

# THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT 4 OF 2000: COURT-DRIVEN OR LEGISLATURE-DRIVEN SOCIETAL TRANSFORMATION?

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## 1 Introduction

In this article it is argued that “the law” is a limited instrument in effecting social transformation, regardless of which legal institution, namely Parliament or the courts, is utilised to drive such a project. This argument is presented within the context of the coming into effect of the Promotion of Equality and Prevention of Unfair Discrimination Act (the Act),<sup>1</sup> which was arguably put in place to effect large-scale societal transformation in South Africa.<sup>2</sup> This article is not primarily concerned with the question whether the law ought to be used to transform a society, but rather whether it can bring about change, and how it can be used to achieve such lofty aims.

The transformatory features of the Act are briefly analysed, followed by an exposition of the debate, between authors who argue (sometimes implicitly) for either legislation-driven or court-driven programmes of social change. It is then argued that one has to accept that, for the time being at least, a court-driven programme of social change will not achieve the desired results. Lamentably, a Parliament-driven programme would probably not succeed either.<sup>3</sup>

In conclusion the approach adopted by the South African Parliament to effect societal transformation when it drafted the Act is considered. It is suggested that an inter-institutional dialogue should be initiated between the executive branch (concretised as the Department of Justice and Constitutional

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\* This article is based on parts of draft chapters of my doctoral thesis, titled “A socio-legal analysis of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000”.

<sup>1</sup> 4 of 2000.

<sup>2</sup> See the discussion in para 2 below.

<sup>3</sup> Eg *cf* Chemerinsky “Can Courts Make a Difference?” in Devins & Douglas (eds) *Redefining Equality* (1998) 191 192: “The failure to improve economic circumstances for African Americans obviously reflects inadequacies not just of courts but also, and perhaps even more significantly, of legislatures”. Komesar *Law’s Limits: The Rule of Law and the Supply and Demand of Rights* (2001) argues that courts are needed most when alternative decision-making bodies such as those driving the political process are functioning poorly. Courts, political processes, markets and informal communities all function well when the number of people affected are small and the decision to be made is not complex. However, when numbers and complexity increase, all these institutions’ abilities decrease. Also see Koopmans *Courts and Political Institutions* (2003) 262: “If many citizens want society changed... the judiciary can help them as little as the political institutions, possibly less so”.

Development), the legislative branch, the judicial branch (concretised as the equality courts) and civil society, in order to further societal transformation.

## 2 A brief analysis of the transformatory ideals expressed in the Act

Anti-discrimination legislation could have a number of purposes:

- (a) Parliament may wish to send a strong moral message that it views discrimination as a social evil, a message that necessarily follows the enactment of law. The legislature may regard such symbolic commitment to combating discrimination as sufficient.<sup>4</sup>
- (b) The goal of an anti-discrimination Act could be to establish forums where discrimination complaints may be aired and resolved.<sup>5</sup> This goal need not move much beyond a symbolic commitment: Such tribunals may not be properly resourced, or little publicity may be given to their existence, or to favourable outcomes for plaintiffs.<sup>6</sup> 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.<sup>7</sup>
- (c) The goal could be to achieve a thorough readjustment in income distribution and unemployment rates of various disadvantaged groups, identified by for example race, sex or gender, sexual orientation, and HIV status, so that these figures become proportionately equivalent to the most privileged group (usually white, heterosexual males).
- (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.<sup>8</sup>

<sup>4</sup> Lustgarten "Racial Inequality and the Limits of the Law" 1986 *Mod L Rev* 68 84-85; Lacey "Legislation Against Sex Discrimination: Questions from a Feminist Perspective" 1987 *J Law & Soc* 411 419-420; McCrudden "Regulating Discrimination: Advice to a Legislator on Problems Regarding the Enforcement of Anti-Discrimination Law and Strategies to Overcome Them" in Loenen & Rodrigues (eds) *Non-discrimination Law: Comparative Perspectives* (1999) 295 297. 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" 12 <http://www.pmg.org.za/viewminute.php?id=8349> (accessed 15 May 2007): "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 "Same-sex Marriage, the Right to Equality and the South African Constitution" 1996 *SAPL* 355 357 states that "some lesbians and gay men ... base their arguments [relating to the right to marry someone of the same sex] on the need for public legitimization of their relationships" (my emphasis). De Vos "On the Legal Construction of Gay and Lesbian Identity and South Africa's Transitional Constitution" 1996 *SAJHR* 265 290 argues that "especially for the historically disempowered, the 'conferring' of rights is symbolic of all the denied aspects of their humanity". He goes on to quote 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).

<sup>5</sup> Cf Joachim "Reform of the Ontario Human Rights Commission" 1999 *Can J ALP* 51 52; Chemerinsky *Can Courts Make a Difference?* 193.

<sup>6</sup> Bailey & Devereux "The Operation of Anti-Discrimination Laws in Australia" in Kinley (ed) *Human Rights in Australian Law: Principles, Practice and Potential* (1998) 292 303.

<sup>7</sup> Lustgarten "Racial Inequality, Public Policy and the Law: Where Are We Going?" in Heppe & Szyszczak (eds) *Discrimination: The Limits of Law* (1992) 455 455-457 describes this goal as the "just treatment of individuals".

<sup>8</sup> Gutto *Equality and Non-Discrimination in South Africa: The Political Economy of Law and Law Making* (2001) 7.

I would argue that while the Act aims to achieve all these goals,<sup>9</sup> it is primarily aimed at *transforming* South African society.

At the risk of oversimplifying current literature on what “transformation” is supposed to indicate, it seems as if a “transformative” law, specifically in the context of present day South Africa, may be seen as a law that attempts 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 somewhat leveled. In the shorter term such laws would aim at the proportional representation across income, wealth and resource categories of the various social groupings, and in the longer term they would aim at the realization of a society where all residents will lead dignified lives, free from hunger and want.<sup>10</sup>

<sup>9</sup> Albertyn, Goldblatt & Roederer (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (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 *Equality and Non-Discrimination in South Africa* 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 reduced 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.

<sup>10</sup> Albertyn & Goldblatt “Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality” 1998 *SAJHR* 248 249 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 “What do We Mean When We Talk about Transformative Constitutionalism?” 2005 *SAPL* 155 159 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 Mosenke “The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication” 2002 *SAJHR* 309 316: “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 *South Africa's Equality Courts: An Early Assessment* (2005) 8 <http://www.csvr.org.za/papers/paprcp5.htm> (accessed 24 February 2006). Lane describes the achievement of greater parity as one of the goals of the new constitutional order; Liebenberg *The New Equality Legislation: Can It Advance Socio-Economic Rights?* (2000) 2 [http://www.communitylawcentre.org.za/ser/esr2000/2000sept\\_equality.php](http://www.communitylawcentre.org.za/ser/esr2000/2000sept_equality.php) (accessed 24 February 2006) argues that the Act is “committed to *ensuring equal outcomes* for disadvantaged groups”; and Bohler-Muller & Tait “The Equality Courts as a Vehicle for Legal Transformation – A Few Practical Suggestions” 2000 *Obiter* 406 407: “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 *Equality and Non-Discrimination in South Africa* 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 *cf* 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).

- (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.<sup>11</sup>

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.<sup>12</sup>

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 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) declares as one of the objects of the Act, “to set out measures to advance persons disadvantaged by unfair discrimination”. The Act must be applied so 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*”.<sup>13</sup> 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. Notable examples

<sup>11</sup> Cf Brand “Die Wet op die Bevordering van Gelykheid en die Voorkoming van Onbillike Diskriminasie” 2000 *Woord & Daad* 13; Moseneke 2002 *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 “Where are We After 10 Years of Discrimination Law?” 1995 *Proctor* 21 who identifies the barriers to a truly non-discriminatory society as “personal attitudes, subtle perceptions and entrenched male focused value systems”; Dror “Law and Social Change” 1958 *Tul L Rev* 788 who states that “social change” refers to changes in social structure or *culture*; Klare “Legal Culture and Transformative Constitutionalism” 1998 *SAJHR* 146 150 talks of a multicultural, *caring* society; and Lane *South Africa’s Equality Courts* 29, who wants to see the equality courts’ 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 & Verwoerd “On the Injustice of (Un)just Joking” 1994 *Agenda* 67 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 *Equality and Non-Discrimination in South Africa* 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 cf 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).

