyches and influence behaviour in subtle, but pernicious ways”. I agree with Jhappan in Dawson (ed) (1998) 67: “I do not think it really possible for even the most empathetic and imaginative white person to truly get what it is like to experience the racism that confronts people of colour who have been subjected to European colonization”. I also agree with Albertyn and Goldblatt (1998) 14 *SAJHR* 262 that people (they refer to judges in their article) “tend to universalise their own experiences”. Also see Van der Walt (2006) 12 *Fundamina* 38: “The observer’s paradox is caused by our limited powers of scientific observation and the paradox of our position as scientific observers: we observe and analyse our culture and its products (like law), yet we are also enmeshed in that same culture” and 39: “[R]ealistic assessment of the limitations of human scientific observation does not imply that every scientific observation is uncertain, but rather indicates *the limits of certainty in observing events from a particular position*” (my emphasis). Empirical research tends to confirm these views. A Human Sciences Research Council (HSRC) survey on social attitudes was undertaken in 2003 and published in 2006 – Pillay *et al* (eds) (2006). In this source at 118-119 Roberts reports that it was asked of respondents if they perceived conflicts in South African society between rich and poor, employed and unemployed, managers and workers, young and old, and between different race groups. Roberts analysed the results and found that respondents who were better educated, white, married, or had higher personal incomes appeared to see less conflict than the other subgroups.

1.7.2 A narrow focus on the Act; South Africa; unfair discrimination

I readily admit that the scope of the thesis is partial and limited. Many recent Acts underpin South Africa's transformation,¹⁵³ and the Equality Act should be understood as one of the cogs in this legislative wheel, not the wheel itself. It would however have been an extremely daunting, if not impossible task, to consider each of these Acts in detail, as well as its interplay with the Equality Act in a single doctoral thesis. In the thesis I focus almost exclusively on the Equality Act: it has been described as the most important Act to have been passed by the South African Parliament, second only to the Constitution,¹⁵⁴ and it explicitly targets the effects of past discrimination, which arguably is the reason for the vast disparities in wealth, income and resources in South Africa. I do not analyse the Employment Equity Act, although this Act also outlaws unfair discrimination, specifically in the workplace.¹⁵⁵ The Employment Equity Act had a different drafting history, falls under a different government department (the Department of Labour), has been in operation for a much longer time and has different enforcement mechanisms. Critically, from a South African perspective where up to 40% of the population is estimated to be unemployed,¹⁵⁶ employment-related, court-driven structural adjustments would be completely meaningless for a large portion of inhabitants, whereas the Equality Act holds greater promise in this regard.

¹⁵³ See the examples listed in n1.

¹⁵⁴ Eg of the Minister of Justice's speech at the second reading debate of the Act, 26 January 2000, as reproduced in Gutto (2001) 25: "No doubt, this is yet another legislative milestone and in some circles, indeed, this Bill is regarded in importance as only second to the Constitution". Also see the speech by Dr EH Davies, delivered at the same occasion, reproduced in Gutto (2001) 39: "This afternoon we are debating a major piece of transformatory legislation. This Bill, when it is enacted, will stand second only to the Constitution as a mechanism for preventing discrimination and promoting equality". In October 2006 a Parliamentary Joint Committee held hearings on the impact of the Act. Joint Monitoring Committee on the Improvement of the Status of Youth, Children and People with Disabilities; Joint Monitoring Committee on Quality of Life and Status of Women and Portfolio Committee on Justice and Constitutional Development; 16 October 2006 to 19 October 2006. <http://www.pmg.org.za/viewminute.php?id=8330>; <http://www.pmg.org.za/viewminute.php?id=8349>; <http://www.pmg.org.za/viewminute.php?id=8373> and <http://www.pmg.org.za/viewminute.php?id=8378> (accessed 2007-05-15). During these hearings the SAHRC noted that "the Act was hailed as the most important piece of legislation that was created after the constitution and expectations were created". During March 2007 an *ad hoc* committee of Parliament reviewed the so-called "Chapter Nine Institutions" – the state institutions supporting constitutional democracy and established in terms of chapter nine of the Constitution of the Republic of South Africa, 1996. I accessed the minutes to these proceedings at <http://www.pmg.org.za/viewminute.php?id=8738> on 15 May 2007. At these hearings, the chairperson of the SAHRC referred to the Act as "the core of the whole Constitution". Also see Gutto (2001) 8.

¹⁵⁵ The Equality Act excludes all causes of action arising from the Employment Equity Act from the application of the Act (s 5(3)).