<sup>12</sup> Also cf Gutto *Equality and Non-Discrimination in South Africa* 7 where he refers to “social legislation”.

<sup>13</sup> S 3(1)(a); my emphasis.

which clearly contemplate a socio-economic transformation are section 7(d) on the provision or continued provision of inferior services to any racial group, compared to those of another racial group; section 7(e) on the 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; section 8(c) on the system of preventing women from inheriting family property; section 8(e) on any policy or conduct that unfairly limits access of women to land rights, finance, and other resources; section 8(g) on limiting women's access to social services or benefits, such as health, education and social security; section 8(h) on the 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; section 8(i) on systemic inequality of access to opportunities by women as a result of the sexual division of labour, and section 9(c) on failing 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.

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. 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*",<sup>14</sup> 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*".<sup>15</sup> A number of the examples listed in sections 7 and 8 at least implicitly address attitudinal discrimination.<sup>16</sup> The sections in the Act dealing with the promotion of equality also, at least implicitly, engage anticipated attitudinal changes.<sup>17</sup>

### 3 A debate: Could (or should) Parliament or courts drive societal transformation?

Klare takes the premise that judicial adjudication is a site of law-making for granted in stating that judges are never completely constrained by legal texts, and that it is unlikely that a system of total judicial constraint (consistent with a democratic system) will ever be developed.<sup>18</sup> He refers to the tendency of common-law academics to over-emphasise court decisions at the expense of legislation, executive action, administration, police procedure and extra-legal dispute resolution.

<sup>14</sup> My emphasis.

<sup>15</sup> My emphasis.

<sup>16</sup> 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)).

<sup>17</sup> Ss 2(b)(ii); 2(e); 3(1)(a); and 24-28.

<sup>18</sup> Klare 1998 *SAJHR* 146-147.

He argues that these other processes matter more to ordinary South Africans, but nevertheless believes that court decisions remain an important source of study: South Africa has a justiciable bill of rights which supposedly introduced a culture of justification. Compared with other law-making, adjudication is

“the most reflective and self-conscious, the most grounded in reasoned argument and justification, and the most constrained and structured by text, rule and principle”.<sup>19</sup>

Adjudication is therefore ideally suited to illustrating what a culture of justification entails.<sup>20</sup>

Klare then attempts to identify a way in which courts can develop a politically and morally engaged method of adjudication without turning it into “illicit judicial legislation”. He terms this possibility “transformative constitutionalism,” by which he means

“a long-term project of constitutional enactment, interpretation, and enforcement committed ... to transforming a country’s political and social institutions and power relationships in a democratic, participatory and egalitarian direction ... [an] enterprise of inducing large-scale social change through nonviolent political processes grounded in law”.<sup>21</sup>

He goes on to argue that South Africa has a post-liberal Constitution committed to large-scale, egalitarian, social transformation; that judges and advocates can be committed to social transformation and be faithful to their professional role; that constitutional adjudication must acknowledge its political role more frankly; and that South Africa’s legal culture and legal education must be transformed due to what he identifies as a “disconnect” between the Constitution’s possibilities and South Africa’s conservative legal culture.<sup>22</sup>

Furthermore, he contends that one can read the Constitution as a post-liberal document because it is social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural and self-conscious about its historical setting, role and mission.<sup>23</sup>

As to lawyers’ roles in giving life to this promise, Klare accepts that whereas national constitutions and “foundational legislation” enacted under a Constitution (the Act could qualify as an example of foundational legislation) may uncontroversially have a transformational purpose as “the act of the people through their elected representatives”, after the idea of transformative adjudication *is* controversial, as this seems to be an invitation to judges to work towards the achievement of political projects. However, judges are supposed to be appointed in a neutral fashion to enforce laws made by others, not to become involved in politics.<sup>24</sup>

<sup>19</sup> 147.

<sup>20</sup> Davis “Duncan Kennedy’s *A Critique of Adjudication: A Challenge to the ‘Business as Usual’ Approach of South African Lawyers*” 2000 *SALJ* 697 704 argues in a similar vein: “[T]here is a modest but significant role for law in promoting a culture of justification” and at 708: “[A]s much as judges should be compelled to enhance a culture of justification by insisting that law complies with the twin principles of participation and accountability, so are judges beholden to justifying their own decisions and being accountable therefor. In this way the citizenry can examine the justification for law, participate in the debate surrounding such law and thereby become not only the addressee but also the author of such law.”

<sup>21</sup> Klare 1998 *SAJHR* 150.

<sup>22</sup> 151.

<sup>23</sup> 153-156.

<sup>24</sup> 157.

How is this “dilemma” to be resolved? Klare believes that legal texts must be interpreted; they do not self-generate their meaning. Texts have gaps, conflict with other texts and are ambiguous. A judge has to work with a medium that is constraining but that is also “far more plastic than is commonly acknowledged (although not infinitely plastic)”.<sup>25</sup> Lawyers should be more honest with themselves and with the larger community, and should accept responsibility for constructing a social order through adjudication. Currently, the existence of the political and moral assumptions that influence judgments are denied.<sup>26</sup>

André van der Walt is skeptical about the “orthodox” common law method of reasoning for achieving transformation. He opines that the common law tradition is an institutionally sanctified and entrenched version of what is regarded as “normal,” and that this tradition resists change because courts fail to recognise opportunities for transformation.<sup>27</sup> In similar vein, Johan van der Walt states:<sup>28</sup>

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

When these authors’ arguments are read together, the implication seems to be that social transformation in present day South Africa will have to be mainly legislation-driven, and that open-ended principles (such as the test for “fairness” or “unfairness” set out in section 14 of the Act) should be avoided, lest a (conservative) judiciary grab the opportunity to scuttle the transformative project.<sup>29</sup>

Viewed from a different perspective, Watson explains why legislation is a better “instrument” than the judiciary in developing the law:<sup>30</sup>

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

A number of authors are more optimistic about the (potential) role that courts, as opposed to Parliament, can play:

<sup>25</sup> 160.

<sup>26</sup> 164.

<sup>27</sup> Van der Walt “Resisting Orthodoxy – Again: Thoughts on the Development of Post-Apartheid South African Law” 2002 *SAPL* 258 259.

<sup>28</sup> Van der Walt “Progressive Indirect Horizontal Application of the Bill of Rights: Towards A Co-Operative Relation Between Common-Law and Constitutional Jurisprudence” (2001) 17 *SAJHR* 341 361.

<sup>29</sup> Courts can play an obstructionist role, consciously or subconsciously. Beermann “The Unhappy History of Civil Rights Legislation, Fifty Years Later” 2002 *Conn LR* 981 984-5 notes how the American Supreme Court’s creation of the “state action” principle in interpreting the Fourteenth Amendment made it very difficult for Congress to act to attack private discrimination. Congress passed civil rights legislation in 1866, 1870, 1871 and 1875. The Supreme Court either read these statutes very narrowly or invalidated them on the basis of unconstitutionality. At 986 Beermann notes that the “state action” doctrine still constitutes a fundamental limitation on the Fourteenth Amendment. He analyses the Supreme Court’s decisions on civil rights and concludes at 1034 that “the degree of anti-civil rights judicial activism at the Supreme Court is still much too high. By and large, the Court has obstructed Congress and stood against efforts to legislatively redistribute power from the advantaged to the disadvantaged”.

<sup>30</sup> Watson “Comparative Law and Legal Change” 1978 *Cambridge LJ* 313 323-324.

Tay holds that the common law system allows for the detailed consideration of particular people in particular circumstances; that previous cases are seen as historical events that arose in a specific and actual social, psychological and historical setting.<sup>31</sup> Only in common law reports do the parties “come alive”; do they have names and histories and personal quirks.<sup>32</sup> Cotterrell points out that common law countries still regard judicial decisions as the “heart of the legal system”.<sup>33</sup> Handler lists the following positive, indirect effects of litigation: it provides publicity; legitimises values and goals, and may be used as part of broader campaign.<sup>34</sup> He argues that litigation may be used as leverage and that litigation may be used to bring a halt to a particular action and so increase the party’s bargaining power; seen from this perspective the eventual court order is not the end but part of the strategy.<sup>35</sup> Litigation may generate harmful publicity that may force the discriminator into settlement, and that would provide some consolation to a claimant who is unable to proceed with the case due to the duration or costs involved.<sup>36</sup> He believes that litigation may also be “consciousness raising” and that it can contribute to a change in public opinion.<sup>37</sup> McKenna believes that a potential advantage of judicial activism is that it may permit legal development in a field where there is typically little political urgency or pressure for legislative action, but admits that *ad hoc* judicial law-making introduces a number of dangers.<sup>38</sup> Krishnan argues that in a country where the legislature or the political system is viewed as illegitimate (he uses the words “corrupt and inaccessible”), courts could constitute a forum where a cause may be advocated. He optimistically asserts that when litigation is “done in a coordinated, structured and repeated fashion,” it “has the potential for creating a culture of rights-consciousness within a society”.<sup>39</sup>

#### 4 A pragmatic response

I would (pragmatically) argue that courts in present day South Africa (and elsewhere, for that matter) are quite limited in what they can achieve. Although some authors view a court-driven process positively,<sup>40</sup> in a South African context it is clear that courts will not achieve much.<sup>41</sup>

<sup>31</sup> Tay “Law, the Citizen and the State” in Kamenka, Brown & Tay (eds) *Law and Society: The Crisis in Legal Ideals* (1978) 1 7.

<sup>32</sup> Tay “Law, the Citizen and the State” in *Law and Society* 7.

<sup>33</sup> Cotterrell *The Sociology of Law: An Introduction* (1992) 17.

<sup>34</sup> Handler *Social Movements and the Legal System: A Theory of Law Reform and Social Change* (1978) 209-210.

<sup>35</sup> 212.

<sup>36</sup> 214.

<sup>37</sup> 218-219.

<sup>38</sup> McKenna “A Proposal for Legislative Intervention in Canadian Human Rights Law” 1992 *Manitoba LJ* 325-327.

<sup>39</sup> Krishnan “The Rights of the New Untouchables: A Constitutional Analysis of HIV Jurisprudence in India” 2003 *Human Rights Quarterly* 791-818.

<sup>40</sup> See the views of Tay, Cotterrell, Handler, McKenna & Krishnan as set out directly above in part 3.

<sup>41</sup> Many of the reasons set out below would apply to any court-driven process, whether taking place in South Africa or elsewhere. Reasons that apply specifically to South Africa are set out in the first, fourth and last sections of part 4.



Firstly, it is not at all clear that South African courts are seen as *legitimate* in the eyes of the majority.<sup>42</sup> It is perhaps trite that courts need to be held in esteem within the psyche and soul of the nation, or to be reduced to “paper tigers with a ferocious capacity to roar and snarl but no teeth to bite and no sinews to execute what may then become a piece of sterile scholarship”.<sup>43</sup> It is at least arguable that Parliament enjoys more legitimacy than the courts and that Parliament should therefore be the main force driving transformation.

Secondly, any court system is *complaints-driven*. Courts function optimally when a single plaintiff sues a single defendant and if the dispute between the parties may be reduced to a single issue.<sup>44</sup> The more complicated the dispute, the more strained the system. Social reform groupings are politically weak and thus use the courts, but they generally bring claims that are complex and that are not easily “solved” in court;<sup>45</sup> courts are unlikely to produce direct, tangible results.<sup>46</sup> A complaints-driven process will produce very few results where the oppressed or underrepresented do not “suffer” the wrongs committed against them;<sup>47</sup> they may experience these wrongs as “part of life” and the

<sup>42</sup> Cf Corder “Prisoner, Partisan and Patriarch: Transforming the Law in South Africa 1985-2000” 2001 *SALJ* 772; Froneman “The Role of the Courts in a Changing Society” 1997 *Consultus* 121; Carpenter “Public Opinion, the Judiciary and Legitimacy” 1996 *SAPL* 110; Van Blerk “The South African Courts, A Legitimacy Crisis – Yes or No?” 1992 *Consultus* 135; Olivier “Is the South African Magistracy Legitimate?” 2001 *SALJ* 166; Lever “Redressing the Racial Imbalance in the Law” 1992 *Consultus* 57; Cameron, Davis & Marcus 1992 *Annual Survey* 766, 770 & 771; McQuoid-Mason “Legal Representation and the Courts” 1995 *South African Human Rights Yearbook* 162; Editorial “Legitimising the Legal System” 1991 *Consultus* 3; Cameron “Rights, Constitutionalism and the Rule of Law” 1997 *SALJ* 504; Olivier “The Role of Judicial Officers in Transforming South Africa” 2001 *SALJ* 455; Olivier & Baloro “Towards a Legitimate South African Judiciary: Transformation, Independence and the Promotion of Democracy and Human Rights” 2001 *Journal for Juridical Science* 31; Nel “Die Samestelling van die Regbank in die Hoër Howe in die Lig van die Strewe om dit Meer Verteenwoordigend van die Gemeenskap te Maak” 2001 *DJ* 29 and the sources quoted in fn 3 above; Sarkin “Evaluating the Constitutional Court’s decision in *South African Association of Personal Injury Lawyers v Heath and others* in the Context of Crime and Corruption in South Africa” 2001 *SALJ* 747; Skjelten *A People’s Constitution* (2006) 25.

<sup>43</sup> Mahomed “Welcoming Address at the First Orientation Course for New Judges” 1998 *SALJ* 107 112. Tyler “Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities” 2000 *Law & Soc Inq* 983 983-985, 988, 1000 highlights morality and legitimacy as two factors that will likely lead to voluntary obedience. He refers to studies that have shown that people voluntarily defer to authorities who make decisions that they regard as fair. If judges are perceived as neutral, honest, concerned about citizens and respectful of citizens and their rights, most people will feel satisfied with court decisions and will be likely to obey them.

<sup>44</sup> *Cf S v Williams* 1995 3 SA 632 (CC) para 8: “[D]emand that a court should be particularly sensitive to the impact which the exercise of judicial functions may have on the rights of *individuals who appear before them*” (my emphasis). Allott *The Limits of the Law* (1980) 65 is scathing – he believes that a system of self-help still exists and that “might is still right” because a plaintiff must still initiate the complaint. Pound “The Limits of Effective Legal Action” (1917) 3 *ABA J* 55 68-69 argues that courts generally depend on interested parties *not* professionally involved with the legal system to set its processes into motion. He argues that claimants need incentives to use this system. Hepple “Have Twenty-five Years of the Race Relations Act in Britain been a Failure?” in Hepple & Szyszczak (eds) *Discrimination: The Limits of Law* (1992) 19 20-21 states that law needs specificity, has to be clear and needs an “identifiable culprit”. Also see Chemerinsky *Can Courts Make a Difference?* 193.

<sup>45</sup> For example, the housing crisis in the Western Cape was not solved when the Constitutional Court ruled in favour of the respondent in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

<sup>46</sup> Handler *Social Movements and the Legal System* 209.