¹⁵⁶ Terreblanche (2002) 33; Christie in MacEwen (ed) (1997) 177-178; O'Regan in Loenen and Rodrigues (eds) (1999) 14; Liebenberg and O'Sullivan (2001) 2.

I take a practical, lawyer-like approach to what “law” entails and from that perspective what the legislature does with the Act interests me: the use of *courts* as the primary agents of societal reform, at least at this stage of the Act’s enforcement.¹⁵⁷ By analysing the potential effectiveness of the Act, I begin to answer a broader question: To what extent may courts play a meaningful role in large-scale societal transformation?

The thesis focuses almost exclusively on the Act and its potential in transforming *South Africa*. Where I consider similar foreign legislative provisions and (quasi-) judicial pronouncements from other jurisdictions, the main aim is to cross-validate my conclusions as they relate to the potential effect of (South African) “law” on (South African) “society”.

The Act deals with the prevention of unfair discrimination, harassment and hate speech, and with the promotion of equality by the state and non-state actors. In the thesis I focus on the prohibition of unfair discrimination. I do not discuss hate speech or harassment, and I only tangentially touch on the promotional aspects of the Act because there are no “teeth” to the enforcement of the promotional duties,¹⁵⁸ and because at the time of finalising the thesis the regulations relating to the promotion of equality had not been promulgated.¹⁵⁹

1.7.3 Empirical research; not normative inquiry

In assessing the Act’s potential to effect societal transformation, I focus on the potential use of the equality courts. In doing so, I *inter alia* rely on empirical research that indicates that ordinary South Africans in present day South Africa to a large degree do not trust the legal system and to a large degree do not experience explicit, blatant discrimination. The thesis is not primarily concerned with normative legal theory. The emphasis is on law as technique; on the practical and the

¹⁵⁷ Cf Albertyn *et al* (eds) (2001) 3: “[T]he Act is intended to give substance to the constitutional commitment to equality, by providing a legal mechanism with which to confront, address and remedy past and present forms of incidental, as well as institutionalised or structural, unfair discrimination and inequality” (my emphasis). The regulations pertaining to the duty to *promote* equality (ie, obligations not primarily driven by courts) had not been promulgated by 31 October 2007, seven years after the Act’s promulgation.

¹⁵⁸ In terms of s 21(1) of the Act, the equality courts only have jurisdiction to hear complaints based on unfair discrimination, harassment, hate speech, and the publication of material that unfairly discriminates. On this reading, it would not be possible to hold a state or non-state actor accountable for failing to promote equality in terms of the Act.

¹⁵⁹ Regulations pertaining to the promotion of equality by the state and by “all persons” were published for comment in GN No 563, *Government Gazette* No 26316, 2004-04-30. These regulations had not come into force by 31 October 2007. I accept the criticism that some of the conclusions I reach in the thesis may well have to be qualified or revisited over time, especially when the sections of the Act pertaining to promoting equality come into force.

pragmatic,¹⁶⁰ not the symbolic.¹⁶¹ Put differently, I do not ask if laws and courts *should* transform a society; I ask if laws and courts *are able* to do this.

The critical left is usually intolerant of empiricism, asserting that what the researcher found would only be the product of the researcher's subjective position and that the results of the work of (reformist) empirical scholars only reinforce the *status quo*.¹⁶²

On the other hand, if the (potential) effects of "the law" cannot be empirically measured, I find theorising about the topic somewhat ethereal. I cannot hope to improve on Macaulay's defence of empirical research and I quote rather extensively:¹⁶³

[W]e [ie empiricists] seek to understand the present and anticipate the future with greater probability of accuracy, understanding that our knowledge can only be tentative ... [T]he goal must be to find the best evidence of what is going on in view of what is being studied. We cannot demand one 'Truth' with a capital 'T'. Sometimes we can test hypotheses with hard data analyzed by state of the art statistics. When we can, we should ... Often, the best we can offer is a provisional and qualified picture of the world as our best guess of what others would find if they looked at what we examined. Yet, this is an advance over supporting one's normative position by anecdotes, urban legends, or statements based on no more than what we want to believe, because too many law professors are expert in finding an example or two of something, and asserting that it is a typical or important enough phenomenon to worry about. Social science teaches that we can and should do better ... *[W]e need some defense against the undisciplined exercise of the imaginative faculty to produce hypotheses held true because of their inspirational origin.*

1.7.4 Time frames

A number of cut-off dates apply in the thesis:

¹⁶⁰ I would for example agree with Kuye in Kuye *et al* (2002) 3 who argues that law is a "practice-oriented discipline", and I would agree with Marcus in Sarat and Kearns (eds) (1995) 238 who suggests that law is a "problem-solving discourse".