<sup>47</sup> Cf *Mohloni v Minister of Defence* 1997 1 SA 124 (CC) at para 14: “[South Africa is] a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons”.

thought of approaching a court may not even enter their minds.<sup>48</sup> A potential claimant may not even realise that a claim exists:<sup>49</sup>

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

In a complaints-driven system, the “wrong” claimants are likely to approach the courts. For example, Lahey sets out an empirical survey of American Supreme Court jurisprudence on the Fourteenth Amendment.<sup>50</sup> From 1868 to 1911, the court heard 604 such claims of which only 28 cases concerned black interests and of which blacks lost 22 of these cases. From 1920 to 1937, the Court declared 132 laws unconstitutional but only a few related to black people and more than 67% were linked to property or economic claims.<sup>51</sup> In Canada, equality disputes are mainly brought (and won) by male complainants.<sup>52</sup> Almost all the American Supreme Court sex discrimination cases have been brought by men.<sup>53</sup> The equality jurisprudence produced by the South African Constitutional Court had to be developed with largely the “wrong” kind of claimants and the “wrong” kind of facts.<sup>54</sup>

<sup>48</sup> Handler *Social Movements and the Legal System* 223. Cf *Moise v Transitional Local Council of Greater Germiston* 2001 8 BCLR 765 (CC) para 14: “[M]any potential litigants (arguably the majority) are poor, sometimes illiterate and lack the resources to initiate legal proceedings within a short period of time. Many are not even aware of their rights and it takes time for them to obtain legal advice. Some come by such advice only fortuitously”.

<sup>49</sup> Verwoerd & Verwoerd 1994 *Agenda* 70.

<sup>50</sup> Lahey “Feminist Theories of (In)equality” in Martin & Mahoney (eds) *Equality and Judicial Neutrality* (1987) 71 74.

<sup>51</sup> 74.

<sup>52</sup> 82.

<sup>53</sup> MacKinnon “Difference and Dominance: On Sex Discrimination” in Dawson (ed) *Women, Law and Social Change: Core Readings and Current Issues* (1998) 364 366.

<sup>54</sup> McKenna 1992 *Manitoba LJ* 327 argues that tribunals are constrained by the facts of particular cases and are usually “unable to shape the law with the same measure of reflection, cogency and universality practised by legislatures”. He perceives danger in politicians becoming too comfortable with their own passivity, with the result that tribunals may then act as a conservative force, “sufficient to prevent a build up of pressure for political change, but insufficient to keep the law in reasonable harmony with social values and power relations”. To the Constitutional Court’s credit, it has somehow managed to develop a relatively cogent equality jurisprudence despite “wrong” sets of facts. To my mind, many equality cases were brought by privileged or powerful members of society. The equality clause in the Constitution was not drafted to cater for the complaints in these cases. Cf Carpenter “Equality and Non-discrimination in the New South African Constitutional Order (4): Update” 2002 *THRHR* 177 184: “Among the ironies is the fact that the only allegation of discrimination based on race to have engaged the attention of the Constitutional Court was brought by whites; that so many cases were on unspecified grounds of discrimination; that most of the women who alleged discrimination based on sex and gender were in fact persons from privileged sectors of society; and that two of the most important cases dealing with gender issues were brought by males. Thus the Constitutional Court has not had many opportunities to deal directly with factual situations of the kind that were a characteristic of pre-1994 South Africa”. Also see Albertyn & Kentridge “Introducing the Right to Equality in the Interim Constitution” 1994 *SAJHR* 149 168; Albertyn & Goldblatt 1998 *SAJHR* 273. A number of more “deserving” cases have since been reported, where the complainants could be described as (historically) vulnerable members of South African society. These complainants were not necessarily successful, however. These cases include *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) (the gay and lesbian community); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) (the gay and lesbian community); *Moseneke v The Master* 2001 2 SA 18 (CC) (administration of deceased black estates); *Hoffmann v South African Airways* 2001 1 SA 1 (CC) (person living with HIV); *S v Jordan* 2002 6 SA 642 (CC) (female sex workers); and *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) (permanent residents).

privileged females,<sup>55</sup> white males,<sup>56</sup> a (rich) German fugitive from justice,<sup>57</sup> and forestry legislation,<sup>58</sup> while the first “affirmative action” decision to be decided by the Constitutional Court was brought by (privileged) “old order” parliamentarians.<sup>59</sup>

It is also possible that the “right” claimants will bring the “wrong” claims. In its first year of operation the Canadian Human Rights Commission had to turn away a number of complaints that could not be related to a discriminatory practice. In its 1978 report the Commission provided the following examples:<sup>60</sup>

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

In the context of anti-discrimination legislation, a number of authors comment on the inherent weaknesses of a complaints-driven process. Handler notes that the school desegregation cases “simply required too many individual lawsuits in too many places”.<sup>61</sup> Freedman argues that the legislature is better positioned to eradicate disadvantage *via* a redistribution of resources than courts, as courts “are best suited to deal with *particular wrongs*, rather than with patterns of systemic disadvantage”.<sup>62</sup> Delgado contends that a complaints-driven process assumes that the “perpetrator” is a malevolently motivated individual and assumes that racism is the exception; not an integrated system that elevates one group at the expense of another.<sup>63</sup> Such a complaints-driven mechanism serves as a “valuable, if unstated, homeostatic mechanism for maintaining and replicating social relations”,<sup>64</sup> “if racism is seen as a disease its cure would be medical, educational, psychological treatment – so intrusive that liberals and conservatives might

<sup>55</sup> *Brink v Kitshoff* 1996 4 SA 197 (CC) entailed a constitutional challenge to the Insurance Act.

<sup>56</sup> The *President of the Republic of South Africa v Hugo* 1997 1 SA 1 (CC) case dealt with a complaint by a male prisoner that (then) President Mandela’s proclamation to only grant clemency to certain female prisoners were discriminatory. *Pretoria City Council v Walker* 1998 2 SA 363 (CC) involved a claim that the Pretoria City Council unfairly discriminated by imposing a flat rate on Mamelodi whereas ‘white Pretoria’ was charged according to actual consumption. *Fraser v Children’s Court, Pretoria North* 1997 2 SA 261 (CC) centered on s 18(4)(d) of the Child Care Act 74 of 1983, which only requires the mother of an illegitimate child to consent to the child’s adoption.

<sup>57</sup> *Harksen v Lane* 1998 1 SA 300 (CC) concerned the alleged unconstitutionality of ss 21, 64 and 65 of the Insolvency Act 24 of 1936.

<sup>58</sup> *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) focused on s 84 of the Forest Act 122 of 1984. The complaint was that the Act unfairly placed the onus on the defendant in civil disputes.

<sup>59</sup> *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC).

<sup>60</sup> Falardeau-Ramsay “Human Rights Legislation: The Path Ahead” (1998) 47 *UNB LJ* 165 168.

<sup>61</sup> Handler *Social Movements and the Legal System* 117.

<sup>62</sup> Freedman “Formal *Versus* Substantive Equality and the Jurisprudence of the Constitutional Court” 2000 *THRHR* 314 320 (my emphasis).

<sup>63</sup> Delgado “Two Ways to Think about Race: Reflections on the Id, the Ego, and other Reformist Theories of Equal Protection” 2001 *Geo LJ* 2279 2295.

<sup>64</sup> Delgado 2001 *Geo LJ* 2295.

be expected to object”.<sup>65</sup> On a more practical level, and in the context of disability discrimination, Astor<sup>66</sup> notes that:

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

A number of authors refer to the “one shotter” *versus* the “repeat player” that is characteristic of a complaint-driven dispute resolution mechanism.<sup>67</sup> In a system where a “wronged” plaintiff sues a “malevolent” defendant, the defendant is more likely to be a well-resourced repeat player while the plaintiff is more likely to be an under-resourced one-shotter. The tactical advantage lies with the defendant – his lawyers are specialists, he can afford long-term litigation based on complex facts, he can afford experts, he can afford to take a long-term view, he can budget for litigations costs and he is familiar with legal jargon and the nature and risks of court proceedings.<sup>68</sup>

Thirdly, the *institutional nature* of courts causes other disadvantages as well. Courts sometimes attempt to “simplify” what could be an immensely complex problem.<sup>69</sup> Most courts have to reach a decision based on partial

<sup>65</sup> Delgado 2001 *Geo LJ* 2295. At 2296 he argues that racism must be looked for in “broad structures that submerge people of color, workers, and immigrants, and replace these structures with ones that can fulfil our unkept promises of democracy, equality, and a decent life” (own emphasis). He does not suggest how this is supposed to be done, or whether the law plays any role at all.

<sup>66</sup> Astor “Anti-discrimination Legislation and Physical Disability: The Lessons of Experience” 1990 *Australian Law Journal* 113 114.

<sup>67</sup> The most-cited article in this regard is Galanter “Why the ‘Haves’ Come out Ahead: Speculations on the Limits of Legal Change” 1974 *Law & Soc R* 95.

<sup>68</sup> Aubert *In Search of Law: Sociological Approaches to Law* (1983) 142. Neumann *The Rule of Law: Political Theory and the Legal System in Modern Society* (1986) 195 refers to Weber’s “advantage of small numbers” – a large number of potential plaintiffs will likely sue a small number of, for example, banks or insurance companies, who may meet and keep deliberations secret, and will probably demonstrate greater solidarity. Law cannot overcome this. Also see Ehrlich “The Sociology of Law” 1922 *Harv L Rev* 130 141; Griffiths “The Social Working of Anti-Discrimination Law” in Loenen & Rodrigues (eds) *Non-discrimination Law: Comparative Perspectives* (1999) 313 325; Kidder *Connecting Law and Society: An Introduction to Research and Theory* (1983) 75-76, 136; Handler *Social Movements and the Legal System* 31 and Hunt “Stemming the Tide of Rising Harassment Litigation: Is Training the Answer?” 2002 *The Hennepin Lawyer* 18 19. Haynie “Oral Advocacy and Judicial Decision-Making in the South African Appellate Courts” 2005 *SAJHR* 473 476 fn 22 quotes a large number of empirical studies that have found that those litigants with more resources are more likely to succeed. In the same article, at 483, Haynie quotes a Constitutional Court judge who bluntly told her “the one-shotters (ie inexperienced and less expensive counsel presumably hired by a resource-constrained litigant) aren’t very helpful”. Another Constitutional Court judge said that the quality of the oral argument reflected the inexperience of one-shotters as they do not address the broader issues. Most judges interviewed by Haynie thought that a bad oral argument was more likely to lose a case for a client than a good oral argument winning a case for a client. Arguably, inexperienced counsel are more likely to produce bad arguments. At 489 Haynie argues that Galanter’s hypothesis may not necessarily apply in South Africa as white, experienced advocates who appear before transforming courts and “ideologically divergent” judges may not necessarily be “sufficiently conversant with new constitutional principles and precedents or new judicial personalities”. The counter-argument is more persuasive: “Conversely, one may find that more experienced may be particularly advantaged before courts whose judges lack the experience of previous appointees. Newly appointed judges who were denied years to develop expertise in a particular area may be compelled to rely on the expertise of veteran advocates”.

<sup>69</sup> Hannett “Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination” 2003 *OJLS* 65 76: “Rather than acknowledging the complex ways in which discrimination operates between and within groups in society, the court retreats into easily compartmentalised, discrete, essentialist understandings of discrimination”. Haynie 2005 *SAJHR* 480 quotes an advocate that suggested that the advocate “give the judge a hamburger rather than a five-course meal – he wants fast food – simplify, simplify, simplify”.

facts.<sup>70</sup> A decision cannot be indefinitely deferred until all the information is available; the search for “truth” has to be pragmatically balanced against the need to reach a (relatively) speedy decision.<sup>71</sup> Judgments are handed down with incomplete knowledge of background social circumstances and the likely effect of new rules or principles cannot be readily ascertained.<sup>72</sup> This means that courts do not necessarily solve the “real” problem – suppose, for example, that a poor tenant’s water supply is discontinued. The “problem” that the legal system may perhaps be able to solve is having the water supply returned, but the underlying, structural disadvantage remains. The tenant has scarce resources and will probably decide not to waste money on a system that cannot effectively address his situation.<sup>73</sup> It is therefore not surprising that poor people do not readily access the justice system; the justice system (lawyers; courts) cannot offer them anything meaningful. Lawyers serve the propertied classes –for example, they draft contracts and wills and assist in the conveyancing of property. Poor people do not need these services.<sup>74</sup> Law “works” for employed people; for people with resources and who have something to lose. If a potential claimant has already lost everything, or never had anything in the first place, law offers little assistance. If the economy does not grow, and insufficient jobs are available, legal “solutions” such as affirmative action will not do anything to eradicate poverty.<sup>75</sup>

Courts fail to solve problems on a different level as well: Cotterrell argues that the legal system depends on ignorance in that the more people learn about the functioning of courts, the more dissatisfied they become with the system. For example, the shock of realising that what the client regarded as important was treated as “irrelevant” by the court could lead to a mistrust of the legal system.<sup>76</sup> In a divorce case, the wronged wife may simply want her day in court to voice personal grievances. However, judges are loath to hear contested divorce cases, and the case may thus be postponed repeatedly in an attempt to force the parties to settle. The wife’s real “problem” is not solved.<sup>77</sup> The legal system forces a dispute into an “admit or deny” pattern while the

<sup>70</sup> *Cf Westminster Produce (Pty) Ltd t/a Elgin Orchards v Simons* 2001 1 SA 1017 (LCC) para 16. Also see *Wagener v Pharmicare Ltd; Cuttings v Pharmicare Ltd* 2003 4 SA 285 (SCA) para 37: “[S]ingle instances of litigation cannot possibly provide the opportunity for the breadth and depth of investigation, analysis and determination that is necessary to produce [an effective structure to deal with strict liability for manufacturers]”.

<sup>71</sup> Levy-Bruhl as translated and interpreted by Cotterrell *The Sociology of Law* 51; *Pharmaceutical Society of South Africa v Tshabalala-Msimang* 2005 3 SA 238 (SCA) para 33.

<sup>72</sup> Cotterrell *The Sociology of Law* 91. Allott *The Limits of the Law* 69-70 refers to “poor feedback systems”.

<sup>73</sup> *Cf Kidder Connecting Law and Society* 90-91.

<sup>74</sup> *Kidder Connecting Law and Society* 74-76.

<sup>75</sup> Nyman “Towards Equal Opportunity Legislation” 1994 *Agenda* 79 82.

<sup>76</sup> Cotterrell *The Sociology of Law* 173.

<sup>77</sup> This example is based on a similar incident that occurred while I was an articled clerk in Johannesburg. The particular divorce case stood down for four days but the plaintiff wife was adamant that she wished to proceed with the case. When a judge was finally allocated to the case during the late afternoon of the fourth day, the wife was called as the first witness. After she testified, the case was postponed to the next day. The case settled that evening. All she wanted to do was to tell her husband that she was angry and hurt – she nursed him back to health after he contracted cancer and he repaid her by having a number of affairs.

“real” conflict may concern human interests that are too complex to truly resolve in this manner.<sup>78</sup>

Fourthly, *representivity* is a major concern in the South African context.<sup>79</sup> If the legal profession, the magistracy and judiciary are dominated by a particular gender or race, or if they hold stereotypical views regarding race and gender equality, will they nevertheless be forthcoming in recognising possible causes of action, and will they grant effective remedies?