¹⁶¹ In Habermas's terms, I focus on "facts", not "norms"; on "social reality", not "claims or reason". See Botha (1998) 36.

¹⁶² Eg of Macaulay (2005) *Wis L Rev* 393.

¹⁶³ Macaulay (2005) *Wis L Rev* 394; 396; my emphasis. And cf Friedman in Drobak (ed) (2006) 159-160: "Legal scholars, alas, are not very good at answering empirical questions. They are intoxicated by the heady liquor of what they consider big ideas. They tend too to look down on 'mere empiricism'; it is slow, time-consuming, and you might, God forbid, have to know something about statistics. Moreover, in the world of the law schools, the way to get ahead, to get a name for yourself, is to float some vast normative balloon. It is likely, then, that only social scientists can come to the rescue".

- I finalised the thesis in the first week of November 2007. I considered South African case law up to 31 October 2007.
- I conducted a limited impact study on the Act during August and September 2006. During this time, I telephoned the 60 pilot equality courts and enquired as to the number of cases lodged at each of these courts for the period 16 June 2003 to September 2006.¹⁶⁴
- I conducted a media survey relating to equality court cases as reported in the mass media for the period 1 June 2003 to 31 July 2006.¹⁶⁵
- The survey of decisions handed down by Canadian anti-discrimination tribunals covered the years 1996-2003.¹⁶⁶

Therefore, where I refer to or analyse the outcome of the three surveys mentioned above, the time frames I adopted for each of the surveys must be kept in mind.

My initial LLD proposal was to conduct an impact study into the effectiveness of the Act. I registered for the LLD at the start of 2001 with the hope that the Act would come into force early in that year.¹⁶⁷ The Act eventually came into force on 16 June 2003, two and a half years after I registered for the degree. By that time, my focus had shifted to a socio-legal analysis of the Act. To conduct a proper impact study, a period of at least five years would probably have been needed. The author of any research study has to cry halt at some point. The results, conclusions and recommendations that follow from the limited telephonic impact study undertaken may have to be revisited when further surveys are undertaken. The thesis should be seen as part of an ongoing work in progress and as a first step in a broader assessment of the effectiveness of “law” in transforming South Africa.

¹⁶⁴ 47 pilot courts are listed on the Department of Justice’s website at http://www.doj.gov.za/2004dojsite/eqact/eqc_eqc%20structures.htm (accessed 2006-08-18). 60 pilot courts are listed in a booklet entitled “Equality for All” published under the auspices of the Department of Justice and Constitutional Development. I telephoned the 60 pilot courts as they appeared in the booklet. See Annexure F.1. The equality court for the Durban equality court (magistrate’s court), by far the busiest of the equality courts, provided me with information for the period July 2004 up to and including March 2006. For the other courts the information is valid up to September 2005.

¹⁶⁵ I performed a search on “SA Media” (SABINET) during August 2006, using the search key words “equality court”, “equality courts”, “gelykheidshof” and “gelykheidshowe” for the period 1 June 2003 to 31 July 2006. The search turned up about 170 newspaper articles.

¹⁶⁶ See Annexure D.

¹⁶⁷ Indications from the Department of Justice were that the Act would come into force in 2001.

The empirical survey I conducted in parts of Tshwane during 2001 would need to be repeated at some point in the near future, but I would argue that the 2001 survey acts as an important signpost against which the results of future surveys can be measured, in order to track the progress or setbacks on the road to societal transformation.¹⁶⁸ Ideally, a follow-up empirical study would form part of the thesis, but empirical research of that nature is costly and time-consuming, and will have to wait for a better opportunity.

A portion of the thesis concentrates on an analysis of the drafting history of the Act, although this was not the initial aim of my research. For that reason, I did not keep contemporaneous notes of the progress in the drafting of the Act and interviews with individuals who played a role in the drafting of the Act were conducted years after. They had forgotten at least some of the detail; documents made available to me were usually in a chaotic and disordered state; and handwritten notes were sometimes illegible. Some information was provided to me “off the record”. I did not conduct interviews with every individual that played a part in bringing the Act to fruition. (Gutto and his assistant researchers conducted interviews with a much larger group.¹⁶⁹) In any event, an attempt to record a definitive, “final”, drafting history is likely to fail.