Handler points out that the outcome of a dispute depends to a large degree on the lawyer-client relationship.<sup>80</sup> A strong client may dominate his attorney; any attorney is able to dominate a poor, unknowledgeable client. It is not necessarily in lawyers’ interests to utilise a particular Act, for example consumer protection laws.<sup>81</sup> A lawyer may be reluctant to use the Act in order to pursue a case involving loan discrimination perpetrated by a bank, since this would reduce his chances of receiving work from that bank in future. Furthermore, clients whose socio-economic or ethnic backgrounds differ from those of their lawyers may not be accurately “heard” or understood by their lawyers, and may consequently end up being represented in court in a way that they would not necessarily have hoped for.

Fifthly, the *remedies* that courts are generally inclined to grant cannot always satisfactorily address the disadvantage suffered.<sup>82</sup> Courts are sometimes explicit in their refusal to grant far-reaching remedies. Buntman considers two cases decided in the United States of America, namely *Washington v*

<sup>78</sup> Aubert *In Search of Law* 63. From another perspective, courts as an institution are also likely to possess limited power when it comes to changing things. Ferejohn & Kramer “Judicial Independence in a Democracy: Institutionalizing Judicial Restraint” in Drobak (ed) *Norms and the Law* (2006) 161 remind readers that courts are the least dangerous branch of government, having neither the purse nor the sword to enforce its own judgments. The authors argue that, as a result of this political weakness, courts will generally attempt to hand down judgments in such a way as to minimise the risk of a “showdown” with the other branches of government, and so ensure that its judgments are usually enforced. Edwards “Judicial Norms: A Judge’s Perspective” in Drobak (ed) *Norms and the Law* (2006) 230 agrees: Judges’ self-restraint builds up constitutional legitimacy over time, which in turn allows the other branches of government to develop the habit of obedience to judgments and as this practice becomes entrenched, courts achieve real independence. However, to ensure the continued existence of that independence, courts must continue to exercise self-restraint.

<sup>79</sup> Zulman “South African Judges and Human Rights” 2002 *Austr LJ* 34 42 points out that the South African judiciary is not particularly representative. In June 2001, 52 of the 192 permanent judges were people of colour: Six of the provincial divisions and the Land Claims Court were headed by people of colour. By June 2004 there were 76 black judges, 126 white judges and 26 female judges (13 white)—Gordon and Bruce (October 2007) “Transformation and the Independence of the Judiciary in South Africa” <http://www.csv.org.za/docs/transition/3.pdf>, page 48 (accessed 6 March 2008). Gordon and Bruce notes in the same article that “although the composition of the judiciary has changed significantly since 1994 and although the majority of new judges appointed are now black, the bench is still not demographically representative of South Africa ...”. In the 2006/7 Annual Report of the Department of Justice and Constitutional Development (<http://www.doj.gov.za/reports/anr200607/200607%20content.htm> and specifically [http://www.doj.gov.za/reports/anr200607/ANR%20200607\\_dojcd\\_part05.pdf](http://www.doj.gov.za/reports/anr200607/ANR%20200607_dojcd_part05.pdf) (human resource management) (accessed 6 March 2008) it is noted that as at 31 March 2007, of the 3621 “professionals” in the employ of the Department (including prosecutors, senior magistrates, magistrates, advocates, state law advisers and the like), 2323 were black and 1298 white. Millar & Phillips “Evaluating Anti-Discrimination Legislation in the UK: Some Issues and Approaches” 1983 *Int J Soc Law* 417 422 note that the legal profession is to a large degree male-dominated. The same is probably true of the South African legal profession. However, based on the profile of the current intake of first year law students at the university where I teach, in future the profession may become dominated by women.

<sup>80</sup> Handler *Social Movements and the Legal System* 25.

<sup>81</sup> Cf Kidder *Connecting Law and Society* 129-131.

<sup>82</sup> Chemerinsky *Can Courts Make a Difference?* 199.

*Davis*<sup>83</sup> and *McCleskey v Kemp*<sup>84</sup> and points out that in both cases the black litigants were portrayed as challenging the “American way” and the “correct” *status quo*. In both cases the Supreme Court rejected the litigants’ claim, based on the consideration that to have held in their favour would have been too disruptive to the economic, social and political order.

*Davis* concerned a complaint by black applicants to the Washington DC police force that the civil service exam was discriminatory, as black applicants failed at a grossly disproportionate rate compared to white applicants. The Supreme Court rejected the argument and found that if it were to consider the possibly disproportionate impact, widespread and wholesale economic redistribution and social re-engineering would perhaps have to take place and would raise questions, or even invalidate a whole range of tax, welfare, public service, regulatory and licensing statutes on the basis that the statutes were more burdensome to the poor than the more affluent white class.<sup>85</sup>

Kagan<sup>86</sup> provides striking examples of the limits of traditional legal remedies: courts can issue orders against overt discrimination, but they cannot increase the tax base of central cities, eliminate economic disparities between the poor and the suburban middle class, create governmental programmes, guarantee jobs, build subsidized houses, or operate halfway houses for the mentally ill.

In the same vein, Loenen argues that it is primarily the legislature that must see to it that substantive equality is achieved. She provides the following example to illustrate that a remedy granted by a court would not always be ideally suited to achieving the “best” result. The Dutch Legislature considered an amendment to its Unemployment Act, in terms of which the factor “work history” would be decisive in ascertaining the period for which a person could claim unemployment benefits – the longer a person had worked, the longer that person would be entitled to benefits. A question was raised in Parliament as to possible indirect sex discrimination: more women than men would have given up their employment to take care of young children and more women would therefore have a shorter “work history”. The Legislature’s solution was to allow people taking care of young children to count these years as part of their “work history”. The *proviso* was couched in gender-neutral terms, therefore also including stay-at-home fathers. Had the Act been promulgated in its original form, a court attempting to identify and grant an appropriate remedy would have been faced with a dilemma, since striking down the “work history” factor would have had much more serious economic consequences than Parliament could have intended. A court would not have been able to introduce the solution opted for by the Dutch Legislature.<sup>87</sup>

<sup>83</sup> 426 US 229 (1976).

<sup>84</sup> 481 US 279 (1986).

<sup>85</sup> Buntman “Race, Reputation, and the Supreme Court: Valuing Blackness and Whiteness” 2001 *Univ Miami LR* 1 21-22.

<sup>86</sup> Kagan *Adversarial Legalism: The American Way of Law* (2001) 180.

<sup>87</sup> Loenen “The Equality Clause in the South African Constitution: Some Remarks from a Comparative Perspective” 1997 *SAJHR* 401 428.

Handler argues that courts consider themselves overburdened and would prefer to minimize the problems they encounter. Enforcement of court orders is problematic, and courts will generally not set up elaborate structures to ensure the enforcement of judgments. This places pressure on a plaintiff and requires staying power. Money payments are generally not difficult to monitor, except when small amounts need to be paid out to a large group of people.<sup>88</sup> Courts or court-like structures are probably better equipped to provide short-term or immediate remedies, and are loath to order long-term restructuring. For example, Chisholm and Napo refer to two commissions of enquiry that were set up to investigate gender violence at two Soweto schools, one a primary school and the other a high school. The primary school enquiry was set up under the chairpersonship of a woman, the Director of Personnel, Human Resources, Development and Organisational Development, who had been educated at a liberal South African university and was acutely aware of gender inequality. The high school enquiry was placed under the control of a male advocate and an outsider to the particular community. Both enquiry reports examined the grievances on a case-by-case basis and recommended the transfer of particular students and/or teachers.<sup>89</sup> In the authors' words, such purported solutions "dissolve but do not resolve" the issues. The long-term effect is to silence and trivialise grievances.<sup>90</sup>

Finally, some authors argue that the attempt to equalise the social position of disadvantaged groups in relation to more advantaged groups, and the restructuring of the overall benefits in a given society, is a political task best left to Parliament, since courts are ill equipped and ill trained in respect of such a task.<sup>91</sup> For example, Koopmans argues that judges are inherently conservative as it is their role to maintain the established order, while those who wish to change the existing order should turn to politics.<sup>92</sup> Waldron points out that courts are not set up as representative law-making institutions.<sup>93</sup> Likewise, Nedelsky argues that legislatures in a constitutional state have a duty to deliberate collectively on the common good<sup>94</sup> – again, this is not something courts are designed or equipped to do. Parliaments are more accessible than courts; members of Parliament are more accountable, and are likely to comprise a more diverse group than judges do.<sup>95</sup> In most instances, Parliament would have better access to resources, different points of view, and data.<sup>96</sup> It follows

<sup>88</sup> Handler *Social Movements and the Legal System* 22-25.

<sup>89</sup> Chisholm & Napo "State and Bureaucracy: Symbolic Access?" 1999 *Agenda* 32 36-37.

<sup>90</sup> Chisholm & Napo 1999 *Agenda* 37.

<sup>91</sup> See in general Koopmans *Courts* 98-104. As to anti-discrimination legislation, see Freedman "Understanding the Right to Equality" 1998 *SALJ* 243 251; Freedman 2000 *THRHR* 320; Koopmans *Courts* 215-216; and Moon "Discrimination and Its Justification: Coping with Equality Rights Under the Charter" 1988 *Osgoode Hall LJ* 673.

<sup>92</sup> Koopmans *Courts* 274.

<sup>93</sup> Waldron "Principles of Legislation" in Bauman & Kahana (eds) *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (2006) 15 22; 25.

<sup>94</sup> Nedelsky "Legislative Judgment and the Enlarged Mentality: Taking Religious Perspectives" in Bauman & Kahana (eds) *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (2006) 93 123.

<sup>95</sup> Eskridge & Ferejohn "Super-Statutes: The New American Constitutionalism" in Bauman & Kahana (eds) *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (2006) 320 325-326.

<sup>96</sup> 327.



that the legislature is much better placed to effect fundamental redistributions in society.<sup>97</sup>

## 5. Conclusion

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

“The human phenomenon of *discrimination* – of those in relative positions of power denying full human status and opportunity to those in relative positions of disadvantage – *is not capable of being codified in precise terms* of the sort that have characterised past legislative efforts.”<sup>98</sup>

The drafters’ solution to this dilemma was reasonable: In Reaume’s terms, they codified a general theory and left it to the courts to see to the detail.<sup>99</sup> It could be argued that the South African legislature in effect appropriated the law of delict as a tool for bringing about social change, in that the Act creates the quasi-constitutional delict of unfair discrimination. The Act contains a general definition of “discrimination”,<sup>100</sup> a test for recognising “prohibited grounds” not listed in the Act,<sup>101</sup> and a general test for “fairness or unfairness”.<sup>102</sup> Over time, equality courts will have to work out the detail by elucidating on a case-by-case basis what constitutes “fair” or “unfair” discrimination in a great variety of contexts and circumstances. This task resembles that undertaken by our courts in relation to the open-ended norm of “reasonableness” found in the law of delict.

The advantage that the drafters’ “solution” holds is that a more accessible enforcement mechanism was created: Instead of having to follow the expensive route of approaching the Magistrates’ Court or High Court, they could seek relief from an equality court which does not require obtaining legal

<sup>97</sup> 350.

<sup>98</sup> Réaume “Of Pigeonholes and Principles: A Reconsideration of Discrimination Law” 2002 *Osgoode Hall LJ* 113 143 my emphasis. Scott *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (1998) 309 argues in similar vein: “Any large social process or event will inevitably be far more complex than the schemata we can devise, prospectively or retrospectively, to map it”; and at 335: “[N]o forms of production or social life can be made to work by formulas alone”; and at 22: “No administrative system is capable of representing any existing social community except through a heroic and greatly schematized process of abstraction and simplification”. One of the drafters of the Napoleonic Code observed that “[A] code may look very complete, but a thousand unexpected questions present themselves to the judges as soon as it is finished: for laws, once drafted, remain as they have been written down, but people never rest” – Koopmans *Courts* 224. At 284 Koopmans says that “ultimately, life always defies general schemes”.

<sup>99</sup> Réaume 2002 *Osgoode Hall LJ* 142.

<sup>100</sup> S 1(1)(viii).

<sup>101</sup> S 1(1)(xxii)(b).

<sup>102</sup> S 14.

representation.<sup>103</sup> Unfortunately, all the usual disadvantages of resorting to litigation in an attempt to solve social ills will follow.

Is there a third way? I suggest that an inter-institutional dialogue between the executive branch (concretised as the Department of Justice and Constitutional Development), the legislative branch, the judicial branch (concretised as the equality courts) and civil society should be initiated.<sup>104</sup> In the short term, the best one could hope for would be that suitable claims will be lodged with equality courts. “Suitable claims” are claims that could potentially raise Parliament’s awareness of the existence of widespread discrimination in a given sector. In other words, they are claims that could potentially act as the platform for further legislative action. It will therefore be civil society’s task to ensure that Parliament remained up to date regarding the prevalence of discrimination by lodging appropriate claims in equality courts on behalf of victims of such discrimination.

The Department of Justice and Constitutional Development, in turn, is obliged to collect data from the equality courts as to the profile of complainants, the profile of respondents, and the nature of cases lodged and cases finalised.<sup>105</sup> Over time, based on an analysis of lodged cases, it may become clear that a response from Parliament is called for. The Department of Justice should then draft an appropriate discrimination bill, and the bill should be debated and refined in Parliament, hopefully with the benefit of contributions by civil society.

Such an inter-institutional dialogue would be the mirror image of Réaume’s criticism of Canadian anti-discrimination legislation. She argues as follows:<sup>106</sup>

“It is hard to avoid the conclusion that, in respect of both these aspects of the problem of discrimination, the legislature has adopted the bottom-up method of case-by-case rule-making by waiting for fact situations not yet covered by the rules to present themselves and then deciding how they should be handled. Given our legal system’s lack of experience with equality as a norm, perhaps a case-by-case method was the best way to start. It is not to be expected that the legislature would be able to articulate at the outset a comprehensive theory in such uncharted territory. But it is not clear that the legislature has taken the next step – moving towards an articulation of the deeper principles that explain the concrete cases.”

What I have in mind is the reverse. The South African legislature has put a general norm in place. The Act states that “unfair discrimination” is prohibited, and then defines “discrimination” and sets out a test with which to determine “fairness” or “unfairness”. These general norms must now be

<sup>103</sup> S 16.

<sup>104</sup> Cf Ngcobo J in *National Education Health and Allied Workers Union v UCT* 2003 3 SA 1 (CC) para 14, who sees the courts and Parliament as acting “in partnership” to give life to constitutional rights (where legislation has been enacted to give effect to the Constitution).

<sup>105</sup> Regulation 23(1) of the Regulations published in GN No R764, *Government Gazette* No 25065, 2003-06-13, as amended by GN No 563, *Government Gazette* No 26316, 2004-04-30, and read with s 25(3)(c) of the Act, obliges the Department of Justice to collect the following data from operational equality courts: the number of cases lodged; the number of cases finalised; the ground of discrimination; the category of discrimination involved; the area from which the complainant originates (rural or metropolitan); the age, gender, race and, where applicable, the disability of the complainant; the gender and race of the person against whom the allegations are made; and the finding and order of each finalised complaint. Also see Annexure B of the same regulations.