1.7.5 Funding and sources

Ideally I wanted to observe anti-discrimination tribunals and other enforcement bodies in other jurisdictions in practice. I have not secured sufficient funding to undertake comprehensive research trips to either Canada or Australia and instead have relied on internet-based research. Most of the anti-discrimination tribunals in these countries make their (more recent) decisions and yearly reports available on the worldwide web. Reliance on these reports may present a skewed picture of the effectiveness of anti-discrimination legislation and enforcement mechanisms. My comparative research focuses mainly on the output of anti-discrimination *commissions* or *tribunals* as these enforcement bodies more closely resemble South African equality courts than higher courts in foreign jurisdictions. I therefore did not consider *constitutional* provisions and jurisprudence of foreign jurisdictions in detail.

¹⁶⁸ Pillay in Pillay *et al* (eds) (2006) 2; Orkin and Jowell in the same source at 279.

¹⁶⁹ Gutto (2001) v – vi.

1.8 Overview of chapters

In Chapter 2 of the thesis I discuss various socio-legal models and theories on the relationship between law and society and how law may be used successfully to change and shape society. I identify different conceptions of “law” and “society” and how law may or may not influence a given society. I identify characteristics of effective transformative legislation from the available literature.¹⁷⁰ I consider whether the legislature or the courts are better placed to drive a societal transformation project, if it is accepted that law could (at least sometimes) play this role. I argue that “law”, in the sense of formalised rules laid down by a legislature, is largely absent from the lives of the majority of South Africans and that it is not a particularly effective tool in effecting societal change.

In chapter 3, I examine the limits of orthodox anti-discrimination legislation and to what extent the Act attempts to address these limits. I compare the Act to the requirements for effective legislation in predicting the Act’s (potential) effectiveness. I compare the profile of reported decisions of Canadian anti-discrimination tribunals and the early equality court judgments as part of assessing the potential ability of the Act to facilitate societal transformation. Where relevant, I refer to sections in the Act that could have been better drafted and to which sections of the Act that may result in controversy, conflicting decisions and possible constitutional challenges. Where relevant, I discuss the Act’s drafting history and consider if a different process would have produced a different (and more effective) Act. The following barriers to a more effective implementation of the Act are also identified: The use of typical lawyers’ language in an Act aimed at lay people and the effect of lobbying by the banking and insurance industries during the Parliamentary drafting process.

Arguably, a court-driven societal transformation project, as concretised in the Act, crucially depends on a cohort of presiding officers sensitive to the objectives of the Act. Chapter 4 describes and criticises the implementation of training programmes for clerks, magistrates and judges. The planning and implementation of training programmes were fraught with difficulties. I acted as minute secretary to most of the meetings of the TMT/TMB and attended all but one of the meetings. I participated in some training programmes for clerks and magistrates and I report on

¹⁷⁰ I explain what I mean when I use the terms “effective” and “transformative” legislation in chapter 2.5 below.

these sessions and the concerns raised by presiding officers during these training sessions. I argue that the initial business plan was overambitious and unrealistic in its assumptions; the overseeing body was ineffective; the development of training material took too long and should have been drafted much sooner; the training seminars were inadequate; the project was inadequately funded and not granted priority by the Department of Justice; and the project manager was inefficient.

Chapter 5 is concerned with three of the requirements of effective legislation: “the source of the new law must be authoritative and prestigious”, “the purpose behind the legislation must at least to a degree be compatible with existing values”, and “the required change must be communicated to the large majority of the population”. I report on an empirical survey undertaken in parts of Tshwane (“white Pretoria”, Eersterust, Laudium, Atteridgeville and Mamelodi) during May 2001. This survey confirmed a lingering legitimacy crisis in the South African legal system, and highlights ordinary South Africans’ conception of substantive equality and unfair discrimination. Somewhat surprisingly, relatively few respondents indicated that they had suffered from serious incidents of discrimination and I consider possible reasons for this finding. I also refer to and discuss more recent independent surveys that, broadly speaking, confirm my most important findings. As set out in the Act, the equality courts are supposed to act as vehicles of societal transformation. However, if potential complainants are unaware of the Act and the courts, these courts will be underutilised. I therefore also focus on the inadequate public awareness programmes that were launched in terms of the initial Department of Justice project.

In chapter 6, I summarise my findings and recommendations and offer suggestions aimed at improving the effectiveness of the Act. I also briefly consider further avenues for socio-legal research relating to the Act.