<sup>106</sup> Réaume 2002 *Osgoode Hall LJ* 127-128.

concretised on a case-by-case basis. Over time it may well become clear that equality courts consistently hold that a particular situation amounts to unfair discrimination. It is, for example, difficult to imagine that admission to a restaurant or holiday resort may ever be based on race or colour. Parliament may in such an event then safely legislate that, for example, restaurants or holiday resorts may never deny patrons access on the basis on race or colour. This example does not deal with systemic discrimination, but the same principle will apply to such cases.

Take the following case: An indigent single parent may wish to approach an equality court because his or her child may have been turned away from a public school for failure to pay her school fees. The fact that many such cases may exist does not turn that specific equality court case into a systemic discrimination matter. The scenario still involves a single plaintiff *versus* a single defendant with a potentially positive outcome for a single litigant. However, once such a claim has been lodged and decided in favour of the complainant, Parliament may wish to step in and prohibit public schools from suspending learners for failure to pay school fees.

Particularly strenuous challenges will be posed to civil society and rights groups to illustrate effectively the existence of systemic discrimination, and to identify claims that could act as an impetus for legislative action in particular sectors.<sup>107</sup> In particular cases it may be difficult to identify the breach of the equality right. It may lie in “inadequate budgetary allocations, capacity deficits (particularly at provincial and local government level), unduly complex regulations, a lack of knowledge by disadvantaged groups of their rights, and inadequate infrastructure”.<sup>108</sup> The identification of barriers preventing the full realization of substantive equality, and subsequent attempts to address these hurdles, would require “careful empirical research combined with a detailed understanding of the context of service delivery”.<sup>109</sup>

<sup>107</sup> The submission by the Equality Alliance to the *ad hoc* Parliamentary committee on the Promotion of Equality and Prevention of Unfair Discrimination Bill during November 1999 noted that the Bill adopted a sectoral approach to the prohibition of discrimination. The Equality Alliance criticised this approach and said that “the initial purpose of adopting a sectoral approach was to take account of the differences and nuances in the way discrimination occurs within particular sectors. However, the way in which the sectors are currently drafted do not take account of these differences and nuances. Prevalent forms of discrimination in particular sectors are not referred to, eg language barriers within the health sector”. The implied corollary of this submission is either that insufficient research had been conducted as to the prevalent barriers to substantive equality in various sectors, or that the available research had not been adequately taken into account when the Bill was drafted. I would argue that the “differences and nuances” referred to in the submission may be identified by appropriate research.

<sup>108</sup> Liebenberg & O’Sullivan “South Africa’s New Equality Legislation: A Tool for Advancing Women’s Socio-Economic Equality?” paper read at a conference *Equality: Theory and Practice in South Africa and Elsewhere* hosted by the University of Cape Town (2001-01-18) 8.

<sup>109</sup> Liebenberg & O’Sullivan “South Africa’s New Equality Legislation” 8. Also see Parghi “A Blueprint for a Brighter Future: The Report of the *Canadian Human Rights Act* Review Panel” 2001 *CJWL* 137 147: “[C]omplex empirical evidence is often necessary to demonstrate that equality-hindering attitudes and norms have actually resulted in unequal conditions ... A second difficulty ... is that expert evidence may be required to analyze the quantitative evidence, explain the assumptions underlying it, assist the tribunal in drawing inferences from it, and scrutinize competing quantitative evidence”.

When considering legislative action, requirements for the creation of *effective* legislation must be kept firmly in mind.<sup>110</sup> My call for an inter-institutional dialogue should not be misconstrued as a call for an avalanche of new laws. Discrimination is a particularly difficult problem to attempt to solve by utilising the law, whether it is courts or Parliament that is called to action. Some forms of systemic discrimination, such as those that occur in highly intimate spheres of life, may be almost impossible to address *via* the law. Where a small number of possible respondents exists, the chances of successfully addressing discrimination through the medium of law may be increased. There are, for example, only four major banks operating in South Africa. An Act of Parliament obliging all banks operating in South Africa to waive bank fees for account holders earning less than, for example, R2000 per month, may well be effective. On the other hand, an Act of Parliament obliging public schools to admit learners who cannot pay their school fees may often be violated owing to the serious difficulties involved in monitoring such violations.<sup>111</sup>

<sup>110</sup> Elsewhere (Kok “Why the Law Cannot Drive the Transformation of Society” August 2007 *Without Prejudice* 60 61) I have suggested the following requirements for effective legislation as gleaned from the authorities cited in that article: 1. The goal of the lawmaker must be realisable through law, which would include that the required change must be able to be implemented and to be strongly enforced. 2. Rules that are highly visible, cost little and do not affect competition will be enforced. 3. Enforcement agents must be committed to the behaviour required by the law, even if not to the values implicit in it. 4. Laws that do not establish clear standards or that are ambiguous or too flexible, will facilitate avoidance. 5. The change-inducing law must provide for effective remedies. As resistance to a new law increases, positive sanctions are probably as important as negative sanctions. 6. To have any hope of effective enforcement, the state driving social change must be relatively powerful, and must have significant technological surveillance facilities at its disposal. 7. The enforcement mechanism should consist of specialised bodies, and the officers presiding over these bodies must receive training in order to acquire expertise. 8. Any new law should not run too far ahead of society’s *mores*. The purpose of the legislation must at least be compatible with existing values to a certain degree. Laws created in opposition to powerful economic values and interests may also (eventually) fail. 9. Laws that facilitate action that people want to take or that encourage voluntary change are likely to be more effective than compulsory change. 10. Laws are more effective when introduced to change emotionally neutral and instrumental areas of human activity, than “areas of life based on emotion” (Luhmann *A Sociological Theory of Law* (1985) 243). 11. Large organisations with specialised personnel who are well-equipped to interpret rules will probably be committed to implementing new laws; whereas small businesses, individual home-owners, small landlords and individuals will probably not have sufficient knowledge, and thus implementation on this level will be very difficult to achieve. 12. Laws created to assist or protect the economically weak will have limited impact. 13. To have any hope of legislating effective laws, Parliament should see to it that its laws are popularised. The required change must be communicated to the majority of the populace. Public awareness must be maintained over the long term. The mass media (soap operas, advertising, music, news) should ideally become involved in popularising the required change. 14. The use of law will increase if the educational system is used in a well-directed way as a “nationally inclusive socialising agent” (Bestbier “Legal Literacy – the Key to a South African *Supra*-culture” 1994 *Obiter* 108). 15. Laws that include incentives encouraging lawyers to use the new law and to inform clients of the existence of the new law, are more likely to be effective.

<sup>111</sup> See the suggested requirements for effective legislation directly above, in particular the following: “Rules that are highly visible, cost little and do not affect competition will be enforced”, “the state driving social change must be relatively powerful, and must have significant technological surveillance facilities available”, and “laws put in place to assist or protect the economically weak will have limited impact”.

## SUMMARY

This article considers which institution – the legislature or the courts – is best able to effect societal change or transformation, within the context of the application of The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, which was promulgated with the express purpose of achieving such societal change.

It is shown that a debate exists between authors who, on the one hand (and sometimes implicitly) argue that the legislature is without doubt the appropriate institution to accept responsibility for driving societal changes, while, on the other hand, other authors are more optimistic about the (potential) role of courts in effecting changes in society.

It is argued that illustrate that courts have a very limited ability to realise social transformation. Attention is paid to *inter alia*, courts' (possible lack of) legitimacy, which includes the current race and gender profile of the men and women who constitute our judiciary; the institutional nature of courts, which includes the fact that courts function by primarily solving the particular dispute before them; and the limited reach remedies typically granted by courts.

As regards discrimination specifically, it is shown that the drafters of the Constitution envisaged a legislature-driven programme, but that discrimination is not easily combated in legal *fora* other than courts. It follows that “the law” cannot effectively address discrimination. A possible solution is then discussed, namely, the creation of an inter-institutional debate between the executive authority (as concretised in the Department of Justice and Constitutional Development), the legislative authority, the judiciary (as concretised in the equality courts) and civil society.